

In Case 6/64

Reference to the Court under [Article 267 TFEU] by the Giudice Conciliatore, Milan, for a preliminary ruling in the action pending before that court between

FLAMINIO COSTA

and

ENEL (Ente Nazionale Energia Elettrica (National Electricity Board), formerly the Edison Volta undertaking)

on the interpretation of [Articles 117, 108 TFEU], Articles 53 of the [EEC] Treaty [repealed] and 37 [TFEU]

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux, R. Rossi, R. Lecourt (Rapporteur) and W. Strauß, Judges,

Advocate-General: M. Lagrange  
Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Grounds of judgment

By Order dated 16 January 1964, duly sent to the Court, the Giudice Conciliatore of Milan, 'having regard to [Article 267 TFEU] of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203

of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law ... infringe [Articles 117, 108 TFEU], Articles 53 [repealed] and 37 [TFEU] of the aforementioned Treaty', stayed the proceedings and ordered that the file be transmitted to the Court of Justice.

On the application of [Article 267 TFEU]

*On the submission regarding the working of the question*

The complaint is made that the intention behind the question posed was to obtain, by means of [Article 267 TFEU], a ruling on the compatibility of a national law with the Treaty.

By the terms of this Article, however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them. This provision gives the Court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under [Article 258 TFEU].

Nevertheless, the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty. Consequently a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned Articles in the context of the points of law stated by the Giudice Conciliatore.

*On the submission that an interpretation is not necessary*

The complaint is made that the Milan court has requested an interpretation of the Treaty which was not necessary for the solution of the dispute before it.

Since, however, [Article 267 TFEU] is based upon a clear separation of functions between national courts and the Court of Justice, it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

*On the submission that the court was obliged to apply the national law*

The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot avail itself of [Article 267 TFEU].

By contrast with ordinary international treaties, the [FEU] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a [Union] of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the [Union], the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of [Union] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in [the third paragraph of Article 4(3) TEU] and giving rise to the discrimination prohibited by [Article 18 TFEU].

The obligations undertaken under the Treaty [on the Functioning of the European Union] would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15 [repealed], [Articles 108(3), 346, 347 and 348 TFEU]). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4) [repealed], 17 (4) [repealed], 25 [repealed], 26 [repealed], 73 [repealed], the third subparagraph of [Article 108(2) TFEU], and 226 [repealed]) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of [Union] law is confirmed by [Article 288 TFEU],

whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over [Union] law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question.

The transfer by the States from their domestic legal system to the [Union] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the [Union] cannot prevail. Consequently [Article 267 TFEU] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The questions put by the Giudice Conciliatore regarding [Articles 117, 108 TFEU], 53 [repealed] and 37 [TFEU] are directed first to enquiring whether these provisions produce direct effects and create individual rights which national courts must protect, and, if so, what their meaning is.

On the interpretation of [Article 117 TFEU]

[Article 117 TFEU] provides that, where 'there is reason to fear' that a provision laid down by law may cause 'distortion', the Member State desiring to proceed therewith shall 'consult the Commission'; the Commission has power to recommend to the Member States the adoption of suitable measures to avoid the distortion feared.

This Article, placed in the chapter devoted to the 'Approximation of Laws', is designed to prevent the differences between the legislation of the different nations with regard to the objectives of the Treaty from becoming more pronounced. By virtue of this provision, Member States have limited their freedom of initiative by agreeing to submit to an appropriate procedure of consultation. By binding themselves unambiguously to prior consultation with the Commission in all those cases where their projected legislation might create a risk, however slight, of a possible distortion, the States have undertaken an obligation to the [Union] which binds them as States, but which does not create individual rights which national courts must protect. For its part, the Commission is bound to ensure respect for the provisions of this Article, but this

obligation does not give individuals the right to allege, within the framework of [Union] law and by means of [Article 267 TFEU] either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of [Article 108 TFEU]

Under [Article 108(1) and (2) TFEU], the Commission, in cooperation with Member States, is to 'keep under constant review all systems of aid existing in those States' with a view to the adoption of appropriate measures required by the functioning of the Common Market.

By virtue of [Article 108(3) TFEU], the Commission is to be informed, in sufficient time, of any plans to grant or alter aid, the Member State concerned not being entitled to put its proposed measures into effect until the [Union] procedure, and, if necessary, any proceedings before the Court of Justice, have been completed.

These provisions, contained in the section of the Treaty headed 'Aids granted by States', are designed, on the one hand, to eliminate progressively existing aids and, on the other hand, to prevent the individual States in the conduct of their internal affairs from introducing new aids 'in any form whatsoever' which are likely directly or indirectly to favour certain undertakings or products in an appreciable way, and which threaten, even potentially, to distort competition. By virtue of [Article 107 TFEU], the Member States have acknowledged that such aids are incompatible with the Common Market and have thus implicitly undertaken not to create any more, save as otherwise provided in the Treaty; in [Article 108 TFEU], on the other hand, they have merely agreed to submit themselves to appropriate procedures for the abolition of existing aids and the introduction of new ones.

By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in [Article 108 TFEU], the States have entered into an obligation with the [Union], which binds them as States but creates no individual rights except in the case of the final provision of [Article 108(3) TFEU], which is not in question in the present case.

For its part, the Commission is bound to ensure respect for the provisions of this Article, and -is required, in cooperation with Member States, to keep under constant review existing systems of aids. This obligation does

not, however, give individuals the right to plead, within the framework of [Union] law and by means of [Article 267 TFEU], either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of Article 53 [repealed]

By Article 53 [repealed] the Member States undertake not to introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in the Treaty. The obligation thus entered into by the States simply amounts legally to a duty not to act, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any measure either by the States or by the Commission. It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals. Such an express prohibition which came into force with the Treaty throughout the [Union], and thus became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it has created individual rights which national courts must protect.

The interpretation of Article 53 [repealed] which is sought requires that it be considered in the context of the Chapter relating to the right of establishment in which it occurs. After enacting in [Article 49 TFEU] that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages', this chapter goes on in Article 53 [repealed] to provide that 'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States'. The question is, therefore, on what conditions the nationals of other Member States have a right of establishment. This is dealt with by the second paragraph of [Article 49 TFEU], where it is stated that freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.

Article 53 [repealed] is therefore satisfied so long as no new measure subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertaking.

## On the interpretation of Article 37 [TFEU]

Article 37 (1) [TFEU] provides that Member States shall progressively adjust any 'State monopolies of a commercial character' so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. By Article 37 (2) [TFEU], the Member States are under an obligation to refrain from introducing any new measure which is contrary to the principles laid down in Article 37 (1) [TFEU].

Thus, Member States have undertaken a dual obligation: in the first place, an active one to adjust State monopolies, in the second place, a passive one to avoid any new measures. The interpretation requested is of the second obligation together with any aspects of the first necessary for this interpretation.

Article 37 (2) [TFEU] contains an absolute prohibition: not an obligation to do something but an obligation to refrain from doing something. This obligation is not accompanied by any reservation which might make its implementation subject to any positive act of national law. This prohibition is essentially one which is capable of producing direct effects on the legal relations between Member States and their nationals.

Such a clearly expressed prohibition which came into force with the Treaty throughout the [Union], and so became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it creates individual rights which national courts must protect. By reason of the complexity of the wording and the fact that Articles 37 (1) and 37 (2) [TFEU] overlap, the interpretation requested makes it necessary to examine them as a part of the Chapter in which they occur. This Chapter deals with the 'elimination of quantitative restrictions between Member States'. The object of the reference in Article 37 (2) [TFEU] to 'the principles laid down in paragraph (1)' is thus to prevent the establishment of any new 'discrimination regarding the conditions under which goods are procured and marketed ... between nationals of Member States'. Having specified the objective in this way, Article 37 (1) [TFEU] sets out the ways in which this objective might be thwarted in order to prohibit them.

Thus, by the reference in Article 37 (2) [TFEU], any new monopolies or bodies specified in Article 37 (1) [TFEU] are prohibited in so far as they tend to introduce new cases of discrimination regarding the conditions under which goods are procured and marketed. It is therefore a matter for the court dealing with the main action first to examine whether this

objective is being hampered, that is whether any new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed results from the disputed measure itself or will be the consequence thereof.

There remain to be considered the means envisaged by Article 37 (1) [TFEU]. It does not prohibit the creation of any State monopolies, but merely those 'of a commercial character', and then only in so far as they tend to introduce the cases of discrimination referred to. To fall under this prohibition the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.

It is a matter for the court dealing with the main action to assess in each case whether the economic activity under review relates to such a product which, by virtue of its nature and the technical or international conditions to which it is subject, is capable of playing an effective part in imports or exports between nationals of the Member States.

### **Costs**

The costs incurred by the Commission of the European [Union] and the Italian Government, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Giudice Conciliatore, Milan, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;  
Upon hearing the report of the Judge-Rapporteur;  
Upon hearing the observations of the parties to the main action, the Commission of the European [Union] and the Italian Government;  
Upon hearing the opinion of the Advocate-General;  
Having regard to Articles 37 [TFEU], 53 of the Treaty establishing the European Economic Community [repealed], [Articles 108, 117 and 267 TFEU];  
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];  
Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

## THE COURT

Ruling upon the plea of inadmissibility based on [Article 267 TFEU] hereby declares:

**As a subsequent unilateral measure cannot take precedence over [Union] law, the questions put by the Giudice Conciliatore, Milan, are admissible in so far as they relate in this case to the interpretation of provisions of the [FEU] Treaty;**

and also rules:

- 1. [Article 117 TFEU] contains no provisions which are capable of creating individual rights which national courts must protect;**
- 2. Those individual portions of [Article 108 TFEU] to which the question relates equally contain no such provisions;**
- 3. Article 53 [repealed] constitutes a [Union] rule capable of creating individual rights which national courts must protect. It prohibits any new measure which subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings.**
- 4. Article 37 (2) [TFEU] is in all its provisions a rule of [Union] law capable of creating individual rights which national courts must protect. In so far as the question put to the Court is concerned, it prohibits the introduction of any new measure contrary to the principles of Article 37 (1) [TFEU], that is, any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade;**

and further declares :

**The decision on the costs of the present action is a matter for the  
Giudice Conciliatore, Milan.**

Donner Hammes Trabucchi  
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 15 July 1964.

A. Van Houtte  
Registrar

A. M. Donner  
President

Robert Schütze European Union Law Lisbonised Cases