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INFORMATION MEMO

Judgment of the Court of Justice in re Costa v. ENEL (Case 6-64),
concerning the nationalization of the electricity industry in Italy

A Milan lawyer, Me. Flaminio Costa, repudiated a debt of 1 925 lire to ENEL (Ente nazionale per l'energia elettrica), on the grounds that the Law of 6 December 1962 nationalizing the electricity industry in Italy was contrary to Articles 102, 93, 53 and 37 of the EEC Treaty. The case was brought before a local magistrate, who asked the Court of Justice for an interlocutory ruling under Article 177 of the EEC Treaty, which declares the Court competent to give such rulings on the interpretation of the Treaty where any such question is raised before a court of law in the Member States.

Giving judgment on 15 July 1964, the Court declared the request admissible, stating that Article 177 should be applied, notwithstanding any domestic law, where any question of interpretation of the Treaty arises, even if the domestic court is not required to apply a provision of the Treaty but only a domestic law that may be incompatible with the said provision. But the Court, under Article 177, naturally confines itself to "interpreting" Treaty clauses and makes no claim to competence in enforcing them or in pronouncing upon the validity of Italian law in relation to them.

The Court has therefore interpreted Articles 102, 93, 53 and 37, as requested by the Italian magistrate, in order to establish whether these provisions have direct consequences and confer upon individuals legal rights that must be upheld by domestic courts. The Court decided that Articles 102 and 93 did not have such effects but that Articles 53 and 37 (in part) did.

Article 102 stipulates that where there is reason to fear that a legislative provision may cause distortion of competition, the Member State desiring to proceed therewith shall consult the Commission. Me. Costa contended that the Italian Government had not complied with this obligation. The Court declared that this obligation did not imply that individuals could plead non-compliance on the part of a State; Article 102 did not confer upon individuals rights that could be vindicated in court. It was for the Commission to enforce compliance with the provisions of the Article, if need be by taking action under Article 169.

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The same interpretation was set upon Article 93, which stipulates in paragraph 3 that "the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or modify grants of aid". This provision does not entitle individuals to plead the failure of a State to comply.

According to Article 53, "Member States shall not introduce any new restrictions on the right of establishment, in their territories, of nationals of other Member States ...". Me. Costa considered the nationalization of a given sector of the economy to have consequences that conflicted with this Article. The Court decided "that a prohibition expressed so formally, coming into force with the Treaty throughout the Community and consequently integrated in the legal system of the Member States, has force of law in those States and applies directly to their nationals, for whom it implies individual rights that the domestic courts must uphold". The obligation imposed on the Member States by Article 53 is fulfilled, however, where nationals of the other Member States are subject to the same rules as nationals of the State concerned.

As regards Article 37(2), which requires the Member States to abstain from introducing any new measure contrary to the requirement that all discrimination between the nationals of Member States be removed, the Court also decided that this was a formal prohibition that was directly enforceable and conferred rights on the individual. It was for the magistrate in the case in point, however, to decide whether the Italian law concerned introduced further discrimination between nationals of Member States and whether ENEL was a "trading monopoly" (since Article 37(1) prohibits the institution not of all government monopolies but only of trading monopolies).

The Court's judgment contains a statement of principle as to the relation between Community law and domestic law. It is that a law passed after the entry into force of the Treaty cannot overrule Community law, notwithstanding the "lex posterior" principle currently accepted in Italy, because by signing the Treaty the Member States agreed to restrict their jurisdiction or to transfer powers to the Community and thus created a body of law applicable to their nationals and to themselves.
