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), that is, any measure having as its object or effect a new discrimination between nationals of Member States regading 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 Guidice Conciliatore, Milan.

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauβ

Delivered in open court in Luxembourg on 15 July 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 25 JUNE 1964[1]

Mr President,
Members of the Court,

The preliminary question upon which you have to give a ruling under Article 177 of the EEC Treaty does not, for once, come from a Netherlands court, but from an Italian one, and it is no longer a question of social security or of Regulation No 3, but rather of a certain number of provisions of the Treaty itself, in respect of which your interpretation is requested in circumstances that are such as to bring in issue the constitutional relations between the European Economic Community and its Member States. This highlights the importance of the judgment you are called upon to pronounce in this case. The facts are known to you: Mr Costa, a lawyer practising in Milan, claims that he is not under an obligation to pay an invoice amounting to 1925 lire demanded of him in respect of the supply of electricity by the 'Ente Nazionale per l'Energia Elettrica (ENEL)'. He objected to this

1—Translated from the French.

payment before the Giudice Conciliatore (which has sole jurisdiction by virtue of the amount involved) claiming that the Law of 6 December 1962 nationalizing the electricity industry in Italy was contrary to a certain number of provisions of the Treaty of Rome, and was unconstitutional. In this connexion he requested — and obtained — a reference of the case, on the one hand to the Italian Constitutional Court, and on the other hand to this Court for a preliminary ruling pursuant to Article 177 of the Treaty.

I — Preliminary questions

Two preliminary questions in connexion with the validity of the reference to this Court must be resolved.

A. The *first* is the question whether the Milan court has referred to you questions which really relate to the *interpretation* of the Treaty. The order contained in the judgment in question does no more than mention 'the allegation that the Law of 6 December 1962 and the presidential decrees issued in pursuance of that Law *infringe* Articles 102, 93, 53 and 37 of the Treaty' and, as a consequence, suspends proceedings and orders the 'transmission of a certified copy of the file to the Court of Justice of the European Economic Community in Luxembourg'. However, in its reasoning, the judgment shows in a brief but nevertheless precise manner, how the law nationalizing the electricity industry in Italy might constitute an infringement of each of the relevant Articles of the EEC Treaty and hence be incompatible with the Treaty. I think that this Court can and must make the necessary effort from the four points of difficulty set out in the judgment that which is relevant to the interpretation of the Treaty. You have been willing to make such efforts in other cases with a view to enabling a national court to give a decision within the limits of its jurisdiction, whilst remaining within the sphere of your own; and this, after all, is quite reasonable in view of the fact that the abstract interpretation of the wording of the Treaty or of Community regulations always takes place in connexion with concrete cases which are the subject of litigation. What must be avoided — and this is a danger which becomes apparent as cases under Article 177 multiply — is that this Court, under the guise of interpretation, might more or less substitute itself for the national court which, let us not forget, retains jurisdiction to apply the Treaty and the regulations of the Community which have been incorporated into national law by ratification. Finding a clear-cut division between application and interpretation is indeed one of the most delicate problems posed by Article 177, all the more so because this dividing line corresponds to that of the jurisdiction of the Community Court and the national courts, a problem which no court has had the task of resolving in case of conflict. It is apparent that a conflict between the Court of Justice and the highest national courts could be of such a nature as seriously to prejudice the system of judicial review instituted by the Treaty, which rests upon a necessary, and frequently even organic, cooperation between the two jurisdictions.

B. This brings me to an examination of the *second preliminary question* which is concerned precisely with the constitutional difficulties to which I have just referred. In its observations, the Italian Government contends that the question referred to you by the Milan court is *absolutely inadmissible* because, it declares, the question is not, as is required by Article 177, the premise of the legal syllogism which the court must normally formulate to decide the dispute before it. In this dispute the court merely has to apply a domestic law of the Italian State; there is therefore as little cause to interpret the Treaty of Rome as to apply it. The Italian Government ex-

presses the position as follows:

'In this case, the court has no provision of the Treaty of Rome to apply and cannot therefore have any of the doubts on the interpretation of the Treaty that Article 177 of the Treaty itself clearly requires; it merely has to apply the national law (that concerned precisely with ENEL) which governs the question before it.'

On the other hand, the Italian Government continues, an examination of a possible infringement by a Member State of its Community obligations through a domestic law can only take place in accordance with the procedure laid down in Articles 169 and 170 of the Treaty in which individuals have not, even indirectly, any standing:

'. . . the rules of law remain valid even after the judgment of the Court, until such time as the State, in pursuance of the general obligation undertaken under Article 5, itself takes the necessary measures to comply with such judgment.'

It may be sufficient merely to set against this plea of 'absolute inadmissibility' the case law of this Court, to the effect that the Court of Justice will not adjudicate upon the considerations that cause the national court to believe that it must refer the question to this Court for a preliminary ruling: it suffices that you should be satisfied that there is indeed a question arising under Article 177, that is to say, a question pertaining to the interpretation of the Treaty or the validity or interpretation of a Community regulation, for which Article 177 gives this Court jurisdiction. One may nevertheless inquire whether this case law, in itself wise and based upon the desire of the Court to show complete respect for the jurisdiction of national courts, should be applied without any reservation or limitation, for instance even in cases where a preliminary question is manifestly unrelated to the main action: should the Court in such cases consider itself bound to give an abstract interpretation of the Treaty which, in these circumstances, would then appear to be a purely theoretical exercise unconnected with the solution of a dispute, when such interpretation might have a bearing upon questions of great importance or be such as to create serious conflicts with national courts? One may be allowed to have some doubts in this connexion. It is for this reason, and with a view to eliminating any possible misunderstanding and with the precise hope of avoiding such a conflict, that I feel that I should deal as clearly as possible with the objections of the Italian Government.

I must first dispose of the second objection, that infringement of the Treaty by a subsequent domestic law which conflicts with the Treaty can only be pleaded under the procedure for a finding of default by a Member State as laid down in Articles 169 to 171, a procedure which is not open to individuals and which does not affect the validity of the impugned law until it has been finally repealed following a judgment of the Court declaring its incompatibility with the Treaty. In fact, that is not the problem; it is that of the *coexistence of two opposing legal rules* (as a hypothesis) *which both apply to the domestic* system, one deriving from the Treaty or the Community institutions, the other from the national legislature and institutions: which must predominate until such time as the conflict is resolved? This is the real problem.

Without recourse to legal theory upon the nature of the European Community (which is too open to controversy) and without taking sides between 'Federal Europe' and 'the Europe of Countries', or between the 'supranational' and the 'international', the court (and indeed such is its function) can only consider the Treaty as it is. But — and it is indeed a simple observation — the Treaty establishing the European Economic Community, as well as the other two 'European Trea-

ties', creates its own *legal system* which, although distinct from the legal system of each of the Member States, by virtue of certain precise provisions of the Treaty, which bring about a *transfer of jurisdiction* to the Community institutions, partly replaces the internal legal system.

To keep to the question of legal rules, it is universally conceded that the EEC Treaty, although to a lesser extent than the ECSC Treaty, contains a certain number of provisions which by virtue both of their nature and their object, are directly applicable in a domestic legal system, where they have been 'received' as a result of ratification (a phenomenon which after all is not peculiar to the European Treaties). In deciding that Articles 12 and 31 of the EEC Treaty *produce direct effects and create individual rights which national courts must protect*, you yourselves have declared that they are, to use the hallowed expression, 'self-executing'. As regards those provisions which are not of direct effect, they enter the domestic legal system in two different ways according to whether the executive organs of the Community (Council or Commission or, more often, the two bodies together with the intervention of the European Parliament) have or have not the power to issue regulations. Where this is not so, the Member State is under an obligation which it must carry out either on its own initiative or in pursuance of recommendations or directives from the executive, and the Treaty only becomes part of the domestic legal system as a consequence of national measures adopted by the competent organs of the State in question. Where, on the other hand, the executive organs of the Community have the power to issue regulations, and make use of it, the incorporation in the domestic system takes place *ipso jure* the moment the regulations are published: this is apparent from the combined provisions of the second paragraph of Article 189 and Article 191. The second paragraph of Article 189 states that 'a regulation shall have general application. It shall be binding in its entirety and *directly applicable in all Member States*'. According to Article 191, 'regulations shall be published in the Official Journal of the Community. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication'. It follows therefore that two classes of provisions are directly applicable:

1. The provisions of the Treaty which are considered as 'self-executing'.
2. Those which have been the subject of implementing regulations.

How can it be conceived that a provision of the Treaty, in pursuance of which a regulation has been issued, does not enter into force in domestic law at the same time as the regulation which is made under it? And how could it be imagined that another provision, which requires no regulation or domestic measure to carry it out, *for the very reason that it is sufficient in itself*, should not have the same effect? Therefore we cannot avoid the problem which results from the coexistence within each Member State of two systems of law, domestic and Community, each operating in its own sphere of competence, nor can we avoid the question what sanction should follow the encroachment by one into the sphere of competence reserved to the other.

For encroachments on the part of the institutions of the Community, there is no difficulty. They are dealt with by the Court under one of the procedures envisaged in the Treaty both at the instance of Member States and of individuals, in particular the application for annulment (Article 173) and the plea of illegality (Article 184).

For encroachments on the part of national authorities, *there must also be a sanction* and this too must be available not only at the instance of the States, but also in favour of individuals when the latter derive individual rights from the

Treaty or Community regulations. As the Court has said, the protection of these rights falls upon the national courts. The question then arises, in what circumstances must such courts exercise their control and, in particular, apply the self-executing provisions of the Treaty or the Community regulations duly adopted, when they conflict with a national law? If the national law came into force prior to the Treaty or to the publication of a Community regulation, the doctrine of implied repeal must dispose of the matter. Difficulties arise however when the domestic law comes into force after the Treaty and is in conflict with a self-executing provision of it, or when the national law came into force after a Community regulation duly adopted and published; in such cases, however, there are real difficulties only when the domestic regulation has been passed by the legislature, because, if it is merely an ordinary administrative act or even a regulation, the action to quash it, or at least a plea of illegality (in those countries which do not fully admit a direct action for the annulment of regulations) must suffice to nullify the effects of a domestic measure to the advantage of the Community rule. In the case of a rule passed by the legislature, however, one is inevitably confronted with a constitutional problem. As you know, this problem is resolved in a most satisfactory manner in the Netherlands, where the recently amended Constitution expressly confers upon the courts power to admit the plea of illegality in respect of laws which are inconsistent with international treaties, at least where provisions of a self-executing character are at issue. In the Grand Duchy of Luxembourg, the courts have established the same rule. In France, this rule is almost unanimously accepted by legal writers, being based on Article 55 of the present Constitution which, like Article 28 of the 1946 Constitution, proclaims the pre-eminence over domestic law of international treaties which have been duly ratified and published; certain judgments can at least by implication be invoked in favour of this interpretation. In Belgium, despite the absence of constitutional provisions on the point, the opinion of legal writers, which has received the public support of a very eminent judge, seems for the greater part to favour the same conclusions.

Although this might at first appear rather paradoxical, there are at the present time difficulties of principle in those two countries which have a constitutional court, that is to say, Germany and Italy. In both cases these difficulties stem from the fact that the Treaty of Rome was ratified by an ordinary law not having the character of a constitutional law and as such not having the power of derogating from either the rules or the principles of the Constitution.

It must be clearly understood that I do not have to concern myself with the interpretation of the constitutions of our Member States. I would only point out that as regards Germany (where to date the constitutional court has not yet expressed an opinion on this point) the objections seem to come from the fact that the legal system of the Community (of which the existence is admitted as distinct from the German legal system) does not offer the citizens of the Federal Republic the fullness of the guarantees which are allowed to them by the constitution of the country, in particular because measures of a legislative nature may be taken within the framework of the Community by organs of a non-parliamentary nature (Council, Commission) in those cases where, by German law, they could only fall within the jurisdiction of Parliament. One can but counter that by saying that Community regulations, even the most important ones, are not legislative measures nor even, as is sometimes said, 'quasi-legislative measures' but rather measures emanating from an *executive power* (Council or Commission) which

can only act within the framework of the powers delegated to it by the Treaty and within the jurisdictional control of the Court of Justice. It is certainly true to say that the Treaty of Rome has, in a sense, the character of a genuine constitution, the constitution of the Community (and from this point of view it is supplemented by protocols and annexes as valid at the Treaty itself and not by regulations); but, for the greater part, the Treaty has above all the character of what we call an 'outline law' and this is a perfectly legitimate method where a situation of an evolutionary nature such as the establishment of a common market is concerned, in respect of which the object to be attained and the conditions to be realized (rather than the detailed rules for its realization) are defined in such a way that the generality of the provisions need not exclude precision: we are still far from the situation of the 'carte blanche' given to the executive by certain national parliaments.

The citizens of the Federal Republic therefore do find within the Community legal system certain guarantees, in particular through review by the Court, which, albeit not identical, are still comparable to those which their own national system ensured (prior to the transfer of jurisdiction under the Treaty) by the existence of a more extensive supremacy of Parliament. It would seem therefore that the real question is whether the creation of such a legal system by a Treaty ratified by an ordinary law is compatible with the Constitution: and this is surely a problem which the national constitutional Court is alone competent to resolve.

It would seem that the same reasoning applies to Italy. In that country, as you know, a judgment of the Constitutional Court dated 24 February — 7 March 1964, given in connexion with the Law creating ENEL, decided that it was possible, despite the provisions of Article 11 of the Italian Constitution, to dissociate the question of a possible infringement of the Treaty as a result of the adoption of a domestic law contrary to its provisions (which question, in the opinion of that Court, was not relevant except as regards the responsibility of the State at international level) from the problem of the conformity of that same domestic law with the Constitution. Since the Treaty was ratified by an ordinary law, a later inconsistent law should have effect in accordance with the principles which govern the succession of laws in time, from which it follows that 'there is no need to inquire whether the law at issue infringes the obligations assumed by virtue of the Treaty', and that, for the same reason, a reference of the matter to the Court of Justice of the European Communities is necessarily pointless (since it could only be useful in so far as it would bear upon an infringement of the Treaty, bearing in mind the interpretation of the same already given by the Court).

It is patently not for me to criticize this judgment. I would merely point out (although this is purely an observation on a point of procedure) that the Italian Constitutional Court refers to the conflict between the law at issue and the *law* of ratification whereas the question relates to a conflict between the law and the *Treaty* (ratified by an ordinary law). But what I would insist upon are the disastrous consequences (and I do not think this expression is too strong) that such a precedent, if it is maintained, would risk having as regards the functioning of the system of institutions established by the Treaty and, as a consequence, the very future of the Common Market.

In fact, I think I have succeeded in showing that the system of the Common Market is based upon the creation of a legal system separate from that of the Member States, but nevertheless intimately and even organically tied to it in such a way that the mutual and constant respect for the respective jurisdic-

tions of the Community and national bodies is one of the fundamental conditions of a proper functioning of the system instituted by the Treaty and, consequently, of the realization of the aims of the Community. We have noticed, in particular, that such mutual respect requires that the self-executing provisions of the Treaty and the regulations lawfully adopted by the executive organs of the Community should receive immediate application within the Member States. Such is the legal system created by the Treaty of Rome and it is the function of the Court of Justice, and the Court of Justice alone, to affirm this when necessary in its judgments.

If it happened that the constitutional court of one of the Member States, possessed of its full jurisdiction, felt bound to acknowledge that such a result cannot be achieved within the framework of the constitutional rules of its own country — for instance, as regards the possibility that ordinary national laws, contrary to the Treaty, might prevail against the Treaty itself without any court (not even the constitutional court) having the power to stop their application, so that they could only be repealed or modified by Parliament — such a decision would create an insoluble conflict between the two legal systems and would undermine the very foundations of the Treaty. For not only could the Treaty not be applied under the conditions envisaged in it, within the country concerned, but, as a chain reaction, it could not even be applied within the other countries of the Community; certainly this would be so in those Member States of the Community (such as France) where the precedence of international treaties is only granted 'on condition of reciprocity'. In such circumstances, there would be only two courses of action open to the State concerned: either to amend its Constitution to make it compatible with the Treaty or to renounce the Treaty itself. By the signature, the ratification and the deposit of the instruments of ratification, that State has bound itself with regard to its partners and could not remain inactive without disclaiming its international obligations. One can easily understand therefore why the Commission which, by virtue of Article 155, was entrusted with the task of supervising the application of the Treaty, has noted in its observations to this Court its 'serious concern' at the judgment of 24 February 1964.

I feel bound to add that, if I have considered it necessary to present such observations, it was solely to clarify the issues, and to allow everyone to accept his responsibilities. I do not for a moment, however, consider that Italy, which has always been in the forefront amongst the promoters of the European idea, the country of the conference of Messina and the Treaty of Rome, cannot find a constitutional means of allowing the Community to live in full accordance with the rules created under its common charter.

Let us now return to the order of the Milan court. I would remark that it complied strictly with the provisions of Article 23 of the Law of 11 March 1953 regulating the composition and the functions of the Constitutional Court, as appears in particular from the following:

> 'Whenever it is impossible to decide the dispute independently of the solution of the question of constitutionality or whenever the court should decide that the objection raised is not manifestly unfounded' (in which case, in pursuance of Article 24, the order rejecting the plea of unconstitutionality must be suitably reasoned) 'the court, after having set out the terms and the reasons of the request which raised the question, shall order that the documents be immediately transferred to the Constitutional Court and that the proceedings be suspended.'

Hence a court which has to decide upon

a request that a matter be referred to the Constitutional Court must not do so blindly and so to say automatically; on the contrary, it is bound to exercise a certain control, which is what Mr Costa, in his oral submissions, has called 'a preliminary inquiry of legality'. In this case the Milan court has effectively exercised such control, not merely, as indeed it was bound to do by Italian law, as regards the reference to the Italian Constitutional Court but also as regards the reference to this Court. In my opinion, it was perfectly right in doing so, because I feel that, despite the absence in the Treaty and in the Statute of this Court of express provisions similar to those of Italian law, a certain control *a priori* of the relevance of the question of interpretation to the solution of the dispute — as well as upon the 'manifestly unfounded' character of the request for a reference — is indispensable, if one wants to avoid purely delaying tactics and the unnecessary burden for this Court of ill-considered references. The foregoing observations suffice, in my opinion, to show that the court was not in a position where *prima facie* a rejection of the request for a reference was justified.

The only problem which could possibly arise is whether, in the case of a law, a court might be justified in refusing to apply it in those cases where, pursuant to the interpretation given by the Court of Justice, it would be bound to reach the conclusion that such a law was contrary to the Treaty. In other words, do Italian courts, other than the Constitutional Court, have the right to decide on the plea of unconstitutionality or are they bound, in any event, to refer the matter to the Constitutional Court? Otherwise, there is no doubt that the court should have referred the matter to the Constitutional Court leaving it to such court to call upon you to interpret the Treaty. But that is a matter relating to the division of internal jurisdiction between the courts of a Member State, a question with which you do not have to concern yourselves. Moreover, the judgment which you are called upon to give will have effect also as regards the Constitutional Court, which will have to bear it in mind: the reference before you, even if premature as regards domestic procedure, will thus not have been useless and will even have saved time. In other words, this would be a case similar to that where a court, availing itself of the rights conferred on it by the second paragraph of Article 177, refers the matter to this Court directly without waiting for the domestic remedies to be exhausted.

These are the various reasons — and it may be that in certain respects they might be considered superfluous, but I have thought it necessary to express them in detail, in view of their extreme importance of principle — for which I submit that you must reject the plea of 'absolute inadmissibility' raised by the Italian Government in its observations.

II—Examination of the questions of interpretation raised

There are four such questions and they concern Articles 102, 93, 53 and 37.

A — *Article 102* — According to the order which brought this matter before you, the *infringement* of Article 102 appears from the fact that, contrary to the provisions of the first paragraph of that Article, the Italian Government failed to consult the Commission prior to the adoption of the Law of 6 December 1962. In this, as well as in the following three cases, it is a matter of deciding what, in the question before you, refers to *interpretation*.

For my part, I notice two questions of interpretation which may affect the present proceedings, the second of which merely has an ancillary character.

1. Does the failure by a Member State to comply with the formalities prescribed by Article 102 result in the automatic invalidity of the measure

in relation to the Treaty, so that the national courts are bound to disregard it?

2. If this is so, what is the scope of this formal requirement? In particular, can the irregularity relating to the lack of official consultation on the part of the government concerned be offset by proof that the Commission had such knowledge of the proposal as to enable it to forward, if necessary, its recommendations to the Member States?

The answer *to the first question* should in my view be in the negative. We are here concerned with an extremely short Chapter entitled 'Approximation of Laws'. Naturally, laws continue as they are until they are 'approximated', that is, amended (apart from those which might possibly serve as models for approximation); furthermore, in this field the Council acts by means of 'directives' pursuant to Article 100. Articles 101 and 102 cover the case where, before the approximation and its expected results have occurred, it is found that a difference between the provisions 'is distorting the conditions of competition in the Common Market and that the resultant distortion needs to be eliminated'. Thereafter a distinction is made according to whether the distortion is the result of existing provitions (Article 101), or whether 'there is reason to fear' that it may be caused by provisions which are to be adopted (Article 102). In the case of Article 101 the provisions are already in force and, without any doubt, continue so, in so far as they are not amended, possibly as a result of a directive of the Council under Article 100.

There remains the case envisaged by Article 102. This evidently is aimed at *prevention* so as to avoid a fait accompli. It is indeed preferable to avoid the intervention of a legislative measure or other such provision capable of causing distortion, rather than to proceed to eliminate it once it has come into existence: hence the procedure for preliminary consultation envisaged by Article 102. Should we, as a result, acknowledge that Article 102 has such a self-executing character as to enable national courts to decide at the instance of individuals that it has been infringed?

I do not think so. This would involve recognizing that national courts have the power to appraise the necessary 'fear' of distortion which the measure might cause within the meaning of Article 101, involving a more or less delicate value-judgment which cannot reasonably be made without the intervention of the organs of the Community, particularly the Commission. Without any doubt, I reject the idea that the Member State concerned is the sole judge of the matter and has a discretion whether or not to refer the matter to the Commission: it is a matter for the Commission to deliver an *objective* opinion whether such 'fear' is justified and, if necessary, to avail itself of the power granted by Article 169 to obtain a decision from this Court that the State has failed to fulfil an obligation by not consulting the Commission before proceeding with such measures. It would add that in fact the Commission has sources of information such as to enable it, at least in the more important cases, to intervene in good time, in particular as regards legislative measures which, in our countries, are not really clandestine! In this particular case, we know that this was so.

As regards the second point (which I am dealing with for the sake of completeness), I would incline to the following interpretation: the procedural requirement laid down by Article 102 is indeed of a compulsory nature for the State concerned. How then must this procedural requirement be complied with? In my opinion this can only be by means of an official communication addressed by the Government to the Commission; a parliamentary question, for instance, would not suffice. If we are

dealing with a draft law, it would appear reasonable to expect that it should be notified to the Commission prior to being tabled in Parliament or at least before the parliamentary procedure is too advanced and the government is already more or less committed.

As for the *sanction* attached to this obligation, I should consider that non-performance here cannot be considered in every case as failure on the part of the State to fulfil its obligations, such failure having to be determined by the Court. It it is *established* that the Commission was perfectly cognizant of the proposal in sufficient time to make representations to the government concerned and that it has (as in the present case), with full knowledge of the facts, refrained from intervening, the irregularity should in my opinion be deemed to be cured. I do not think that too much weight should be attached to formalities in the relationship between the Commission and the Member States; the relations between the two should be inspired by the spirit of cooperation which is indispensable for the healthy application of the Treaty.

I repeat that I have only made these comments on a subsidiary basis, because I think that the infringement by a Member State of its obligations under Article 102 can only be raised pursuant to the procedure of Articles 169 to 171 and cannot require national courts to declare void, or inapplicable in domestic law, a measure adopted in disregard of the provisions of the said Article.

B—*Article 93* — I would give a similar opinion as regards Article 93. Sanctions for the obligations of the Member States under Article 93 (3) ('The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid') can only be imposed under the procedure of Articles 169 to 171. As far as the question is concerned whether 'any such plan is compatible with the Common Market having regard to Article 92', on which the possible infringement of the Treaty depends, one need only read Article 92, especially paragraph (3), to be convinced that this question of compatibility implies here again a delicate value-judgment, requiring a balancing of the political and economic interests of the State concerned with the requirements for a common market. This judgment cannot possibly be left to the sole appraisal of the national courts without any intervention by Community organs or by governments. In my submission, therefore, it is not possible to regard the provisions of Article 93 as self-executing.

C—*Article 53*—We are dealing here with the right of establishment. The Milan court referred to this Article because 'the Law of 6 December 1962 introduced in Italy certain restrictions on the establishment and the administration in Italian territory of undertakings and companies of other Member States for the production and the sale of electric energy'.

Two questions of interpretation seem to stem from this remark:

The first one relates once again to the question whether the provision mentioned is self-executing. This provision states: 'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty'.

By contrast with the opinion I have adduced with regard to Articles 102 and 93, I submit that we are dealing here with a self-executing provision. The provision is clear, precise and, it would appear, requires no preliminary examination by the Commission and the governments nor any value-judgment: we are much closer to provisions such as those in Article 12 or in Article 31 concerning the standstill in matters of customs duties or quantitative re-

strictions. Nevertheless — and in my opinion this further interpretation should also be given — Article 53 cannot in my submission be interpreted except in the light of Article 52. Article 52 concerns 'restrictions on the *freedom of establishment* of nationals of a Member State in the territory of another Member State', and freedom of establishment itself is defined in the following manner in the second paragraph:

'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, *under the conditions laid down for its own nationals by the law of the country where such establishment is effected* . . .'

To comply with the provisions of Article 53, therefore, it is sufficient that no new restrictions should be introduced which bring about *discrimination* between the nationals of different Member States; therefore, the problem does not arise if the provision under consideration does not make any discrimination. It is of course possible that certain restrictions on the freedom of establishment result as far as non-nationals are concerned from a measure adopted by a Member State, for instance in cases of nationalization; but such a measure, quite legal in itself under Article 222, will not be contrary to Article 53 if the conditions of access to the exercise of the activity at issue are restrained or suppressed in the same manner as regards nationals of the country and without any discrimination whatsoever against non-nationals. We know that, as far as ENEL is concerned, such is the case, but this of course is a matter for the national court to judge.

On this point, therefore, I would adopt the *first* of the two interpretations suggested by the Commission in its observations, since the second one seems to me to be outside the field of the rules on the right of establishment as they appear in Articles 53 et seq.

D — *Article 37* — On this point the judgment referring the matter to this Court is particularly laconic: 'Finally', it states 'Article 37 of the Treaty establishing the EEC is to be taken into account because the Law of 6 December 1962 creates a new monopoly governed by public law excluding the nationals of other Member States.'

I think I can discover, in connexion with Article 37, two points of interpretation which may affect the dispute:

1. What is the field of application of this Article and in particular is it applicable to a public service for the production and distribution of electricity, such as ENEL?
2. If so, are the provisions of Article 37 at least partially self-executing?

First Question. Both the Italian Government and ENEL rely substantially on the fact that ENEL has the character of a *public service* and that therefore its activities are wholly outside the ambit of Article 37. They are particularly insistent upon the fact that such activity has nothing whatsoever to do with 'monopolies of a commercial character' which alone are considered by Article 37 and which affect particularly trade between Member States. They further point out that ENEL was set up with the essential aim of eliminating the cartels which, prior to such time, profited from a real monopoly position and that, far from running counter to the rules of the Treaty, the establishment of ENEL was wholly in accordance with the Treaty's objectives.

I am convinced that there is a great deal of truth in these observations. However, from a strictly legal point of view, they are not altogether conclusive. Indeed the Treaty, at least in Article 37, has not ventured into distinctions based upon public service, and this is understandable. One is dealing there with a concept which varies considerably from one country to another and a precise definition of which, already difficult as

far as domestic law is concerned, is undoubtedly impossible at Community level.

Article 37 is part of the Chapter relating to the elimination of quantitative restrictions between Member States. In this connexion, however, the Treaty has acknowledged that monopolies of a commercial character raise particular problems which, short of suppression pure and simple which has not been prescribed, required measures of control which surpass the mere arithmetical increase of quotas in the circumstances envisaged by Article 33. The essential object of these, however, is nonetheless 'the free movement of goods' in accordance with the heading of Title I (under which the provisions at issue appear) and the restrictions referred to are those which militate against such free movement because of discriminatory conditions between the nationals of Member States.

The concept of 'national monopolies having a commercial character' to which Article 37 is applicable must be understood in the light of the above. The second paragraph of Article 37 (1) indeed goes further by defining them: 'The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.' (These delegated monopolies are obviously those which fall within the scope of the definition which has just been given).

The wording, taken, as it should be, in its context, seems to me perfectly clear: it is not the legal form that matters, nor the legal nature of the body within the framework of national public law, but rather the effective part played by such body in trade between Member States. It follows that one cannot exclude *a priori* a public service, if it is an industrial or commercial public service, from the sphere of application of Article 37. On the other hand — and it is here that the observations of the Italian Government and of ENEL become particularly relevant — it is obvious that this will not normally apply to a public service such as a service for the production and distribution of electricity which does not aim at making such production or distribution an object of international commerce; it could only be the case if, although international commerce were not the main object of the body in question, the sale of electricity abroad reached, or was about to reach, such a volume that such a body should be considered as 'appreciably' influencing or capable of influencing trade with Member States. There is no doubt that the qualification 'appreciably' refers grammatically only to the verb 'influences' and not to the previous two verbs (that is, 'supervises' and 'determines'); but the *appreciable influence*, actual or potential, upon either imports or exports between Member States is the only relevant consideration having regard to the purpose of the provisions at issue, whether such influence is exerted by supervision or determination or by any other means. It is up to Member States, as the need arises, to make the necessary progressive adjustments, and it is up to the Commission to make to the States concerned whatever recommendation they consider necessary pursuant to paragraph (6).

In the case before you it seems clear that ENEL cannot be considered as having an 'appreciable influence' upon trade between Member States, because the 'international trade' of ENEL is limited to a few frontier exchanges between Italy and France. As regards the 'potential' influence resulting from the powers of supervision and determination by the Italian State, it is for the Commission to decide whether they are of such a nature as to require progressive adjustment in accordance with paragraph (1). In

such case, the Commission should, if necessary, address the recommendations envisaged by paragraph (6) to the State directly. But until such time as this takes place, existing legislation, which we shall assume here existed prior to the entry into force of the Treaty, remains valid within the domestic system and must be applied by national courts.

We may recall here that by virtue of Article 90 any trade, no matter how small, carried on by 'undertakings entrusted with the operation of services of general economic interest', is still, at least in principle, subject to the rules of the Treaty and in particular to those on competition; nor can they be exempted from such rules simply because Article 37 does not apply.

Second question. Are the provisions of Article 37 self-executing? As far as paragraph (1) is concerned I have already submitted that it is not. It seems to be clear that the provisions of Article 37 (1), coupled with those of paragraphs (3) to (5), are not directly applicable within the domestic system: we are dealing with the progressive adaptation of a monopoly situation which must be made effective by Member States pursuant upon those recommendations which the Commission is empowered to make to them under paragraph (6). On the other hand, the difficulty does arise when we are dealing with the rules relating to 'standstill' specified in paragraph (2).

There can be no doubt that as a principle a rule on standstill must be observed more strictly than one relating to a programme of adjustment. We find here again the rather drastic wording of Articles 12 and 31: 'Member States shall refrain . . .' which has been interpreted by the Court as not preventing a direct application sanctioned by national courts. Moreover Article 37, leaving aside its aim, — which is to regulate the particular problem of monopolies, is part of Chapter 2 of Title I and this Chapter relates to the elimination of quantitative restrictions between Member States: Article 37 (2) appears therefore as a *repetition and adaptation to the situation of monopolies* of the rule relating to standstill as provided by Article 31 which you yourselves have already considered as directly applicable.

Not to acknowledge the direct effect of Article 37 (2), therefore, would require very compelling reasons of the kind which I have submitted should apply in the application of Article 102 and Article 93. But is this justified?

In my submission, one should make a distinction between the first and the second part of Article 37 (2).

In the first part it is stated that 'Member States shall refrain from introducing any new measure *which is contrary to the principles laid down in paragraph (1)*'. The word 'principles' speaks for itself: it is surely impossible to know whether a measure is or is not contrary to the 'principles' of paragraph (1) without making a more or less difficult and subjective appreciation which will inevitably interfere with the general character of the programme of adjustment established, or capable of being established, by virtue of paragraph (1). Such an appreciation cannot reasonably be made outside the framework of the discussions between the Commission and the Member State or States which are immediately concerned: such a question is particularly relevant with regard to the relations between Member States and the Community and the possible infringement by a Member State of the first part of Article 37 (2) cannot be raised except under the procedure laid down in Articles 169 to 171.

I would view in a different manner, however, the second part of Article 37 (2) '. . . or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States'. In fact, we are here dealing with a more direct

application of the rule on standstill in matters of customs duties and quotas. It is true that the wording does not only refer to measures which in themselves might amount to a re-establishment or an increase in customs duties, or to a re-establishment or a reduction of quotas, but also to those measures which 'restrict the *scope of the Articles* dealing with' the abolition; this may leave a certain margin of appraisal. Nevertheless I am inclined to think that the appraisal, at times quite complicated, which must be made in certain cases, cannot in itself represent an obstacle to the application of a sanction by national courts in favour of interested parties, because the rule on standstill is in such cases directly affected and its infringement may adversely and directly affect the rights of individuals and private legal relationships. But, in my opinion, such a sanction can only be applied with regard to *effective* measures of restriction which interfere directly with 'acquired rights' which are allowed to individuals by present regulations: a purely 'potential' restriction can only be considered by the Commission and under the procedure envisaged by Articles 169 to 171.

I am therefore of the opinion that:

1. The plea of 'absolute inadmissibility' raised by the Italian Government should be dismissed.

2. Articles 102, 93, 53 and 37 of the Treaty should be interpreted as follows:
   (a) the infringement by a Member State of the obligations which it has undertaken by virtue of Article 102 can be dealt with only through the procedure of Articles 169 to 171 and cannot result in the nullity or inapplicability in domestic law before the national courts of whatever measure was taken in disregard of such Article.
   (b) The same interpretation should apply to Article 93.
   (c) As regards Article 53:
      (i) It produces direct effects and creates individual rights which national courts must protect;
      (ii) In conjunction with the second paragraph of Article 52 it must be interpreted as meaning that it prohibits any new restriction on the freedom of establishment involving discrimination between the nationals of Member States.
   (d) Article 37 (2) produces direct effects and creates individual rights which national courts must protect as regards new measures introduced by a Member State which effectively result either in the introduction of new custom duties or charges having equivalent effect or of an increase in such duties, or in the establishment of new quantitative restrictions or measures having equivalent effect.

3. It is for the Milan court to decide on the costs of the proceedings before this Court.