Meek Acceptance? The West German Ministries' Reaction to the Van Gend en Loos and Costa decisions

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The Federal Republic of Germany (FRG) is the quintessential "good" European. Whether it is in terms of public support for economic and political integration, or in supplying the funding which oils the wheels of the Brussels machinery, Germany has been a continual and reliably strong voice in favour of integration. Its powerful export economy is galvanised by the integrated Common Market, and the geopolitical reassurance garnered by sharing its sovereignty and pooling its resources has allowed Germany's immensely successful re-emergence as a major power in the post-war period. It was more than just a happy coincidence for the political elites of the time that Germany's *Wirtschaftswunder* – a cornerstone in legitimising the new republican order – was temporally analogous to the founding moments of the European Communities. It allowed the strongly pro-integration elites working around Chancellor Adenauer to forge ahead, assured that the 'permissive consensus'[1] amongst the German electorate would not shirk at ever greater moves towards an economically and politically united Europe.

Yet legal integration has been considerably more problematic for the FRG on a number of profound historical and philosophical grounds. Historically, as the ideological home of the nationally defined and defining *Rechtsstaat*, the German legal system has played a profound role in shaping national identity since the imperial period.[2] Even the failure of the Weimar Republic is traditionally defined in terms of constitutional 'mis'-provisioning and the failure of the new legal order to curb the excessive political violence of the period.[3] Clearly, in the immediate post-War period, the shape of and values embodied by the new republican constitutional order were to be crucial in determining whether the new state would stand or fall. It is hard to imagine a member State where the role of the Law and the

1. For excellent analysis of German public support for Europe and European integration, see E. NOELLE-NEUMANN, *Phantom Europe: Thirty Years of Survey Research on German Attitudes toward European Integration*, in: L. HURWITZ (ed.), *Contemporary Perspectives on European Integration: Attitudes, Non-Governmental Behaviour, and Collective Decision Making*, Aldwych Press, London, 1980, pp.53-74, or E. KOLINSKY, *The Euro-Germans: National Identity and European Integration in Germany*, in: M. MACLEAN, J. HOWORTH (eds.), *Europeans on Europe: Transnational Visions of a New Continent*, MacMillan, London, 1992, pp.160-183. When asked if they would favour a politically "united Europe", 69% of West Germans responded favourably in 1970, 73% in 1972 and 72% in March 1974. See Eurobarometer Poll, 1, April-May 1974 or „Europa ist die grosse Heimat", Allensbacher Berichte, 29(1974).
2. M. JOHN, *Politics and the Law in Late Nineteenth-Century Germany. The Origins of the Civil Code*, Oxford Historical Monographs, Oxford, 1989.
3. D. HESSELBERGER, *Das Grundgesetz. Kommentar für die politische Bildung*, Bundeszentrale für Politische Bildung, Bonn, 2001, pp.17-20.

constitution has had such a prominent position in the self-understanding of the nation than in Germany. In perhaps the defining moment of post-War German history, the establishment of the Basic Law in 1949 created a remarkably successful document defining the FRG, both in its pre- and post-unification form. Recent scholarship has convincingly focussed attention on the role of law, justice and the constitution in successfully liberalising and modernising the country.[4]

However, the Basic Law contains a structural paradox which has made legal integration so much more difficult for the FRG than elsewhere. A crucial aspect of the internal definition through law was the new-found rigour, and even militancy,[5] of its rights-based and democratic legal system. This was based predominately on an adherence to a progressive set of basic rights enshrined in the first twenty articles of the constitution. All public authority was subsumed to these fundamental principles, which were rendered unalterable by the constitution itself and guarded fiercely by a powerful judicial branch, led by the Federal Constitutional Court (FCC). Yet at the same time, the constitution contained an intrinsic openness to forms of international co-operation (articles 24 and 25), a rejection of militaristic modes of diplomacy (article 26), and a preamble espousing the virtues of world peace.[6] The result of this was that the creation of a new West Germany went hand-in-hand with the FRG's new role into the international community[7] – defined by its willingness to obey international law, reject military intervention, and promote the use of multilateralism – the archetypal "civilian power".[8] Whilst remaining a nominally dualist state, in the sense that international law represented a separate and independent body of law from national legislation, clearly the FRG was to pay great attention to rules and regulations laid down by the international organisations to which it belongs.

4. See for instance A. KAUDERS, *Democratisation as Cultural History, or: When is (West) German Democracy Fulfilled?,* in: *German History*, 2(2007), pp.240-257, U. HERBERT, *Liberalisierung als Lernprozeß. Die Bundesrepublik in der deutschen Geschichte – eine Skizze*, in: U. HERBERT (ed.), *Wandlungsprozesse in Westdeutschland. Belastung, Integration, Liberalisierung, 1945 bis 1980*, Wallstein, Göttingen, 2002, pp.7-49; R. WITTMANN, *Beyond Justice: The Auschwitz Trial*, Harvard University Press, Cambridge, MA, 2005.
5. The concept of "militant democracy" was central in the early years of the FRG, with the republican system leaving no room for elements wishing to overthrow the democratic framework.
6. D. HESSELBERGER, op.cit., pp.56 and 202-209.
7. A. HYDE-PRICE, *Germany and European Order. Enlarging NATO and the EU*, Manchester University Press, Manchester, 2000, pp.25-47.
8. West Germany has often been called a "Civilian Power" because of these traits. S. HARNISCH, H.W. MAULL (eds.), *Germany as a Civilian Power? The Foreign Policy of the Berlin Republic*, Manchester University Press, Manchester, 2001, pp.1-9.

Therefore, the establishment of the direct effect[9] and supremacy[10] doctrines by the European Court of Justice (ECJ) in the early 1960s was especially problematic for the FRG. Here was the supranational court – not explicitly bound to any program of basic rights provision – declaring the primacy of Community legislation over national legal systems. Whilst an effective legal framework seemingly benefitted the FRG's economy and moved closer to the stated goal of political union, it posed a number of profound constitutional questions, most of all about the inviolability of the basic rights. As such, the German reception of Community law has been much more nuanced and problematic than in other areas of integration, including even the providing the lion's share of the funding for the Common Agricultural Policy spending. In fact, it seems much more accurate to describe the German reaction to legal integration as "constructively critical", in no way analogous to the broad support for further economic and political integration outlined earlier. This is perhaps best reflected in the discordant relationship between the ECJ and the highest German judicial body, the Federal Constitutional Court, notably in the series of well-documented "Solange" cases. In the first of these in 1974, the FCC provided the ECJ with a slap on the wrist, reserving its own right to be the final arbiter on the applicability of Community law in the FRG, as long as there was not a comparable mechanism for rights protection at the supranational level.

Expert and public opinion towards the ECJ's decisions was ripe with a surprising amount of some quite harsh criticism.[11] German legal-academia was deeply divided on a number of questions, predominately whether Community law represented a new and unique strand of 'supranational' law, as championed by a the Euro-law associations, or whether it was simply a complex, but traditional form of international law, thereby not having direct effect or supremacy within the national legal framework. Similarly, the reception of the two decisions in the West German media in the mid-1960s was highly controversial. At first welcomed as a punch on the nose for the Gaullists, many commentators began to realise that the rights-protection and legal recourse offered by this new system was barely

9. This refers to a legal principle first established in the "Van Gend en Loos" case, which made EC law obligatory and applicable to individuals with the member States, not just their governments. It involved a Dutch company (Van Gend en Loos) importing chemicals into Holland from Germany. Its implications were highly significant and led to substantial rises in the use of Article 234 (177) Preliminary Rulings, which were the means through which national courts sought advice from the ECJ, thereby increasing the importance and influence of the ECJ within national legal systems. See Case 26/62, NV Algemene Transporten Expeditie Onderneming Van Gend en Loos vs. Nederlandse Administratie der Belastingen [1963] European Court Report 1.
10. This refers to the legal doctrine where EC law became supreme over past, present and future conflicting national legislation. The case itself involved an Italian national who refused to pay an electricity bill to a nationalised company. It marked a fundamental inroad into national legal sovereignty and potentially threatened the integrity of national constitutions. Case 6/64 Flamino Costa vs. ENEL [1964] European Court Report 5.
11. For a review of the heated academic and public debates surrounding the direct effect and supremacy doctrines, see B. DAVIES, *Constitutionalising the European Community: West Germany between Legal Sovereignty and European Integration 1949-1975*, Unpublished Doctoral Thesis at University of London, 2007.

comparable to that offered by the national constitution. This awakening trepidation was encapsulated in headlines in West German newspaper such as "Here is where the national cow is slaughtered" in the otherwise pro-European *Rheinische Post*,[12] or the business paper *Handelsblatt's* fear that legal integration would lead to "retarding influences" from Europe on the Basic Law, Europe's "most progressive national constitution".[13] This comment was typical of both the academic and media reception of the ECJ's doctrines – namely that in a direct comparison, the Basic Law came out on top against the EC's legal system – yet it hardly reinforces the standard idea of Germany as the "good European" and of the permissive consensus.

Against this contentious backdrop then, we might expect that the FRG's political and bureaucratic machinery would react to the surprisingly hostile atmosphere. Yet apart from a dissenting observation submitted in the Van Gend en Loos case, the German bureaucracy was surprisingly inert in dealing with the ECJ. Why is this the case?

Much scholarship has been produced to explain why national governments did not react more strongly to the radical reduction in national legal sovereignty established in the Van Gend en Loos and Costa cases - after all, integration during the mid-1960s was hardly at high ebb. This question is even more relevant in the German case because of the constitutional dilemma that legal integration raised. Some scholars have argued that Law has its own logic and own language and politicians are reluctant to rescind the Tocquevillian principle and cross over into this unfamiliar territory.[14] Others have argued that legal integration was deemed to be in the longer term national interest and allowed to pass, or even encouraged to avoid the intricacies of further intergovernmental negotiation.[15] Others still have argued that the national governments were powerless to act in the face of a trans- and supranational legal constituency.[16] The most sophisticated of these explanatory

12. *Hier wird die nationale Kuh geschlachtet,* in: *Rheinische Post*, 31 May 1974.
13. *Europarecht bricht das nationale Verfassungsrecht,* in: *Handelsblatt*, 30 October 1973.
14. Positions in this field range from the perspective offered by P. PESCATORE, *Aspects of the Court of Justice of the European Communities of Interest from the Point of View of International Law*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1972, pp.239-252, which focuses on the powerful codified institutional position of the ECJ, that of E. STEIN, *Toward Supremacy of Treaty - Constitution by Judicial Fiat: On the Margin of the Costa Case*, in: *Michigan Law Review*, 63(1964), pp.491-518, which focuses on the role played by litigants, or that of J. BENGOETXEA, N. MACCORMICK, L.M. SORIANO, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, in: G. DE BURCA, J.H.H. WEILER (eds.), *The European Court of Justice*, Oxford University Press, Oxford, 2001, pp.43-85, which explains the ECJ's decisions as an attempt to maintain the coherence of the EC legal system.
15. See for instance A. MORAVCSIK, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, UCL Press, London, 1998, pp.67-72, or G. GARRETT, *The Politics of Legal Integration in the European Union*, in: *International Organisation*, 1(1995), pp.171-181.
16. E. STEIN, *Lawyers, Judges and the Making of a Transnational Constitution*, in: *American Journal of International Law*, 1(1981), pp.1-27. The archetype Neo-Functionalist account can be found in W. MATTLI, A.M. SLAUGHTER, *Law and Politics in the European Union: A Reply to Garrett*, in: *International Organisation*, 1(1995), pp.183-190, and W. MATTLI, A.M. SLAUGHTER, *Revisiting the European Court of Justice*, in: *International Organisation*, 1(1998), pp.177-209.

models emphasise the judicial[17] and political[18] context in which the ECJ was acting at the time.

However, as with many model building exercises, the generalisations involved in their shaping serve to hide some of the most interesting idiosyncrasies in specific cases. The historian, with the luxury of immersion into national archives, is able to provide a more nuanced and empirical scrutiny to the claims of theorist. Indeed, what is most interesting about the reception of the ECJ's decisions in Germany is not the inter-judicial dialogue itself, even though this is what has received the most scholarly attention thus far, but rather what was being said and done outside of the courtroom – particularly amongst the ministry officials who were actually shaping the government's European policy.

The answer lies to a large extent in the distinct and idiosyncratic "semi-sovereign"[19] nature of decision-making power in the FRG. Peter Katzenstein describes the Federal Republic as a "tamed power" because, as a result of its particular historical context, power is decentralised amongst many bodies and institutions and change in policy formation is achieved only slowly, incrementally and in a co-operative manner. A defining feature of this system is the "*Ressortsprinzip*" - a system of very strong ministerial independence, with highly formalised structures within administrations, and a clear separation of powers and competencies between individual ministries. As a result of this, information, expertise and administrative functions are guarded fiercely by each of the ministries. For policy formation to occur there needs to be a good deal of cooperation and accord between governmental and societal groups. The result of this is slow, incremental action and a political system which is extremely stable, inclusive and consensus based, but plagued by inertia when faced with making quick responses to short term issues.

It was clear from the start of the attempts at integrating European markets that competency would have to be shared between the technical specialists (Economics ministry) and the diplomats (Foreign Office). It was due to the domination of the early years of the FRG's political system by Konrad Adenauer that the Foreign Office gained the upper hand over the Economics ministry. Adenauer combined his role as Chancellor with that of Foreign Minister at the start of the post-war period,[20] allowing him to populate that ministry with like-minded and loyal allies,

17. Karen Alter alternatively understands the constitutionalisation process as a 'negotiated compromise' between national and supranational court systems. K. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001.
18. Notably, Joseph Weiler's work argues that national governments allowed an unchecked ECJ to expand its remit as fundamentally as it did as a response to the concomitant Gaullism emanating from France. J.H.H. WEILER, *The Constitution of Europe – "Do The New Clothes Have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999.
19. P.J. KATZENSTEIN, *Policy and Politics in West Germany: The Growth of a Semi-sovereign State*, Temple University Press, Philadelphia, 1987.
20. Adenauer served this double role from 1951 until 1955 when he was succeeded by Heinrich von Brentano.

not least people like Walter Hallstein,[21] Carl-Friedrich Ophüls[22] and Karl Carstens.[23] In his autobiography, Adenauer asserted that he aimed to tie in West Germany to its Western neighbours in a staged process of 'small steps', thus to "reawaken confidence in the Germans", protect Europe's "Christian and humanistic ideology" from the threat of Communism, bolster the social cohesion within West Germany itself, and to overcome the "centuries of […] war, destruction and bloodlettings" created by European conflicts.[24] A united Europe, political or economic, was however foremost a legal entity, formed on a "basis of law and liberty" and guaranteeing "equal rights for all".[25] Clearly, the moves taken by the ECJ to bolster the Community's legal effectiveness would have found resonance amongst the officials in the institutional body most closely associated with Adenauer.

The story to be told in this article then is one where the political elites around the Chancellor were stridently in favour of integration and competency for European policy - and for reacting to the ECJ – lay in the hands of the ministries they controlled - the Foreign Office (AA) – or least likely to be aware of the wider constitutional implications of the European court's decisions – the Economics ministry (BWM). Both ministries fiercely guarded their competency in the face of increasing apprehension on the part of the two ministries whose specific role was the safeguarding of the national constitutional order – the so-called "*Verfassungsressorts*" – the Justice (BMJ) and Interior ministries (BMI). An important distinction to be made here too is that the officials in the Legal section of the AA were international law scholars, and not constitutional jurists. The threats posed to the integrity of the Basic Law were best understood and articulated by ministries not involved in the shaping of European policy. In particular, the sidelining of the increasingly sceptical Justice ministry was crucial in determining the German inertia to the ECJ. In fact, the competition between ministries resulted in the exclusion of important and knowledgeable voices from the government's submission to the ECJ in the Van Gend en Loos case, which in the end – quite remarkably – was written by relatively low-level ministerial officials, despite the political importance of the case. Indeed, after the dissenting submission in the Van Gend en Loos case, the political leadership was able to effectively quell any rebellion amongst the bureaucrats and successfully reign in sustained German resistance to the constitutionalisation process.

21. Hallstein was at this time State Secretary in the Foreign Office.
22. Ophüls was at this time part of the German delegation to the negotiations and employed by the Justice ministry.
23. Carstens served in the Foreign Office as State Secretary (1960-66) and became Federal President (1979-1984), as well as actively publishing on European Community law during this period.
24. K. ADENAUER, *Memoirs 1945-1963*, Trans: Beate Ruhm von Oppen, Weidenfeld and Nicolson, London, 1966, pp.79-190.
25. Ibid., pp.190-191.

Division of Competency 1957–1963

Despite Adenauer's domination of the early FRG, ratifying the Treaty of Rome in the German Bundestag proved to be tricky business. In May 1957, Ewald Bucher,[26] the FDP parliamentarian and later Justice Minister at the time of Van Gend en Loos and Costa, published an article concerning the constitutional problems around the transferral of national competencies to a supranational organisation without sufficient constitutional provisions guaranteeing basic rights and the separation of powers. The article had already prompted a heated discussion in academic circles,[27] and was now raised in the Bundestag's committee by both the SPD and FDP to attack the Treaty of Rome. Defending the government's position, Ophüls and Carstens argued that all foreign treaties were subject to the conditions of the national constitution and that the Federal Constitutional Court had previously made this statement itself in its case law. When asked what would happen were the supranational authority to issue a decision contrary to the Basic Law, Carstens argued strongly that the Basic Law was the final and supreme source of authority for all German government agencies and that conflicting norms would simply be unenforceable.[28] Moreover, Carstens emphasised the pragmatic approach being taken by the Foreign Office, stating that making the European level identical to the national would be impossible in the face of six different national systems, and the idea was simply to create something workable at the beginning, whether this was congruent with national standards or not.

However, the argument regarding the necessary amount of "structural congruence"[29] between the national and EC constitutional orders was far from settled at this point. The principle of congruence emerged from the writings of the academic Hans-Jürgen Schlochauer the previous year[30] and provoked discussion not just amongst legal specialists, but also within the administration. As early as 1953, discussions between the Justice ministry and the Foreign Office, again represented by Ophüls, had raised the issue of many more competencies being transferred to the supranational level than had been foreseen by the writers of the

26. Bucher earned a doctorate in Law from the University of Munich in 1941, serving as a lawyer until 1953. He was a FDP MP from 1953 until 1969, serving as Justice Minister from 1962 to 1965 and running for President in 1964. He switched allegiance to the CDU in 1984. Bucher, as a critical voice, played a crucial role in ministerial disputes regarding the reception of EC law during the 1960s.
27. E. BUCHER, *Verfassungsrechtliche Probleme des Gemeinsamen Marktes*, in: *Neue Juristische Wochenschrift*, 10(1957), pp.850-852.
28. Politisches Archiv des Auswärtiges Amt (PAA) B020-200-14, Third Meeting on 21 May 1957 of Sonderausschuss "Gemeinsamer Markt-Euratom" des Bundestages.
29. H.J. SCHLOCHAUER, *Zur Frage der Rechtsnatur der Europäischen Gemeinschaft für Kohle und Stahl*, in: W. SCHÄTZEL, H.J. SCHLOCHAUER, *Rechtsfragen der Internationalen Organisation*, *Festschrift für Hans Wehberg zu seinem 70, Geburtstag*, Vittorio Klostermann, Frankfurt am Main, 1956, p.367.
30. Ibid., p.367.

Basic Law.[31] In fact, the BMJ official, Roemer, stated his fear that too zealous a use of Article 24 BL would simple create an "*Überstaat*" which would subsume the member States, a prospect guaranteed to wake opposition to the project, not least within the Bundestag.[32]

On behalf of the BMJ, Roemer was again involved in similar discussions concerning the negotiations on the Treaty of Rome and acted as an advisor on an inter-ministerial committee advising the West German delegation on judicial matters. Here again, concerns were raised by the BMJ about the nature of competency transfer through Article 24 BL, which resulted in advice being given to the delegation that the democratic controls of the supranational executive be strengthened, particularly if the executive were given the right to issue directly effective legislation.[33] The question about the applicability of directly effective supranational legislation was difficult for the BMJ to answer and it frequently wrote to the AA for clarification of Treaty points during the years preceding its establishment as a legal principle in Van Gend en Loos.[34]

Indeed, the BMJ continued to be also concerned by the transfer question throughout the period and sought to reassure itself about the integrity of the national constitution by asserting that the Basic Law could be protected in the face of conflicting supranational or international law in successive meetings with other ministries, either through legal reform or calling on Article 79 (iii) BL.[35] For instance, in discussions with the Foreign Office in April 1957, a BMJ delegation reached agreement with the AA representative that the Basic Law guaranteed the Republic's legislator the right to issue national law overriding conflicting international law, albeit through the alternative Article 25 BL. However, despite the BMJ's attempts to keep a grip on the development of the EC legal system, its influence was waning due to a series of arguments between the ministries about which department actually held the responsibility for monitoring and guiding German European policy. As a result of these disputes, the BMJ was increasingly sidelined in matters relating to the EC and its legal order.

31. PAA B10-893, Note, btr. Besprechung mit Herrn Min Dir Roemer vom Bundesjustizministerium über Fragen der Verfassungsmäßigkeit des Entwurfs der Satzung einer Europäischen Gemeinschaft.
32. PAA B10-89, Note, btr. Besprechung mit Herrn Min Dir Roemer vom Bundesjustizministerium über Fragen der Verfassungsmäßigkeit des Entwurfs der Satzung einer Europäischen Gemeinschaft.
33. PAA B80 255 EWG 1955-58, Entwurf eines Vertrages über den Gemeinsamen Marktes: hier: Institutionelle Fragen, 3. Dez. 1956.
34. See for instance Bundesarchiv (BA) B141-11050 Bundesjustizministerium: Verhandlungen über die Europäische Integration: Gemeinsamer Markt Nov 1956 – Jan 1957; BA B141-11051 Bundesjustizministerium: Verhandlungen über die Europäische Integration: Gemeinsamer Markt Jan 1957 – May 1957. Note that these letters were written at least six years in advance of the Van Gend en Loos decision.
35. See for instance memos regarding Brussels Conference from October to November 1956 in BA B141-11049.

The causes of these disputes lay within the governing elite. Even within Adenauer's own party, in fact amongst his closest advisers, there were major differences about the form that European integration should take. These disputes proved to have a major impact on the nature of the administrative reaction to the ECJ throughout the entire period. The fundamental division within the CDU itself lay between the conceptions of Adenauer and his Economics minister, Ludwig Erhard. Erhard and a grouping within the BWM favoured a much looser alignment of the Western European states in favour of a larger Atlantic-based free trade network. This was in opposition to Adenauer's attempts to build closer cooperation with France by tying West German institutionally to a tighter knit European community.[36] Even with Adenauer's considerable influence, it was unavoidable that the economic nature of integration provided the BWM with a great deal of influence over how policy was formed. As a result, Erhard began to push ever harder for the BWM to take over responsibility for integration from the Foreign Office. This prompted a flurry of secret memos from Carstens on behalf of the AA and Erhard for the BWM with the result that in October 1957, Adenauer formally gave control for matters of economic integration to the BWM.[37] By late 1958 however, through a round of negotiations, the BWM and AA had reached agreement that the AA would also be involved in the co-ordination of policy, at least on issues concerning foreign policy and political co-ordination. However, with the competencies being shared between the two big ministries, smaller ministries, particularly the two *Verfassungsressorts*, were increasingly squeezed out of the European policy making process.

This was particularly evident when deciding on the personnel for the permanent representation in Brussels. In a meeting at the Foreign Office in July 1958, the BMJ and the BMI both insisted on sending one representative each to Brussels, arguing that the huge legal importance of the EC required a number of constitutional and legal specialists to be on hand. The BMI had argued strongly, like the BMJ, throughout the negotiations on the Treaty of Rome that a much closer structural congruence, particularly in terms of the separation of powers, was needed between the European and national levels, particularly in terms of strengthening the European Parliament.[38] The Chairman of the meeting, Herbert Müller-Roschach, standing in for Carstens at the time, immediately questioned the relevance of sending personnel from the BMI and BMJ, despite the written interventions of the Justice Minister himself and the State Secretary of the BMI, stating that the current

36. B. LÖFFLER, *Soziale Marktwirtschaft und administrative Praxis. Das Bundeswirtschaftsministerium unter Ludwig Erhard*, Franz Steiner Verlag, Stuttgart, 2002, esp. pp.430 ff.
37. BA N1266 1462, Nachlass Walter Hallstein: Institutionelle Fragen: Ressorts Zuständigkeiten; BA B146-598 Ministerbüro Schumanplan.
38. See Referat I A 4 (von Meibom) 29 October 1956, Note betr. Euratom, hier: Gemeinsame Unternehmen, bezugl. Franz. BA B141-11046, Bundesjustizministerium Verhandlungen über die Europäische Integration: Gemeinsamer Markt Oct 1956-Nov 1956, Entwurf vom 24.10.1956.

head of the representation had more than a sufficient understanding of the EC legal system – this was, of course, Carl Friedrich Ophüls.[39]

However, when asked about the situation in Brussels, Ophüls admitted in a letter in August 1958 that he was simply unable to cope with the legal work being given to him and recommended strongly that both *Verfassungsressorts* be allowed to send trained personnel as soon as possible.[40] Despite this, Adenauer intervened personally in the debate, denying both the BMI and BMJ the chance to send personnel to the representation, citing "overstaffing" as the reason.[41] The result of the discussions was that the Foreign Office promised the two *Verfassungsressorts* that its chosen representative would be a fully trained jurist and that he would keep the two ministries informed of all legal developments. When questioned by the BMI two months later as to the chosen personnel, the Foreign Office failed to provide any kind of response. By the time a working group for affairs of the European Community was established in a cabinet meeting of 1962, both the BMJ and BMI had been completely sidelined from the European policy formation mechanism, with only the State Secretaries of the AA, BWM, Agricultural, Transport and Social ministries being invited to participate.[42]

However, with the fight for ministerial competency going on in the background, the ECJ was being faced with an increasing number of court cases, many involving West German companies.[43] These cases received an increasing amount of media coverage, particularly when the perceived unfairness of the ECJ towards these companies raised an increasing public hostility towards the court, and this trend is mirrored by opinion in the West German bureaucracy. Members of the legal section of the AA felt compelled to write to the State Secretary to warn him that by continually losing its cases, the Federal Republic was considered to be acting imprudently amongst judicial circles and suggested that the government take more care about which cases it fought and who it chose to be represented by.[44]

Strikingly, then, from this point on, the relevant legal personnel in the BWM and AA responsible for recording cases at the ECJ were more interested in whether

39. PAA B020-200-123, Vertretung der BRD der der EWG, Protokoll der Ressortsbesprechung im Auswärtigen Amt am 28. Juli 1958 betr. die Errichtung einer ständigen Vertretung der Bundesrepublik bei den Europäischen Gemeinschaften.
40. PAA B020-200-123, Fernschreiben von Ophüls, 6 August 1959.
41. Ibid., Chancellor's Office to Foreign Office, 6 August 1958.
42. See BA B141 61069 Bundesjustizministerium: Institutionelle Entwicklung der Europäischen Gemeinschaft Juliy 1959 – Jun 1965.
43. Most notably, Case 19/61 Mannesmann AG v High Authority of the European Coal and Steel Community [1962] European Court Report 357. Such cases received extensive press coverage in *Die Klage gegen die Hohe Behörde,* in: *Frankfurter Allgemeine Zeitung* (FAZ), 21 February 1958; *Erhöhte Schrottumlage ist eine Strafe,* in: *FAZ*, 22 February 1958; *Klage gegen Lieferbeschränkungen,* in: *FAZ*, 25.02.1958; *Schrottklagen abgewiesen,* in: *Handelsblatt*, 23 June 1958; *Entscheidendes Gerichtsurteil,* in: *Handelsblatt*, 25 June 1958; *Bonn fühlt sich im Recht,* in: *Industriekurier*, 12 August 1958; *Nold vor dem Europagerichtshof,* in: *FAZ*, 20.11.1958.
44. PAA B20-200-500, Gerichtshof: Streitfälle, Letter from Von Haeften to State Secretary, 18 July 1961.

a case was won or lost than looking at the implications that the case had for the national constitutional order. Clearly concerns about damaged diplomatic prestige were taking attention away from the much more important implications of the constitutionnalisation process. Evidence for this is provided by the recording of the Ruhrkohlengesellschaften and Stork cases.[45] Whereas high profile cases involving substantive financial losses for West German firms gathered large folders of documentation in the ministry archives, these two cases, both of which had crucial importance for the constitutionnalisation process, were filed without commentary in long lists of other, less important court cases.[46]

Reactions to Van Gend en Loos (1963)

However, the Van Gend en Loos case did start a number of alarm bells ringing. The case was first commented on by a specialist in the EC Law section of the BWM, Ulrich Everling,[47] who raised concerns at the possible implications of the case and asked his equivalent in the Foreign Office, BMJ, Finance and Agricultural ministries whether the federal government should make an official statement on the case. Everling suggested making clear to the ECJ that the West German government rejected the possibility of the principle of direct effect and believed that states alone, and not their citizens, should be able to call upon EC legal norms.[48]

The response from the other ministries did not reflect the urgency of Everling's concern. The legal section of the Foreign Office's laconic response stated that it agreed with Everling's rejection of direct effect but did not know if making a statement would be worthwhile.[49] The ministries of Finance and Agriculture also agreed with the AA, with the former stating that it could not see any difficulties arising from the decision and therefore that a statement would not be necessary.[50] Two weeks after Everling's initial memo, the BMJ finally responded, agreeing with the rejection of direct effect, but stating that for clarity's sake, it would be a good idea to issue the ECJ with a government statement so that the court would feel

45. Case 1/58 Stork vs. High Authority [1959] European Court Report 17, Case 36-38 and 40/59 Ruhrkohlenverkaufsgesellschaften vs. High Authority [1960] European Court Report 423. In this cases, the ECJ stated that it was not necessarily bound by national law, such as basic rights provisions – clearly important for German constitutional law.
46. See PAA B20-200-181, Rechtsachen 9/57 11/57 12/57 27-29/57 31-34/57 1/58 and PAA B20-200-422, Gerichtshof (Urteile von 30/59 bis 42/59).
47. Ulrich Everling was a productive figure in the bureaucratic response to the ECJ, holding key roles in the legal departments of the Economics ministry from 1953 until 1980, when he became a Judge at the ECJ itself.
48. PAA B20-200-712, Gerichtshof der Europäischen Gemeinschaften: Rechtssache 26/62, Schnellbrief from Everling, 21 September 1962.
49. Ibid., Letter from Referat 500, 23 September 1962.
50. Ibid., Schnellbrief, 27 September 1962.

obliged to explain its reasoning more fully.[51] The Foreign Office finally agreed the next day with the BMJ's suggestion and Everling began to work constructing the government position.

On the 17 October 1962, Everling circulated a draft response in which he rejected the special nature of EC law, regarding its effect as no different from that of standard international law, mirroring concomitant debates in academic circles. He argued that citizens retained the rights of their own national constitutions, guaranteed through the actions of their elected public authority, and whilst the EEC Treaty bound these public authorities, it was not qualitatively different from other international agreements and therefore did not have direct effect for member State's citizens. Moreover, Everling argued, it was not the responsibility or in the competence of the ECJ to decide on the applicability of norms for citizens, and citizens did not have the right to call upon supranational norms to challenge national laws. Only the member States themselves and the Commission had the right to call upon the court.[52] Everling's suggestion met with widespread approval amongst the other ministries, with the Foreign Office adding to the draft the question as to what would happen in cases of collisions between conflicting supranational and national rights.[53] With this amendment, a final statement was completed and submitted officially to the ECJ on 7 November 1962.

Over the following months, the ECJ continued its deliberations and announced its decision in February 1963, which was very much at odds with the West German position. Two months after this, the legal section of the Foreign Office wrote a summary to the State Secretary, the ardently pro-integration Karl Carstens, explaining the rejection of direct effect adopted in the government statement and the fact that the ECJ had entirely ignored this opinion.[54] Carstens' response to this was furious. He described the submission as riddled with errors, and the overall opinion given as far from watertight, since the implications of direct effect was still "highly controversial" amongst academic circles, which was indeed the case at this point in time. Indeed, Carstens pointed out that he himself agreed with the principle of direct effect and regarded the actions of the legal section, and all those involved in the submission as "extremely politically unseemly".[55] He demanded that this opinion be made clear in writing to the BWM and that from that point forward, that he be involved in any submissions to the ECJ. This scolding clearly made an impression. When Everling suggested another submission to the ECJ in further legal cases that year, the Foreign Office's legal section clearly stated that any submission was to go through Carstens, and no longer exclusively through the BWM.[56] By centralising the power to submit opinions to the ECJ, Carstens'

51. Ibid., Schnellbrief, 5 October 1962.
52. Ibid., Schnellbrief und Anlage, 17 October 1962.
53. Ibid., Schnellbrief, 22 October 1962.
54. Ibid., Aufzeichnung, 5 April 1963.
55. Ibid., Note, 10 April 1963.
56. PAA B20-200-871, Rechtssache, Letter, 18 September 1963.

political clout had reigned in any future possibilities for dissent from the AA and BWM.

The debate around the submission of an opinion to the ECJ in the Van Gend en Loos case is astonishing. In effect, the West German government submitted an opinion based on the thoughts of relatively minor administrative figures, who held completely different opinions on the case in hand and on the principle of direct effect than both their bureaucratic and political seniors. That this could occur is due to the segregation and tight guarding of responsibility for monitoring European events between ministries without the specialist expertise in legal-constitutional affairs (Foreign Office and BWM), and the complete sidelining from European policy of the ministries with that specialist knowledge – the BMJ and BMI. The BMJ had admittedly played a role in the submission of opinion to the Court, yet its involvement seems to have been strangely remote, with limited participation in the drafting process and with its replies to questions and suggestions taking several weeks to arrive. Clearly it was Everling and the legal section in the Foreign Office taking the initiative to respond, excluding both other ministries and also the personnel around and above them.

The response of the specific ministries to the behaviour from their legal specialists is also noteworthy. In the case of the BWM, no action was taken against Everling and he continued to actively follow and pursue the development of the EC legal order unabated, perhaps reflecting the disinterest of his seniors in the BWM to matters of EC law. On the other hand, the legal section at the AA was severely chided by their State Secretary, a figure with legal training and a keen interest in EC law. This reflected the established differences between the BWM and the AA regarding their ambitions for European integration, with the former's focus falling entirely on economic issues and the latter placing considerably more emphasis on the goal of moving towards a politically (and legally) united Europe.

The response to Van Gend en Loos points to three other important conclusions: firstly, opinion towards the EC legal system amongst the administration was divided, just as it was in the academic and public arenas. It was difficult to reach agreement not just between ministries, but indeed even within certain ministries. Secondly, the reaction of Carstens within the Foreign Office contrasted greatly with the non-reaction of his equivalents in the BWM – clearly Everling had much more room for manoeuvre in determining the BWM's reaction to the ECJ. This demonstrated an acquiescence within the BWM's leadership resulting from a number of factors including an underestimation of the growing importance of EC law, a distinct lack of interest in legal-constitutional affairs, and a broad, if unspecific agreement with the developments. Thirdly, by the end of the Adenauer period, it was clear that the two departments, which had a huge interest in such matters – the *Verfassungsressorts* – were completely sidelined from European policy making. This was not exclusively due to the competitive nature of the sharing of ministerial competency. Political orientation also played a role, with the BMJ being sidelined partly due to its head's – Ewald Bucher - affiliation with the FDP, a party regarded as hostile to European integration due to its (and Bucher's

published)[57] opposition during the debates on the ratification of the Treaty of Rome.

The Reaction to Costa (1964)

In 1963, the Federal Republic experienced its first change in leadership as Ludwig Erhard moved from the BWM to replace Adenauer as Chancellor. As already discussed, Erhard's views towards European integration differed greatly from Adenauer's, with the former taking a much stronger pro-Atlantic line than his predecessor. The new administration was quickly faced with another fundamentally important change in the supranational legal order: the Costa case. The Italian Constitutional Court reached its decision on the case in February 1964, the text of which arrived at Ulrich Everling's desk in the BWM on 20 March 1964 and the legal section of the Foreign Office three days after.[58] While this prompted no immediate reaction for either department, by the early summer, the question of supremacy began to increase in profile as firstly the Italian court's decision to deny supremacy was questioned by a Dutch MEP in May 1964,[59] and secondly by a high profile speech supporting supremacy by Hallstein at the European Parliament in June.[60] On the 8 July 1964, a week before the ECJ published its Costa decision, the Foreign Office legal section crafted its position on the supremacy question, in which it recommended that West Germany keep a "reserved" position in any discussions of the question, since it believed it unlikely that either the FCC would accept such a legal doctrine or that the Bundestag would accept such a limitation of its power through the use of Article 24 BL. It concluded that the transferral of competencies should be limited to those actually explicitly named in the Treaty of Rome and any judicial expansion of these was problematic.[61]

The Legal Section sent its opinion secretly, under request, to the Interior ministry, which promptly disagreed with the Foreign Office. The BMI argued that it was irrelevant for the Bundestag to attempt to legislate against existing EC law because it would be attempting to legislate in an area of competence already transferred to the EC. It would therefore be illegal. As such, any national or European justice would rule against the subsequent national law.[62] Moreover, it

57. See footnote 26.
58. The text from the Costa decisions was unusually and inexplicably routed through the Ministerial Office (Ministerbüro) of the Foreign Office before arriving at the legal section. Why this should happen was queried, without reply, by the Ministerbüro. See PAA B20-200-874, Rechtssache.
59. See Written Question by Van der Goes van Naters, in BA B106-39770, Bundesinnenministerium: EWG Rechtsystematik: Urteil des Italienischen Verfassungsgericht von 24.2.64 (Schriftliche Anfrage des Herrn van der Goes van Naters).
60. KAS-IX-001-033/1, Korrespondenz: Ausgänge (CD Fraktion im EP) 1965.
61. PAA B80-620, Note 8 July 1964.
62. BA B106-39770, Bundesinnenministerium: EWG Rechtsystematik: Urteil des Italienischen Verfassungsgericht …, op.cit., Note, 10 August 1964.

argued, it was impossible to imagine that two competing laws could stand together, as this would imply that the supranational system had a legal will entirely "independent" and "original" from the member States, and since this was based on a transferral of competency from the member States, it could hardly by original or independent.[63] By accepting that the national parliament was powerless to legislate against EC law and that EC law was an inextricable part of the national legal order, the BMI in effect accepted that supremacy was an inevitable and logical consequence of the transferral under Article 24 BL.

As a result of this fundamental disagreement, a meeting was arranged between the members of the Foreign Office and the BMI to discuss this issue. The meeting which took place on the 12 August was revealing about the attitude of the AA to developments in the EC legal system. Firstly, the BMI's representative, Hans-Peter von Meibom, had to make it clear that the rejection of supremacy would fundamentally undermine the functioning of the EC, which in turn would seriously damage the West German economy. The legal section of the AA was forced to admit that it had never seen the question from this viewpoint before, being more interested by the political considerations involved in the possible accession of the UK, which supremacy made more problematic. Secondly, von Meibom complained that the Foreign Office had clearly misunderstood the BMI's position on Article 24 BL, stating that the transferral of competencies was not irreversible and that the Bundestag still held the competency to legislate in all areas that the EC had not been clearly delegated. This left von Meibom with the impression that whilst the meeting had been open and in good humour, the "legal section of the Foreign Office had only very scarcely dealt with the [legal] problems in the EC".[64]

Evidently from the meeting between the BMI and AA, it was the political events of European integration, particularly Charles De Gaulle and the British accession that held the attention of the key decision makers at Foreign Office. Moreover, from the files of the level of ministerial office and State Secretary – the leading co-ordinators of Foreign Office policy – it is clear that EC law was not a topic of discussion, being left entirely to the Legal Section to deal with.[65] There was simply no record of matters of EC law being discussed on a regular basis. Indeed, even after Carsten's decision that opinions to the ECJ should pass through State Secretary level prior to submission, his correspondence on matters of EC law with the legal section for the rest of his tenure was limited to asking the legal section to proof read an essay he had written in 1963.[66] This is strong evidence to suggest that Joseph Weiler's approach to the constitutionnalisation process – that legal integration was allowed to happen unabated as a response to the continued political problems dealing with De Gaulle – can not hold true in the West German case. The link between politics and law in the sense proposed by Weiler is simply

63. Ibid., Note, 8 August 1964.
64. Ibid., Note, 12 August 1964.
65. See files under PAA B21.
66. PAA B20-200-1168, Reden, Interviews, Vorträge, Stellungnahmen, Presse.

not evident, even if certain personnel, such as Carstens were equally aware of the concomitant legal and political developments.

More evident is that the complex legal terminology and the 'newness' of the nascent supranational system involved in the ECJ-national court dialogue was simply too difficult for many figures in the administration to follow. The misunderstandings between the AA and the BMI – the latter excluded from European policy formation by the competition for competency – demonstrate that the personnel of the *Verfassungsressorts* were more suited to follow the implications of the ECJ's jurisprudence. Indeed, further evidence is given by the actions of the BWM, where Everling, commenting in 1965 that he would focus his attention only on those cases with "vital importance", failed to provide a submission to the ECJ regarding Costa, but did so for subsequent cases involving West German firms.[67] Clearly, as with the Foreign Office, the main focus when monitoring the EC legal system was determined by ministerial specialism – political or economic – and not the constitutional element, which the marginalised *Verfassungsressorts* undoubtedly could have brought. Moreover, the same personnel had learnt the lesson from the year earlier, when their submission to the ECJ against the principle of direct effect in the Van Gend en Loos decision had earned them a severe dressing down from their political superiors. As a result, the FRG did not submit its position in the Costa case, despite the obvious dissension amongst some of the ministries.

Continued Divisions of Competency (1964–1968)

The sidelining of the *Verfassungsressorts* continued into the late 1960s as the competition between the ministries for European competence was far from over. It was in fact the concerns being raised in the BMJ and BMI by Van Gend en Loos and Costa that prompted another round of ministerial disputes. On 12 July 1967, the State Secretary in the BMJ, Horst Ehmke, wrote to his counterparts in the AA and BWM asking whether it was time for a reassessment of the division of competencies between the ministries, particularly as the legal aspects of the integration project were becoming ever more important and common.[68] Accompanying this was a BMJ memorandum on the competencies held by the ministries concerning European policy, in which the ministry voiced its concern at how close EC law was to breaking certain basic rights (Articles 2, 12, 13, 14) and that questions of democratic legitimacy and basic rights protection were becoming increasingly prevalent.[69]

67. See for instance Case 58/64 Grundig-Verkaufs GmbH vs. Commission [1966] European Court Report 299.
68. BA B141-61070, Bundesjustizministerium: Institutionelle Entwicklung der EG 1965-8, Letter, 12th July 1967.
69. Ibid., Note, 25th July 1967.

Despite this, the State Secretary in the BWM, Fritz Neef, rejected the proposal out of hand, stating after discussions with colleagues, that there was no evidence that EC law was becoming more important or more voluminous. Moreover, the legal sections in the BWM and AA, he argued, had developed a system of "close and trusting" co-operation regarding EC law and that further discussion of competency division should be discussed through the more formal means of the State Secretary Committee.[70] The State Secretary in the Foreign Office, Klaus Schütz, instigated an investigation into the division of competencies concerning EC law within his own ministry. This demonstrated that there was no formal division for EC legal matters. Practically the relevant ministries handled those of a specific, technical nature and those requiring transposition into national law, whilst the legal section of the AA handled legal issues of political importance.[71]

With this logic, its is unsurprising then that the BMJ and BMI were excluded from issues of EC law, since legal issues of a "political" nature - meaning issues concerning the supremacy and effectiveness - fell under the remit of the AA, despite being the natural constituency of the *Verfassungsressorts*. Therefore, as the EC was still understood as an external, international organisation – the AA report stated that most EC law issues were dealt with in the "International Law Section"[72] – and the *Verfassungsressorts* dealt with domestic constitutional issues, they were marginalised, despite their concerns that EC law was increasingly affecting the national constitutional order. As a result of the report, Schütz was equally as dismissive of Ehmke's suggestion as Neef had been,[73] much to Ehmke's fury. In his reply to his counterparts, Ehmke claimed that issues such as the demarcation of limits of national and supranational law and the use of the preliminary ruling mechanism by West German courts were increasingly urgent. Most importantly, action needed to be taken against the continued undermining of national parliamentary power through the strengthening of its European equivalent, preferably through treaty amendment.[74] Nevertheless, Neef quickly brushed aside Ehmke's concerns, stating that the essence of integration was that member States were not fully in control of its development and that the growth of EC legal system was due to the impossibility of predicting the path integration might follow.

Indeed, the expansion of EC law was in the interest of West Germany as it helped to achieve certain political goals: namely the sidelining of French obstructionism within the EC by making the necessity of continued and more legitimate integration inevitable.[75] Without a doubt, Neef's instrumentalisation of

70. Ibid., Letter, 4th August 1967.
71. PAA-B20-200-1662, Allgemeine Rechtsfragen nicht Institutionelle Art (4 Nov 1966-30 Juni 1970), Memo, 6th September 1967.
72. Ibid., p.5.
73. BA B141-61070, Bundesjustizministerium: Institutionelle Entwicklung der EG 1965-8, Letter, 12th September, 1967.
74. PAA-B20-200-1662, Allgemeine Rechtsfragen nicht Institutionelle Art (4 Nov 1966-30 Juni 1970), Letter, 29th September 1967.
75. Ibid., Letter, 28th November 1967.

legal integration to achieve political goals, against French wishes, matches Weiler's contextual model perfectly, but there is little evidence that this policy was followed in a systematic way. If this were a conscious policy on behalf of the West German administration, then the decision making level at the Foreign Office – responsible for the political strategy of European policy – would have mentioned the EC legal system, or even at some point discussed it. As already seen, this simply did not occur. The end result of Ehmke's attempt to bring the BMJ closer to the European policy formation mechanism ended in failure, and the BMJ was merely given the opportunity to prepare a report on the medium and long-term development of the EC legal system for the State Secretary Committee meeting in January 1968. The report's conclusion was tepid, stating simply that the *Verfassungsressorts* should be more involved in the monitoring of EC law than the current situation allowed for, without making any concrete suggestions as to how this should come about.[76]

Conclusion

The story told in this article is one of a surprisingly inert bureaucratic reaction to the process in which European Community law became both directly effective and supreme within the national legal order. The passivity is all the more puzzling because this marked a fundamental inroad into national legal sovereignty and was greeted with widespread criticism in both public and academic opinion. Indeed, when it is considered how important the subjugation of all public authority to the national constitution and its unalterable basic rights was in the context of post-war Germany, it is absolutely astonishing that the Federal Republic did not react in a stronger manner to the Van Gend en Loos and Costa decisions. Indeed, the opinion delivered to the ECJ in response to the 1963 decision was crafted not in the higher echelons of the government, but by relatively low ranking officials, whose actions prompted a furious response from their seniors. It is also noteworthy that the government remained equally inert to national court decisions relating to Community law, which would in later years prompt embarrassing criticism from the European Commission.[77] Evidently there is something in the nature of legal integration, which inhibits pro-active policy responses in national governments. This is likely to be a combination of factors, including the specialised terminology of the legal realm and an unwillingness to undermine the traditional separation of powers between the judiciary and executive. However, the executive has not held as

76. The Verfassungsressorts were excluded from State Secretary Committee meetings on European policy – see BA B106-39573, Bundesinnenministerium: Einstellung des BMJ zu EWG-Fragen 1964, Letter, 13th May 1964. For the BMJ report, see PAA B20-200-991, Rechtsfragen der Europäischen Gemeinschaft, Memo, 12th January 1968.

77. Most embarrassingly, of course, for the FRG government was the threat of infringement proceedings from the Commission soon after the FCC's Solange I decision. See BA B106 39568, Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974, Memo, 9th October 1974.

many reservations in impinging on areas traditionally held by the legislative branch, a major criticism of those supporting the democratic deficit thesis. Moreover, the predominance of law school graduates in the German bureaucracy has traditionally been extremely high,[78] undermining the idea that many did not 'understand' what the implications of the ECJ's decisions were.

Instead we must look at the specificities of the German ministerial constellation for a full understanding as to why the government failed to act. The '*Ressortsprinzip'*, which led to a fierce competition for competency over the 'new' policy area of integration, meant that the favoured bodies – the Foreign and Economics ministries – moved to exclude the institutions with a specialised interest in the impact of the ECJ's jurisprudence on the national order. Party political interests indeed played a part in this, especially with the sidelining of the FDP Justice Minister Bucher. However, party alignment was only a secondary matter as there remained a broad base of political support for integration and steps taken towards this (including legally) across the traditional party division of the CDU and SPD, particularly after the Godesberg reform of the latter.[79] As such, politics played a lesser role in determining the bureaucratic reception of the constitutionnalisation process than might have been expected. In fact, the Justice ministry was divided as an institution on the question of the ECJ.[80] The real rivalry was between the ministries, and with the size, influence and the backing of successive Chancellors, the Foreign and Economics ministries were able to manifest a joint leadership over European policy formation. The result of this was that the division of labour in monitoring Community law left the Economics ministry overseeing law of a specific and technical nature, whilst the Foreign Office scrutinised legal developments with a political character.

This had two substantive consequences. Firstly, the constitutionnalisation process was being recorded not by specialists in constitutional law, but in international law. The implications of this are most evident in the meetings between the BMI and AA after the Costa decision. Clearly the BMI was surprised and somewhat disappointed in the lack of technical expertise and thought being used at the Foreign ministry. Secondly, this is important because the AA held most responsibility for understanding the implications of the ECJ's decisions. Instead of reacting against the ECJ, as the Justice ministry did, the Foreign ministry remained benignly indifferent. This is hardly surprising since its strongly pro-integration tendency was evident right from the start, indeed since its shaping as an institution

78. Dahrendorf claims that 85% of higher level German bureaucrats in 1962 had a legal education. See R. DAHRENDORF, *Gesellschaft und Freiheit*, R. Piper Verlag & Co (2nd ed.), Munich, 1963, pp.234-235.
79. The SPD initially opposed European integration because it was seen to inhibit the chances of national unification. For a discussion of this, and the changes in the Godesberg programme, see J. BELLERS, *EWG und die "Gobesberger" SPD*, Universität Siegen, Siegen, 2003.
80. Whilst the Justice Minister Ewald Bucher was famously criticised for being anti-ECJ, many of the Justice ministry's employees revealed their embarrassment of this situation to their ministerial counterparts. See PAA-B20-200-1662 Allgemeine Rechtsfragen nicht Institutionelle Art (4 Nov 1966-30 Juni 1970), Letter, 29th September 1967.

by Adenauer himself. A picture then emerges of a Foreign ministry with the lead role in monitoring political-legal developments, only partially aware of what the ECJ was doing and certainly not motivated enough to act on the concerns of certain academics, media debates and the trepidation of the *Verfassungsressorts*. In the Van Gend en Loos case response, the officials who did feel strongly enough to voice concerns to the ECJ were quickly and forcefully quietened by their political superiors. The concerned *Verfassungsressorts* were hardly likely to get more support from an Economics ministry with a profound interest in the establishment of a fully functioning Common Market, founded on a powerful and effective set of legal mechanisms.

The established view of the FRG as the "good European" only paints half the picture. Whilst assumptions about the broad support of the West German government and populace towards political and economic integration undoubtedly hold true, this does not fully explain the hesitancy of the administration to respond to the legal integration process, particularly in the face of public and academic concerns about the integrity of the national constitution. The seemingly meek acceptance of the ECJ's doctrines was not primarily due to the permissive support of the ministries. The FRG did after all submit its dissent in the Van Gend en Loos case, which clearly points to turbulence below the apparently calm surface of the "good European". That turmoil has been documented here for the first time. Instead, it should be seen that Adenauer and his clique of pro-European loyalists – no better example than in Karl Carstens – held a stranglehold on the bureaucratic machinery and shaped and dominated the ministerial constellation right from the very start of the FRG so as to facilitate Germany's role in an increasingly united Europe. Wherever dissent lay in the bureaucracy – and the opinion submitted in the Van Gend en Loos case should be seen as such an aberration - it was quelled, and those ministries with most to say about the possibly dangerous implications for the national constitution were routinely sidelined from European policy. The dominance of the international law scholars within the AA over the constitutional law specialists in the BMJ suited the political leadership's purpose fantastically well. The political agenda of the pro-integration elite would not allow public and academic disquiet, nor even discord in the administrative machinery, to hinder or delay the development of the European project.