SURVEY OF LITERATURE

General

Under the auspices of the Institute of European Law of the University of Cologne a congress was held last April on the development of the case-law of the Court of Justice of the European Communities during the ten years of its existence. Since it may take some time before the documents of this important conference are published reference is made to some reports which have appeared. *Günter Kohlmann* has written a review in the *Monatschrift für Deutsches Recht*, 1963, pp. 560-1 in which he mentioned in particular the criticism which was voiced by Prof. Zweigert during the final session—a criticism in which many did not concur: the judges are chosen for too short a period; no appeal lies from judgments of the Court; no possibility of rendering dissenting opinions; the oral procedure is too restricted and the procedure for taking evidence is not sufficient. *Manfred Zuleeg* wrote a short summary for the *Juristen-zeitung*, 1963, pp. 419-420. A more elaborate report of the conference was written by *Günter Hess* in *Europa Archiv*, 1963, pp. 497-502. In this report the discussions on the relationship between Community law and national law, the position of the Court as a constitutional bench, and the possible modification of the provisions concerning the legal protection of private parties were particularly emphasized.

One of the most complicated and at the same time one of the least spectacular subjects of Community law is the technique of harmonisation of national laws in view of the implementation of the Treaty and the regulations based upon it. Professor *Eric Stein* considered in his contribution to the Conference of the British Institute of International and Comparative Law at Ditchley Park in June 1963 the different aspects of this harmonisation-problem. He indicated the major function of these activities as "precisely to help remove disparities between the national laws of the member States in ... (those) areas of law where the disparities obstruct trade and interfere with competition and make the formation of common policies difficult". These activities are only partly covered by Article 100 of the E.E.C. Treaty, the general harmonisation provision. Other activities come under special harmonisation provisions (e.g. Art. 27 customs procedures; Articles 54(3), 56(2) and 57(2), access to non-salaried activities; Articles 95-99, taxation; Article 112, export-aid to third countries; Articles 117-121, social legislation; Article 220, new rights for individuals and companies) and even without a general or specific treaty-provision, investigations about harmonisation were established with regard to the implementation of common policies (agriculture, transport) or Community legislation (industrial property). Professor Stein described those activities as the proverbial iceberg from which only the small top is visible and the greater part submerged in a labyrinth of preparatory activities invisible from the outside. As an observer in Brussels for a year he could follow closely the "approximation work" in the Community, prepared by the offices of the Community in cooperation with competent officials of the national governments and in other cases with independent experts or with representatives of interested groups. The result of his survey is first a very accurate analysis of the process of preparation in different fields of interests of drafts to be put by the Commission before the Council or before the member States. But secondly Professor Stein managed to deliver an eloquent proof of the significance and of the many sides of the harmonisation activities. A very instructive intermezzo of the anti-trust-discussions at Ditchley Park which will be reviewed below.

The German *Neue Juristische Wochenschrift* has announced to its readers a regular section on the law of the European Communities. Further surveys will appear every three months. A first survey has been written by *Prof. Hans Peter Ipsen* and *Gert*

Nicolaysen in the issue of September 19, 1963 (pp. 1713-1721). This contains a summary of the action programme of the E.E.C. Commission and a discussion of some recent developments of Community law. Dr. Nicolaysen reviews in an analysis of the structure of the Communities the first Tariff Commission case (Rec. IX, 1963, p. 3; 1 C.M.L.Rev. 1963-4, p. 82). He expresses the wish that the German courts would give up their reluctance to request the Court of Justice in Luxembourg for preliminary rulings on the interpretation of the Treaties. *Prof. Ophüls* contributes an introductory article on sources and structure of the European Communities to this issue (pp. 1697-1701). He refers to one of the most striking characteristics of the Communities, i.e. the merger of public and private law. He distinguishes the primary sources of European law (the Treaties themselves) from the secundary sources (implementation measures of the institutions). Customary law is playing an increasingly important role. Prof. Ophüls refers in this connection to the theory of the implied powers without mentioning, however, the limitation to this theory which the Court adopted in its judgment 25/59. As to the impact of Community law on the law of the member States, he points to the difference between rules of a self-executing character (certain Treaty provisions, general decisions of the E.C.S.C., regulations of the E.E.C.) which are binding on subjects without prior intercession by the member States and those where implementation by the national governments is necessary (directives and certain decisions). Finally he discusses the relationship between the spheres of Community law and national law. He distinguishes three fields of activities. In those areas where the member States remain fully sovereign national law governs exclusive of any consideration of Community law. The situation is in his opinion equally clear where the Community has been declared exclusively competent. Here Community law—both *unmittelbar* and *mittelbar* binding—prevails over national law. Difficulties only exist in what he calls the *Zwischenzone*.

In an article entitled "Wirtschaftslenkung und Verfassungsrechtsschutz im Gemeinsamen Markt" (*Aussenwirtschaftsdienst* 1963, pp. 157-161) *Ehle* defends the thesis that the present legal protection of natural and legal persons against acts by Community institutions is insufficient in view of the lack of a material "Rechts- und Verfassungsordnung" in the E.E.C. Treaty to which these institutions are bound. He analyses where the basic rules for such an "Ordnung" may be found. The E.E.C. Treaty itself contains only the prohibition of discrimination on grounds of nationality (Article 7). Further reference points are contained in the general principles common to the laws of member States (Article 215(2)) and the principles laid down in the Convention on the Protection of Human Rights. Although the national constitutions do not form part of the legal order of the Communities, the basic rules and constitutional principles *(Verfassungsprinzipien)* which they embody and which are common to the Six could—according to Ehle—nevertheless be incorporated under Article 215(2). They could thereby become "règles de droit relatives à son application" (Article 173(1) which could be invoked before the Court of Justice in Luxembourg.

The *Revue Générale de Droit International Public* (no. 3, 1963, pp. 563-602) contains a stimulating contribution by *Philippe Cahier* on the internal law of international organisations. He makes a distinction between two kinds of rules: those which concern the internal functioning and administration of the organisation and those which have external effect insofar as they regulate the behaviour of member States. The latter category is limited to the European Communities. Of particular interest is his concluding section on the relationship of the internal order of an international organisation and of a State. Whereas the classic organisation established a clear and absolute division between two legal orders—the international and internal order —, the situation with respect to the Communities is different. The European rules automatically form to a large extent part of the law of the member States. Also Community law prevails over national law, not only insofar as the Treaties them-

selves are concerned, but also as to the implementation measures. Although some of the member States have specifically stipulated this principle in their Constitution (e.g. the Netherlands) or in their case-law (e.g. Luxembourg judgment of July 14, 1954) doubts as to the supremacy of Community law still exist in some member countries, notably in Belgium. It is usually said that Belgian jurisprudence recognizes the priority of a posterior law over anterior treaties since the Cour de Cassation judgment of November 26, 1925 (cf. *de Visscher, Revue critique de droit international privé*, 1955, p. 300). However, a recent speech by the Procureur Général of the Cour de Cassation, *M. R. Hayoit de Termicourt*, published in *Journal des Tribunaux*, no. 4414 of September 15, 1963 has led to startling results. In his contribution the Procureur Général demonstrates that the value of the judgment referred to above is limited to those treaty provisions which are not self-executing. Recent legal developments, notably the creation of the European Communities are pointing, in Belgium as well, in the direction of a recognition of supremacy of international rules over national rules irrespective whether the latter were anterior or posterior. This supremacy of Community law is according to the author of fundamental importance for the functioning of the Communities. It would be paradoxical to institute a Court of Justice with the task of assuring the uniform interpretation and application of Community law and at the same time to apply national laws which are contrary to previous Community legislation. Moreover this legislation is expanding rapidly with regulations which are binding in every respect and are directly applicable in each member State. It would be incorrect for the Courts to accept priority of posterior laws over anterior treaties, only because a constitutional provision clearly indicating the contrary is missing. An effort must therefore be made in order to assure a better understanding and knowledge of the law of the European Communities, whose general supremacy over national law can no longer be denied.

Association

H. Brunner has written a short survey of the provisions of the new association agreement with 18 African States in the *Aussenwirtschaftsdienst* 1963, pp. 259-261. He emphasizes the importance for German industry in making real use of the greater trading possibilities which are granted under the agreement. The commercial policy part of the convention foresees the gradual construction of a free trade area. The problem of products imported from third countries into one member country with a low customs tariff and subsequently re-exported to another member country with a higher external customs tariff, which is inherent in every free trade area has to be solved by means of a system of certificates of origin. The Commission has drafted certain proposals for such a system. These proposals are discussed in this same issue at pp. 240-241 by *Dr. H. Wockenfoth.* This writer has also contributed a somewhat descriptive article on the recent association agreement between the Community and Turkey at pp. 298-300 (see also Legislation Section p. 372).

Court of Justice of the European Communities

The case-law of the Court remains the subject of many, often important articles. *Peter Hay* (one of the collaborators of Stein and Nicholson's American Enterprise in the Common Market, Michigan 1961 and recently, again with Prof. Stein the co-editor of a Case-book on the Law and Institutions of the Atlantic Area) wrote an article in the *American Journal of Comparative Law* (Vol. 12, No. 1, pp. 21-40) on "Federal Jurisdiction of the Common Market Court". After a description of the functions of the Court, he discusses the "appeal for annulment" of Article 173 and, as he calls it, the "indirect charges of illegality" of Article 184 of the E.E.C. Treaty. Under this provision the inapplicability of the (illegal) regulation may be invoked

by a party when appealing an individual decision before the Court of Justice based upon this regulation. The possibilities of appeal by natural and legal persons are more limited under Article 173 E.E.C. than under the corresponding Article 33 E.C.S.C. Efforts were made in two recent cases to expand the scope of Articles 173 and 184 (resp. cases nos 19-22/62 and 31 and 33/62; cf. 1 C.M.L.Rev. 1963-4, pp. 210-211 and [1963] C.M.L.R. 160 and 152). Both of these efforts failed. In the first, Article 173(2) was held clearly to establish the principle that private persons may attack only individual decisions directed to them or which are of immediate and individual concern to them. The second decision held Article 184 not to contain an independent possibility of appeal, analogous to Article 173, but to provide only for an incidental attack in the course of legal proceedings already pending before the Court and based on other provisions of the Treaty. Article 184 consequently can not be used in a dispute pending before a national court. As Hay rightly pointed out, the jurisdiction of the Court in Luxembourg may nevertheless be invoked, should the national court decide that a preliminary ruling by the Court of Justice is required under Article 177 on the interpretation of a Treaty provision or the validity of the Community act which was attacked before it. Hay discusses the meaning of Article 177 and the questions to which it has already given rise: which national courts are bound to refer matters to the Court of Justice, under which circumstances are they free not to refer, the binding effect of Court rulings etc. On the latter point Hay expresses a rather extreme view. In his opinion these decisions are binding to the same extent as the Treaty itself. One may query whether this conclusion has not been drawn too quickly (see the annotation in 1 C.M.L.Rev. 1963-4, pp. 214 *et seq.*). In a final paragraph the author accentuates the importance of the Community law for national judges, who are also called upon to ensure its observance. He deems inadequate the possibility of exercising through Article 177 a real federal judicial control. National courts will have to institute the proceedings under Article 177 more often than is the case at present in order to ensure a uniform interpretation of the Community law throughout the member States.

After the short commentary by *Wolfgang Wenner* on the first Tariff Commission case (case No. 26/62; 1 C.M.L.Rev. 1963-4, p. 241) in *Aussenwirtschaftsdienst* no. 3, *Dr. Bülow* has written a more elaborate note in the June issue (pp. 162-165). The case is of importance for the interpretation of both Article 12 and Article 177 E.E.C. He analyses several points in particular. First, the problem of when a question of interpretation of the Treaty lies. Secondly whether the Court in Luxembourg should examine whether its ruling is essential for the national judge to be able to render a decision. The Court rightly concluded that this question fell outside its competence. The author also investigated the consequences to be derived from the interpretation of Article 12 in respect of other Treaty provisions. In his opinion the Court's judgment implies that immediate effect in internal law should also be given to Articles 31, 32 par. 1, 37 par. 2, 53, 62, 76, 90 par. 1, 96 and 106 par. 3, the wording of which is similar to that of Article 12. The *Neue Juristische Wochenschrift*, 1963, pp. 1751-1752 contains two further annotations of *Prof. Ophüls* and *Prof. Wengler* respectively. Whereas the former describes the judgment as "in Übereinstimmung mit der Auffassung der Vertragsverhandlungen" the latter voices many reservations against it. The starting-point of Prof. Ophüls is that there are fundamental differences between the Treaties whereby the Communities were instituted and other international treaties. By granting sovereign legislative and administrative powers to Community institutions in certain fields, the member States have necessarily deprived themselves of these powers in the same areas. Community law thus has an absolute supremacy over national law in these areas. Consequently the question whether a particular treaty provision is or is not self-executing, is replaced in the Communities by the question of whether a permission falls on one or the other side of the border line between Community law which is independent of the will of the member States, and national law whose complete determination is reserved to the member States. This absolutist

approach overworks the very real federal problem of preemption which must arise in intermediate areas where both Community and member States have legislative and regulatory powers.

Prof. Ophüls does make an attempt with respect to the Communities to avoid the consequences of the theory of strict division between the national and international legal order which is still prevailing in Germany. Prof. Wengler on the other hand maintains this division strictly: one should in his opinion distinguish the question whether it is the intention of a Treaty provision to bind state organisms other than the legislature, from the one whether this is in accordance with internal constitutional law. The Court in Luxembourg is competent to answer the first but not the second question. Another reason why Article 12 should not have been interpreted by the Court as it was is that the application of a law which is contrary to Article 12 has been reserved to the national courts in the various member States. A German court is bound to apply such a law. The result of this is that even though Article 12 is self-executing private persons do not benefit from this interpretation. For the time being Prof. Wengler deems this judgment to be "eine halbe Sache". It would seem, however, that this statement is inspired too much by national constitutional law and has not taken into account the wider implications of the Court decision.

The reserved attitude of Prof. Wengler and some other German commentators towards the first Tariff Commission case (cf. 1 C.M.L.Rev. 1963-4, p. 82) contrasts with the satisfaction of French annotators (cf. *Jeantet* in *Jurisclasseur Périodique*, May 8, 1963, No. 13177). *Prof. Ch. Rousseau* (*Revue Générale de droit international public*, 1963, no. 2, p. 421) points to the importance of the case as well, which "ouvre des perspectives dont on ne peut sous-estimer l'importance". The legal development of the economic union "présente un intérêt de principe considérable pour l'exercise et la défense des intérêts individuels". The Court has reached its conclusion, Prof. Rousseau continues by carefully analysing the spirit, "l'économie" (the system) and the terms of the Treaty: "l'appel qu'elle fait à cet égard au préambule est à retenir pour l'élaboration d'une technique rationnelle de l'interprétation de traités".

Attention to the ginger-bread decision (cases nos. 2 and 3/62, 1 C.M.L.Rev. 1963-4, p. 211) has been drawn by *Louis van Bunnen* in the Belgian *Journal des Tribunaux* of September 8, 1963 (no. 4413). Charges having the equivalent effect of import duties which were imposed by Belgium and Luxembourg were found by the Court of Justice to be contrary to Article 12 of the E.E.C. Treaty. The annotator agrees with the judgment: "Faisant valoir des moyens d'irrecevabilité et d'assez faibles raisons de fond, le gouvernement belge s'est efforcé de défendre son oeuvre contestable".

The granting of tariff quotas by the Commission on certain products to member States recently has been the object of various appeals to the Court (cf. Cases nos. 24/62, 34/62, reported at p. 351-2 of this issue). *Günther Wurms* has written an introductory article on the functioning of this system of tariff quotas in the E.E.C. in *Aussenwirtschaftsdienst*, 1963, at pp. 257-259.

Case no. 25/62 (Plaumann-case, July 15, 1963) concerned the refusal by the Commission to grant a certain tariff quota to Germany on the import of clementines. Both the appeal for annulment of the Commission decision and the claim for damages which were instituted by a German import-firm were declared inadmissible. The case was commented upon by *Dr. Bülow* in *Aussenwirtschaftsdienst*, 1963, pp. 243-246. His annotation gives a good survey of the restrictive conditions under which private persons may institute appeals of this nature under the E.E.C. Treaty and the differences which exist with respect to the comparable E.C.S.C. provisions. Bülow comes to the same conclusions as the Court. He does not approve, however, the reasoning of the Court in its refusal to admit the claim for damages. The statement by the Court that "an administrative act which has not been annulled cannot of itself constitute a basis for liability for damages to those subject to it. Such persons cannot

therefore claim damages merely on account of the act itself. The statement that the „Court cannot in the guise of a claim for damages, decide upon measures which would negative the legal effect of such a decision which has not been annulled" (see pp. 353-4 of this issue), seems far too general to him, as it does to *Goffin*, who has commented upon this case in this issue at pp. 354-8. He asks whether a claim for damages should also be denied where an accompanying appeal for annulment was not instituted (e.g. because no appeal was permitted or because one could not know beforehand that one would suffer damages)? Bülow is inclined to reply to this question in the negative. He refers to the consolidated cases 9 and 12/60 under the E.C.S.C. Treaty, where the Court on purpose left this question unanswered. Bülow has also annotated the Brennwein case (no. 24/62) and the Oranges case (no. 34/62) in *Aussenwirtschaftsdienst* 1963, pp. 276-281. In both cases the German government had instituted an appeal against the Commission on the ground that the tariff-quotas which it had granted under Article 25(3) were insufficient. Particular attention deserve his interesting comments on the economic background of the disputes, in the course of which he charges the Commission with a protectionist policy in the field of tariff quotas. His conclusion is that the result of the Brennwein case (annulment of the decision of the Commission) should be applauded, although he does not agree on all points with the reasoning of the Court. The result in the Oranges case on the other hand does not meet with his approval, because the Court in his opinion has not paid enough attention to the factual situation and its evaluation.

The Bosch case (no. 13/61) has been commented upon in numerous law journals. For completeness reference should be made to an annotation by *André Françon* in the bi-lingual *Journal du Droit International* 1963, pp. 391-403. The Cour d'Appel judgment of January 26, 1963 (U.N.E.F. v. Consten, cf. 1 C.M.L. Rev. 1963-4, p. 218) has also been analysed in various reviews. *Mezger* wrote a comment in the *Revue critique de droit international privé*, 1963, pp. 408-413. Reference is made here only to his viewpoint on the much-debated question—most recently at the Congress of the Federation of Associations of European Law in the Hague—whether the national courts fall under the definition of "national authorities" who are bound to suspend their procedure under Article 9(3) of Regulation No. 17. He supports with much stress, but few arguments ("le terme 'autorités' est le plus général qu'on ait pu choisir", p. 412) the franco-italian thesis that the civil courts fall within the scope of the term authorities.

Establishment

The *Aussenwirtschaftsdienst* for August 1963, pp. 221-225 contains an article by *Dr. H. Arnold* on the harmonisation of company law in the E.E.C. He poses the question whether it is necessary for a good functioning of the Common Market to have a uniform system of company structure throughout the Community. The author is of the opinion that this is not required and points to the situation in the United States and Canada, where each state or province has its own company laws. He then discusses the advantages and disadvantages of a European company law which can exist along with the present national laws.

Social matters

The European Social Charter was signed on October 18, 1961 by thirteen members of the Council of Europe at Turin. Austria has not yet adhered to it. *Dr. Arthur Karisch* in an article in the *Oesterreichische Juristenzeitung* 1963, pp. 192-196 compares the provisions of the Charter with existing Austrian regulations. In some respects the Austrian legislation goes less far, in certain others it goes further. Adherence of Austria should therefore be welcomed. Karisch regrets that the Charter does not contain an active social policy but is limited to an enumeration of social rights.

Patents

The draft European patent convention which was published by the Commission of the E.E.C. in October 1962, has been the object of many comments from authors both within and outside the Community. One of the major problem areas concerns the accessibility or availability of the patent. Two alternatives are set forth in the draft: limitation to residents of the E.E.C. or availability to all residents of signatories of the Union treaty of Paris. It is understandable that objections have been raised in the United States against too restrictive an interpretation. *David L. Ladd* provides the arguments for as wide an accessibility as possible (*Propriété industrielle*, 1963, pp. 124-128; *Gewerblicher Rechtsschutz und Urheberrecht*, Ausl. und Int. Teil, 1963, 337-341). *Prof. R. Plaisant*, on the other hand in *Recueil Dalloz*, 1963, pp. 195-202, is of the opinion that a restriction of accessibility to the nationals of the Six alone is not in violation of the Paris Treaty. He compares this draft with the draft prepared under the auspices of the Council of Europe and discusses primarily the relationship between national patents and the European patent, the rights of the patentee, the license and the Compulsory license provisions. The article of *R.Ch. Noyes* in the *Propriété Industrielle*, 1963, pp. 153-155 discusses the procedural aspects of the draft convention. He pleads for the official recognition of the profession of patent agent. In this same issue *C.M.R. Davidson* doubts whether a European patent limited to the member States of the E.E.C. is at all desirable (pp. 155-158). He would prefer a more universal approach which would make it possible for all states parties to the Treaty of Paris to accede. Some comments on the projected convention have been written as well by *Dr. Alfred Monath* and *Florent Gaspar* in the *Revue de Droit Intellectuel* 1963 (resp. at pp. 84-86 and 86-91).

Competition

Among several anthologies of materials on the law of competition, the recent *Supplementary Publication* No. 6 (1963) of the *International and Comparative Law Quarterly*, entitled "Comparative Aspects of Anti-Trust Law in the United States, United Kingdom, and European Economic Community" contains a number of interesting insights. The twelve short articles, primarily on policy, enforcement, extra-territoriality, and patent complications, were prepared for the Ditchley Park Conference of June 1963. Several brief comments as to their contents will have to suffice here. Prof. *Donald Turner*'s analysis (pp. 1-13) of the present state of U.S. anti-trust law concludes in favour of the legislistic, rule-fixing approach over the extended use of open-ended economic criteria which leads courts and administrative bodies into problematic areas better suited for legislative solution. This view is apparently shared by Prof. *B. S. Yamey*, in his analysis of the British legislation wherein he finds inconsistency between ends and techniques (pp. 14-17). *VerLoren van Themaat* (pp. 14-26) discusses practical implications of different short—and long-run Community policy objectives and the way they are phased over the transitional periods. The systems of enforcement are described by *Spivack*, *Rogers*, *Gilbert* and *Schumacher* in sufficient detail to emphasize widely diverse procedures. Extremely provocative is the suggestion made by Prof. *Harlan Blake* (pp. 78-94) that the Commission study the potential merger problem now while the Market is still in a formative stage, with an eye to the salutory effect on competition in America of the successive campaigns against wide scale concentration. He advocates a system of rough but clear rules, including notification and a presumption of illegality for mergers covering a certain fixed percentage share of the market,—which would ease the problem for the courts and parties by reducing litigation of essentially unascertainable economic facts. *R. C. Barnard* finds, upon what some will consider a rather conservative reading of the cases, that U.S. courts have not in reality gone far in giving American legislation extra-territorial effect and offers several practical suggestions to Europeans

with business ties in the U.S. for planning so as to avoid risk of suit there (pp. 95-116). *J. Lever* argues (pp. 117-130) that the present jurisprudence and a wide reading of s. 6 and s. 8 of the British Restrictive Trade Practices Act (... "interconnected bodies corporate (are to be) ... treated as a single person ..."), while sweeping under the statute many agreements between parties absent but directly affecting the British market, remain still inhabited by the requirement of personal jurisdiction. Prof. *Giorgio Bernini* and *G. W. Tookey*'s selections on patents and antitrust suggest several new areas of inquiry. The former emphasizes that the trademark regime be treated separately, as not inherently anti-competitive. He rejects the argument that industrial property falls outside Arts. 85ff. EEC—a position discussed in more detail by others cited elsewhere in this section of the literature survey (see, *infra* p. 382). With reference to the Commission's communications of Nov. and Dec. 1962, he indicates that the Council, not the Commission, has competence to issue group exemptions under 85(3), states that patent license agreements should be considered legal as long as not part of a general anti-competitive scheme, and advocates minimal *per se* rules accompanied by a case to case approach. *Tookey* in turn cautions against destroying the benefits of the patent system by a too hesitant policy of exemptions from Arts. 85ff. Dr. H. *Mathies*, legal advisor to the High Authority, offers in the appendix a useful summary of practice under Arts. 65-66 ECSC.

The *Business Lawyer* for November 1963 contains a symposium on the Community of a more general sort by four American experts (pp. 126-175). Of particular interest to U.S. and British practitioners are "How European Businesses are Organized," by Prof. *Alfred F. Connard*, and "How Competition is regulated in the Community." Mention may also be made in this connection of *George Nebolsine's* contribution to the Community symposium appearing in the *New York University Law Review* for May, 1963, entitled "Foreign Enterprises under the Common Market Anti-Trust Rules" (pp. 479-495). "Das Kartellrecht der Europaischen Wirtschaftsgemeinschaft," by *Gleiss* and *Hirsch*, which appeared in Heft 5/1962, pp. 121-127, of *Aussenwirtschaftsdienst des Betriebs-Beraters*, still provides the foreign practitioner with a useful introduction in systematic fashion to the major problems of interpretation of Arts. 85ff. EEC.

J. J. A. Ellis deals in two recent articles with one problem of treaty interpretation of very wide scope. In "Lès Règles du Traité de Rome Applicable aux Entreprises," *15 Rev. Int. de Droit Comparé No. 2.* April/June 1963, pp. 299-328, he concludes that not all impediments to competition are to be banned, but only those incompatible with the formation of the common market as such. The body of the article was given over to a review of drafting history, present content, and problems of interpretation of Regulation No. 17, but offered limited analysis and almost no reference to the critical literature. A later contribution, "L'Interpretation du mot 'affecter' dans l'article 85, 1er du Traité ...." *Recueil Dalloz* 9 Oct. 1963, cahier 33, pp. 221-228, sets out in detail the documentary and textual analysis upon which the author's above cited conclusion rests, regarding the "negative" or "protective" function of Art. 85(1). Practical implications for the working of the Commission are not explored.

Questions of legislative and administrative competence as between Community and national organs, and as between Community organs mutually, have been recently treated. *L. P. Suetens*, in a short article appearing in the *Journal des Tribunaux*, 20 Oct. 1963, examined the influence of Community competition rules on the scope of the Belgian Law of 27 July 1961. Using as specific model the exclusive dealing agreement, he notes that Art. 85 EEC forbids only restrictions of competition, and not the agreement as such. The national legislation is seen to retain its function, especially in regulating the effects of annulment of agreements. Broader in scope, but not necessarily conflicting is the persuasive and well reasoned argument in behalf of the exclusive competence of Community organs in the area of competition,

made by *Nicola Catalano*, in "Rapport entre Les Règles de Concurrence Etablies, par le Traité C.E.E. et les Législations des Etats Membres," *15 Rev. Int. de Droit Comparé* No. 2, April-June 1963, pp. 269-298. Developing mainly a refutation of the position of Prof. Steindorff, Catalano shows by textual analysis and projection of the logical and practical consequences, how essential it is to prevent fragmentation of treatment of ententes and abuses among the various national legal systems. The treaty norms are directly applicable, must preclude application of more stringent national norms, and yet do leave national governments some role to play. The difficulties of Reg. 17, Art. 9, are only briefly touched upon. That, by his interpretation, national legislation will, after the realization of the common market, have a very minor norm-forming function does not disturb Catalano, who draws analogies from the American experience.

The implications of Catalano's analysis for legal administration had already been raised in the context of an elaborate examination of Reg. 17, Art. 9(3), by *Gleiss* and *Hirsch*, in "EWG-Kartellrecht and Zuständigheit nationaler Behörden," *Betriebs-Berater*, Heft 16/1962, pp. 623-625. The phrase "As long as the Commission has not initiated any procedure pursuant to Articles 2, 3, or 6 ... ." is discussed with regard to "old" and "new" cartels and those requiring and not requiring notification. The authors conclude that a literal reading of Article 9(3) leaves little room to national authorities in the application of Community cartel law, and renders the question of *when* the commission is to be considered as having "initiated" a procedure one of limited, more purely formal, significance. On the particular question of competence raised by promulgation of group exemptions, pursuant to Art. 85(3) EEC, the same authors have taken a position quite opposite to that of Prof. *Bernini*, in his contribution to the Ditchley conference, cited *supra* p. 381. They maintained, in "EWG-Kartellrecht: Gruppenfreistellung durch die EWG-Kommission," *Betriebs-Berater*, Heft 30/1962, p. 1176, that the wording of both Art. 85(3) and Regulation 17 authorized the *Commission* to make group exemptions of an abstract general (hence: "legislative") nature, rather than only for master-contracts, for example. The position is amplified in *Gleiss-Hootz*, "Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs—und Patentlizenzverträge," *Betriebs-Berater*, Heft 33/1962, pp. 1304-1306, and "Keine-Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs und Patentlizenzverträge," *Neue Juristische Wochenschrift*, Heft 6/1963, pp. 230-234.

The points are further made that a group exemption need not be watertight, but based only on reasonable probabilities of harm to competition; and that Regulation 17 must not be read as requiring notification of agreements which might qualify for group exemptions.

The latter articles deal also with the substantive aspects of the communications of Nov. and Dec. 1962. The criticism is raised that other industrial property rights, exclusive dealerships, and certain export and re-import prohibitions were not exempted together with the limited patent license. While these authors conclude on a favorable note commending the Commission's first efforts to eliminate uncertainty in a difficult area, *Prof. J. R. Gil Baer*, in his article in the *Revue du Marché Commun* No. 58, May 1963, pp. 212-222, is not so sanguine. Aligning himself with the various Chamber of Commerce criticisms of the Commission's Communications of 9 November 1962, he seems to urge not only that the exclusive dealing contract and the typical legal restrictive patent agreement were not meant to fall within 85(1), but also that they are often not amenable to the standards of exemption of 85(3). The first he considers a useful means of extending commerce, doing no harm to the principles of the Common Market, even where national price differentials result, as long as a monopoly is not involved and similar goods exist. The second is defended as essential to making available the benefits of technological innovation, an end promoted by Art. 36 EEC. Broadening the attack to cover both the earlier and the later communications is the well-reasoned article of Dr. *Kurt Ehlers* in

Gewerblicher Rechtsschutz und Urheberrecht, Ausl. und Int. Teil, "Export and Re-Import-verbote in Lizenzverträgen aus der Sicht des EWG-Kartellrechts," n° 9/1963, 424-432. Resting on Articles 36 and 222, Ehlers defends the position that the current regime of industrial property is to be maintained. Art. 85(1) should not apply as long as licensees are not subjected by agreement to any further distribution limitations than inherent in the protection to a licensor under the usual arrangements. By a systematic analysis of export and re-import prohibitions as relating to the various industrial property rights, he comes to the same conclusions as *Gil Baer*. His discussion, while primarily from the point of view of German law, undoubtedly has merit for the other member states.

An interesting case before the Bundesgerichtshof on the legality of the above-mentioned prohibitions is reported in *Monatschrift für Deutsches Recht*, Heft 8 (August) 1963, p. 653. It is the case of 14.6. 1963—KZR 5/62, in which a producer of electric razors brought a suit under the Gesetz Unlauterer Wettgebewerb (prohibiting unfair competition) against a distributor who reimported from foreign sources and sold below the producer's fixed prices, thus outside her fixed distribution system. The BGH (Kartellsenat) affirmed the position of the Bosch case that pre-existing re-export prohibitions on foreign suppliers could become invalid under Article 85(1) until a contrary declaration by the competent instance. It than sent the case back for a determination of what additional proof was necessary, and for which period, to show completeness of the producer's pricing and distribution system, and hence possible invalidity under 85(1). The implications of the case for mode of application of 85(1) by national courts are not further discussed.

More in the area of procedural matters, *Dr. W. Schlieder*, in *Der Betriebs-Berater* Heft 25, 10 Sept. 1963, pp. 1040-1042, offers a theoretic basis for allowing late notified existing cartels to remain eligible for a favorable application of Article 85(3). The practical analogies to the late-filed new cartels are made, and doubts raised by the *Bosch* case dispelled, though without consideration of the possible good effect on compliance that stringent sanctions may have in this situation. A similar problem is raised by *Gleiss* and *Hirsch*, in "EWG-Kartellrecht: Bereichsausnahme für Verkehr," *Aussenwirtschaftsdienst des Betriebs-Berater*, Heft 2/1963, pp. 34-36, where, after contending that Art. 85ff. EEC also applies in principle to the transport sector, the retroactive effect of Regulation no 141 on agreements not duly notified under Regulation no 17. is discussed. The broader consequences of Regulation no. 141 and the Bosch case for the role of the national authorities and for the development of appopriate rules for this sector are further outlined.

To another problem of procedure is directed *C. Tessin*'s discussion of the "Hearings Regulation" issued to amplify Regulation no. 17, Art. 19, which provided for the right of interested parties to be heard in a decision of the Commission, in *Aussenwirtschaftsdienst des Betriebs-Beraters, Heft 8*, (Aug) 1963—pp. 231-3. Besides a summary of the major points of the Regulation, there is some analysis of the questions of who may be heard, what constitutes a complaint, and under what conditions written and oral proceedings may be adopted. The possibility of enforcement of the right to hearing, by both parties directly and indirectly entitled thereto, by an action against the Commission before the Court is briefly noted. The substantive rights of third parties are examined by *H. Van den Heuvel*, in "The Civil-Law Consequences of violation of the Anti-Trust provisions of the Rome Treaty," *American Journal of Comparative Law*, Spring, 1963, pp. 172-193. In this valuable contribution, the author considers the effect of nullity under Art. 85(2) EEC in the national jurisdictions of the member states, and also the question of actions for damages or for unjustified enrichment by third parties who are affected by the operation of unlawful agreements.

In closing this section, reference is made to several contributions relating to further ascertainment of the substantive scope of the EEC competition rules. In *Aussenwirtschaftsdienst des Betriebs-Berater* for 30 July 1963, *Gleiss* comments on

the current inquiries being carried out at the request of the Commission, particularly with regard to concentrations under Art. 86 EEC. The Statistical Bureau of the Communities is assembling information on the extent of concentration tendencies in the market; but it will not be made available to the Commission in expectation of immediate application. The *Iowa Law Review* for Fall, 1963, contains an article by Prof. E. E. Bergsten on "Refusal to sell as a violation of anti-price maintenance legislation—The French experience" (pp. 42-74). Article 37 (1)(a), introduced into French penal law in 1953, and the recent *Nicolas* case, illustrated by several parallel American decisions, are analysed. The author concludes that the final impact of this new law on the French economy has not yet been felt. The history of the practice and the current status of legality of open-price-systems are the subjects of *W. Pickel*, in *Betriebs-Berater*, Heft 17/1963, pp. 699-708. The application of published-price and customer lists, detailing specific transactions, as contrasted with pure bulk statistic gathering, is shown to have been condemned as a restricted practice most harshly in America, and to have become suspect only recently in England. The negative influence which this practice undoubtedly has on the freedom of market decision by the individual seller has rightly led the author to conclude against their validity, both under German law and under Article 85(1) of the EEC Treaty.