# SURVEY OF LITERATURE

## *General*

As the law of the European Communities in the various fields is developing, its impact on the laws of the member States is growing. More than six years have passed since the entry into force of the E.E.C. and Euratom-Treaties and a great number of implementation measures have been enacted during that period. It is therefore understandable that there is an increasing need to determine the relationship between Community law and the national laws. Conflicting constitutional provisions may prevent a uniform application and interpretation of the law of the Communities by the courts of the member States. Recently a number of contributions have been written on this subject, mostly by German authors. The problems they raise with respect to the incorporation of the Community Treaties and their implementation measures in the various countries should be of great interest as well to British lawyers. The majority of these problems will come up again in the event of Britain joining the Communities, as was pointed out clearly by *Norman S. Marsh* in a lecture delivered to the French Center of Comparative Law on "Great Britain and the legal problems of the Common Market" *(Revue Internationale de Droit Comparé*, 1963, pp. 649-663).

The interesting study by *Günther Jaenicke* in the *Zeitschrift für ausländisches, öffentliches Recht und Völkerrecht*, 1963, pp. 484-535 deals in particular with the relationship in the field of agriculture, where common market organisations are being set up. This requires an interplay of community rules and national provisions which may easily lead to conflicts. The most important part of this article has been devoted to the division of competence between the organs of the Community and the national authorities. Jaenicke described the various instruments of agricultural policy used in the Regulations Nos. 19-22 (cereals, pig-meat, eggs and poultry), such as levies, restitutions, market interventions and special measures of protection against market distortions. He analysed which Community measures are foreseeen and which additional national rules are required. In a second part Jaenicke discussed the question of ensuring the application of Community law in the internal law of the member States. In his opinion Article 189 E.E.C. indicates the regulations as sources of law, but does not determine their status with respect to national laws. Since the Treaty is silent on the position of Community law vis à vis national law he is disposed to conclude from national constitutional law that national laws of a later date prevail over previous Community law, even if the latter is "binding in every respect and directly applicable in each member State" (Article 189 par. 2). There is only an obligation of the member States in international law to observe Community law as follows from Articles 5 E.E.C., 192 Euratom and 86 E.C.S.C. respectively. But this obligation can only be determined through the procedure of Articles 169-171 E.E.C. (141-143 Euratom, 88-89 E.C.S.C.). This theory leads necessarily to the conclusion that Article 177 E.E.C. is of a restricted scope and cannot be used by a national judge in a conflict between Community law and national law of a later date in order to determine the supremacy of Community law. The same subject was treated by *Dr. Dietrich Ehle* in the *Monatschrift für deutsches Recht*, 1964, pp. 9-15. His starting point is the direct applicability of Community law in the international law of each member State. Conflicts between these two legal orders can only be solved by a further delimitation between them. His article contains an elaborate and reasoned attack on the court's theory of the two separate legal orders as formulated in the Bosch-case (case 13/61 Recueil VIII, 1962, p. 91). The outcome of his argument is that Community law has become national law by way of transformation. In case the Community institutions do not use the powers conferred upon them by the "trans-

formed" Community law, national law remains intact and new national legislation may be enacted. On the other hand, where Community rules are directly applicable or where the institutions use their legislative or administrative powers, conflicting national laws are abrogated. This Community law prevails over ordinary laws but yields to the Constitution. Community provisions which conflict with the Constitution are not applicable within the national legal order. A third contribution on this subject has been published by *Prof. H. J. Schlochauer* in the *Archiv des Völkerrechts*, 1963, p. 1-34. The first three parts of his essay were devoted to a characterization of the supranational organisation, the nature of supranational law and the relationship of supranational law and international law. His conclusion is that these two branches of the law are closely related. Determinative for the relationship between supranational law and national law is therefore the relationship international law and national law. Schlochauer also adopts the dualistic conception in this respect, invoking decisions of the Permanent Court of International Justice and the International Court of Justice as well as the constitutions of the majority of the E.E.C. member States to support his view. He finally discusses the relationship between supranational law and national law. His conclusions go less far than Ehle's. As for Germany, Belgium and Italy he equalizes Community law with national law. Only the constitutional law of France, the Netherlands and—since a judgment of July 14, 1954—of Luxembourg permits in his opinion the supremacy of Community law over national law. A fourth contribution has been written by the Italian *G. Balladore Pallieri*, again in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1963, pp. 473-484. The object of his study was the contention that the organs of the European Communities can direct themselves with binding force to the natural or legal persons of the member States. He came to the conclusion that the national constitutive acts in respect of the Treaties form the effective authority behind the Community rules (at least in Germany) which could otherwise not be implemented. An analogy with the structure of a federal state should therefore be denied. The special aspect of the Communities lies rather in the fact that the member States have accepted an obligation to execute decisions and judgments which they could not yet foresee (*cf.* Article 5 E.E.C.). This essay demonstrates clearly the formalism of the dualist theory concerning the relationship between international and national law, when applied to the European Communities. A final contribution on this same topic was written by *Nicola Catalano* in the *Journal des Tribunaux* of January 26, 1964. It will be discussed below in the section Court of Justice of the European Communities.

The increasing importance for practising lawyers of some knowledge of European law is demonstrated by the fact that a number of general legal periodicals have recently started regular sections on the law of the Communities. Such a section has now also been announced by the French *Jurisclasseur Périodique*. The author of this chronicle, *Jeantet*, gave an excellent survey of a number of important aspects of Community law in the first issue for 1964 (1964, I, 1812). In a first part he successively dealt with the foundation of the Common Market—free movement of goods, persons, services and capital—, escape-clauses and the problem of harmonisation of legislations. He then discussed some major questions of European cartel-law (basic rules, vertical agreements, procedural provisions). The last two parts are devoted to the control by the Court of Justice of the legality of Community acts and the preliminary rulings. The most recent case-law and literature are referred to in his text.

### *Harmonisation of laws*

Shortly after the interesting analysis of Professor *Eric Stein* in *Supplementary publication* No. 6 (1963) of the *International and Comparative Law Quarterly* on the various aspects of harmonisation of laws, which was reviewed in the previous survey of literature (*1 C.M.L.Rev. 1963-4*, p. 374), another competent essay has been published on this

subject in the *Recueil Dalloz* 1963, pp. 273-280 which contains similar conclusions. *Robert Lecourt*, judge at the Court of Justice of the European Communities, and *Michel Chevallier*, attaché at the Court, draw up a balance of what has been achieved six years after the entry into force of the E.E.C. Treaty. They review the Treaty articles which regulate the different forms of harmonisation and the instruments which they foresee. They are concerned about the fact that as compared with the economic success of the Common Market little has been done sofar. Rather than thinking of harmonisation in terms of technical legislative operations, they stress the need of a general harmonisation, based upon an overall conception of method and organisation. Added as an appendix to this interesting contribution is a useful table containing the texts of Treaty provisions where specific harmonisations are foreseen, the procedure to be followed, the date by which this has to be achieved and the results up to 1964.

Apart from this general study on harmonisation of laws there have been published a few articles on specific topics. Article 220 par. 4 E.E.C. refers to new negotiations between the member States in order to ensure the simplification of the formalities govering the reciprocal recognition and enforcement of judgments. *Jean-Louis Ropers* in the *Jurisclasseur Périodique*, 1962, *D.* 1679 points to the need for implementing this Treaty article in view of the ever closer relations between the nationals of the member States. As to the question of mutual recognition, laws have been enacted in various member countries and there exists already a judicial practice. As to the question of enforcement only the Swiss penal code contains a general provision. "Conflicts of Laws in contract matters in the E.E.C." is the title of a study by *Jean-Denis Bredin* in the bi-lingual *Journal du Droit International*, 1963, pp. 939-964. Although little results have been obtained in Europe in the unification of private international law, Bredin concludes that the actual legal practice does not differ so much. Differences do exist in some fields, such as the intention of the parties when determining the law applicable and the question which element should prevail in determining this law. In other cases it seems that Italy is the only country where a deviating practice exists. In the other member States one can discern a shift from a heavy emphasis on the "intention" of the parties to other criteria.

Another subject of harmonisation mentioned by Article 220 E.E.C. is the abolition of double taxation within the Community. This matter has been discussed by Prof. *A. J. van de Tempel*, president of the Fiscal Committee of the O.E.C.D. in *La Fiscalité du Marché Commun* 1963, pp. 131-139. In the summer of 1963 the Fiscal Committee published a draft Convention on the abolition of double taxation. The author expects, however, that it will take some years before the final text will be ready for ratification. In the meantime the member States of the E.E.C. should try to cooperate closely with the efforts in the O.E.C.D. The *Journal of Business Law* for January 1964 (pp. 73-82) carries an article by *Professor J. Bärmann* on "Taxation in the Common Market". This is a competent summary of the recommendations of the Neumann Committee on Taxes and Finance in the Community.

*Stan C. Kaiman*, a student of the George Washington University Law School contributes an article to the *George Washington Law Review* for December 1963 on "Copyrights and the Common Market" (pp. 365-374). He observes that copyright is not mentioned specifically in the Treaty (other than as "author's royalties" in the list to Article 106), even in Article 36. The provisions on copyright law are not being affected by the terms of the Treaty and there seem to be no steps taken for harmonisation of the national laws in this respect. The author concludes that this is because the various national laws are not widely divergent and because all the member States subscribe to the Berne Convention.

### *Court of Justice of the European Communities*

*Professor Werner Feld* contributes an article in the *Villanova Law Review* 1963 pp. 37-58

on "The Judges of the Court of Justice of the European Communities" which provides a revealing analysis not of the decisions of the court but the personalities who are responsible for these decisions. He discloses that the delicate balance existing between the nationalities of the heads of the various organs of the Community prevented Dr. Otto Riese from being elected to the presidency of the Court after the expiry of President Donner's first term. He points out that the Treaty provides that the judges are appointed by the Six governments "acting in common agreement", but in fact each government is permitted to have its own nominee. This, together with the fact that judges are only appointed for six years, subject to reappointment, is liable to lead to a judge yielding to the wishes or interest of his own government. Although no instances of this seem to have arisen, such insecurity of the judges ought not to be continued, and it is suggested that judges should be appointed either by the European Parliament or by the Court itself from lists submitted by the member governments or the highest national courts. The judges of the Court have come from a varied background of academic, industrial and political life which has probably given them a particularly wide experience of affairs. Only three, Hammes, Riese and Rossi have had substantial previous experience on the bench.

*Robert Lecourt*, judge in the Court of Justice, has written a short article in the *Revue du Marché Commun*, 1963, pp. 273-276, in which he points to the importance of the case law of the Court for the development of European integration. It will largely depend on the way the Court conceives its task whether or not it will fertilize the application of the Community treaties.

The Dutch courts have already had practice in applying Article 177 E.E.C. on a number of occasions. The four preliminary rulings which have been rendered up to now, have all originated in the Netherlands (most recently on February 18, 1964, in Internatio and Puttershoek v. Dutch Ministry of Agriculture, consolidated cases 73 and 74/63). It is therefore interesting to observe the views expressed with respect to the application of Article 177 in other countries. *André Pépy* wrote two articles on the French courts and Article 177, one in the *Revue critique de droit international privé*, 1963, pp. 475-503 and pp. 695-717 and the other, a much shorter one, in *Recueil Dalloz* 1964, pp. 9-12. This same subject has been treated some time ago by *R. M. Chevallier* in the *Revue du droit public et de la Science politique* 1962, p. 646, and by *J. L. Ropers* in the *Jurisclasseur Périodique* 1961, D. 1624 and 1962, D. 1709 Pépy discusses two questions mainly. He rightly observes that natural or legal persons do have a right to raise a preliminary question of Treaty interpretation or validity of a Community act in a dispute before a national court, but that the court itself has the sole competence to bring the matter before the Court of Justice in Luxembourg (cf. Wöhrmann and others v. E.E.C. Commission, consolidated cases 31 and 33/62, Recueil VIII 1962, p. 1005. 1 *C.M.L.Rev.* 1963-4, p. 211). Pépy pleads for a strict interpretation of Article 177, par. 3. The obligation of a supreme national court to request a preliminary ruling is in principle absolute, since this is a provision of *ordre public* (public policy), i.e., as soon as a question of Community law is raised before it, the court has to refer the matter to the Court of Justice. There are only a few exceptions to this rule: first, if the subject-matter of the dispute falls completely outside the scope of the Treaty; secondly, if the result which is desired by the party raising the question can be achieved as well by application of national law only. Like *Catalano* (*Manuel de droit des Communautés européennes*, 1962, p. 89) and *Chevallier* (*loc. cit.* p. 61 and in *Recueil Dalloz* 1963, p. 299) he is extremely hesitant to leave the highest national courts free to apply the theory of the "*acte clair*" (contra: advocates-general Roemer in case 26/62, Recueil IX, 1963, p. 48 and Lagrange in consolidated cases 28-30/62, Recueil IX, 1963, p. 88). This follows both from the fact that the Treaty has been drawn up in four—deviating— languages, each text being equally authentic, as from the circumstance that texts can be clear in appearance (cf. case law on Article 12 E.E.C., case 10/61, Recueil VII 1962, p. 15, cases 2 and 3/62, Recueil VIII 1962, p. 851 and case 26/62, Recueil IX 1963, p. 15). His conclusion is that the

Conseil d'Etat and the Cour de Cassation will be very careful in using both the criterion of "acte clair" and whether the question is "de caractère sérieux". These courts will not easily conclude that a demand is "manifestement non-fondé". He finally questions whether the Court has been wise in its wording in the consolidated cases nos. 28-30/62. Who determines whether there is "material identity" between two questions? The latter judgment has been annotated by *Jean Robert* in the *Recueil Dalloz*, 1963, pp. 641-643. In this Second Tariff Commission case (*1 C.M.L. Rev. 1963-4*, p. 213) the Court was faced with the same questions as in the First Tariff-Commission case (*1 C.M.L.Rev. 1963-4*, p. 82). It decided that there existed no longer an obligation on a domestic court, from whose decision there is no possibility of appeal under domestic law, whenever the question raised is essentially the same as a question which in a similar case formed the subject of a preliminary ruling. Robert is of the opinion that the Court has kept, on the one hand, a strict control on the uniform interpretation of the Treaty, on the other, that it has prevented "toute inflation dilatoire du contentieux de l'interprétation", a conclusion which rather contrasts with Pépy's conclusion referred to above.

*Nicola Catalano* has annotated the judgment of the Cour d'Appel of Amiens of May 9, 1963 (*1 C.M.L.Rev. 1963-4*, p. 359) in the *Journal des Tribunaux* of January 26, 1964, in which he expressed his views on the relationship between Community law and the law of the member States. In his opinion conflicts between these two legal orders should be settled on the basis of a division of competences. Where the Community is competent, its rule must prevail over conflicting national law. In order to solve a conflict it is necessary to interpret the rule of Community law, a power reserved to the Court of Justice of the European Communities (Article 177 E.E.C.). According to Catalano this article is of Italian origin and was inspired by Article 23 of the law No. 87 of March 11, 1953. Catalano has voiced two objections against this judgment of the Court of Amiens. He criticizes its statement that notification of a cartel-agreement together with an acknowledgment by the E.E.C. Commission are not enough to presume that the Commission has initiated a procedure (in the sense of Article 9 par. 3 Regulation No. 17). In his opinion these two articles may very well indicate that the Commission has assumed jurisdiction. It follows from his reasoning that he objects also to the Court of Appeal stating that the Court of Justice does not have the power to decide conflicts between Community legislation and the domestic law of the member States. The same judgment had been previously annotated by *M. Waelbroeck* in the *Journal des Tribunaux* of November 10, 1963. On the first point mentioned by Catalano, Waelbroeck agrees with the Court of Appeal (*cf. idem Deringer*, "EWG-Wettbewerbsrecht," Art. 9 Anm. 16 and 17). He recalls the arguments against a wide interpretation of the words "national authorities" of Article 9 par. 3, although he is personally of the opinion that the Court declared itself rightly bound by Article 9.

The *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 1964, pp. 274-302 contains an exhaustive although controversial contribution by Prof. *G. de Grooth* of the powers of the High Authority under Article 70 par. 3 E.C.S.C. He analyses in particular the judgments of the Court of Justice in the two transport cases (H.A. v. Dutch Government, case No. 25/59, Recueil, VI 1960 p. 745 and case No. 9661, Recueil VIII 1962, p. 429. In these cases the Court dealt with the scope of the powers of the High Authority to implement the obligations under Article 70 par. 3, which reads: "The rates, prices, and tariff provisions of all kinds, applied to the transport of coal and steel within each member State and between member States shall be published or brought to the knowledge of the High Authority". Both cases were of extreme importance for Dutch transport, because the publication of the transport rates and conditions was at stake (*cf.* in general on these problems the contribution of *Bin Cheng* in *English Law and the Common Market*, 1963). The Court upheld the right of the High Authority to make a binding recommendation based on Article 14 E.C.S.C. to remind the Dutch government of their obligation under

Article 70 par. 3. Prof. de Grooth criticized the Court for having followed a systematic and teleological interpretation rather than having given a historical one to this Treaty provision. He referred to the legislative history of Article 70 from which it was clear that the Dutch government did not agree to accept any publication of transport rates. In the light of this objection Article 70 par. 3 was modified in such a way as to offer the alternative of either publication or notification to the High Authority. According to Prof. de Grooth the Court could therefore not deviate from this express provision.

Finally reference should be made to a rather uninspired and uninspiring survey of the case-law of the Court during the years 1960 to the middle of 1962. This survey was published by *B. Moser* in the *Juristische Blätter* 1963, p. 413-418. He limited himself mostly to a summary of the facts and dictum of each case without making any effort to analyse them.

*Establishment and services*

In an article in the *Revue international des sciences administratives* 1963, p. 235-246, *André Benazet* describes the significance of the right of establishment and free movement of services within the E.E.C. for the sector of public works and buildings. According to the general programmes of the Council of October 25, 1961 (O.G. 32/62) freedom of establishment and services had to be realised in this sector by December 31, 1963. Nevertheless, in view of the unusual character and requirements peculiar to this sector, a gradual abolition of restrictions has been foreseen of the award of public works by public authorities by the end of the transitional period (December 31, 1969). During this period a quota-system will apply in favour of the nationals of each of the member States. The member States may suspend the award of public works contracts to nationals of other member States until the end of the current year, from the moment when the total number of these contracts awarded to foreigners exceeds a certain quota. It is foreseen that this quota—determined on the basis of an average of all public works awarded during the preceding two years—will gradually rise toward the end of 1969. As the national legislations and administrative procedures in the member States vary considerably (France, Italy, Belgium, Luxembourg: public tendering; Germany, The Netherlands: mostly by private contract) a draft-directive has been drawn up in order to reduce these differences. The directive—which applies only to tenders above a certain amount—contains procedural provisions for tendering for projects and criteria for participation in them. A Consultative Committee, consisting of national experts, will assist the Commission in the enforcement of this directive.

The scope of the right of establishment and freedom to grant services for lawyers has already been the object of some discussions. Schedules II and III of the general programmes provided for an elimination of all discriminatory restrictions concerning tax consultants and other legal advisers before January 1, 1966 or January 1, 1970 respectively. *John Collard*'s article in *Journal des Tribunaux* 1964, pp. 37-40 contains a well-reasoned argument for as wide an application of this freedom to the bar as possible. He rejects the main objection voiced against this principle (inter alia by *Schaus* in *Journal des Tribunaux* 1962, p. 73), namely that Article 55 prevents an application of this freedom on the grounds that in certain countries (France, Belgium, Luxembourg) "*avocats*" are required to perform acts of "government action" *(autorité publique)*. These activities are performed so seldom and are restricted to the bar where the *avocats* are registered, that it would be unreasonable to exclude a whole profession. Furthermore exclusion would mean discrimination against those countries where "*avocats*" are not called upon to perform any "government action".

*Dr. Wolfgang Stabenow*, who has written in this issue at p. 391 on the same subject, has contributed an article on the legal aspects of the European transport integration in the *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 1964, pp. 228-254 as well. He analysed the relation of the Title Transport to the other Treaty provisions and came to the conclusion that, apart from certain exceptions, the Treaty as a whole applies to the sector transport. He presented an over-all view of the major problems which are outstanding.

*Patents and Trade-marks*

The European trade-mark law and the draft convention for a European patent form the subject-matter of two articles in the *Jurisclasseur Périodique* 1964, no. 5 and the *Aussenwirtschaftsdienst* of the *Betriebsberater* 1963, pp. 321-324 respectively. In the field of trade-marks a draft convention has not yet been drawn up, but the general aspects of such a convention can already be discerned. *Albert Chavanne* discussed the various provisions which are desirable in such a convention. He stressed particularly the need to create a narrow bond between the Union of Madrid and a prospective European trade-mark. *W. Trüstedt* discussed the draft-patent convention, the provisions of which have been previously analysed in this review by Kenneth Johnston (*1 C.M.L.Rev. 1963-4*, p. 17) and Prof. Haardt (*1 C.M.L.Rev. 1963-4*, p. 252). He pointed in particular to the fact that the European patent will only be partially administered by an independent European authority. The European Patent Office does have the right to issue a patent, but proceedings will be brought before the national authorities in case of violation of the patent. Both authors mention the relationship to third countries, but reach opposite conclusions. Trüstedt would welcome application for the European patent by nationals of third-countries. Chavanne, on the other hand, who considers a European trademark in the first place as a means to promote the economic integration of Europe, would rather limit the accessability to nationals of those countries which have adhered to the convention.

A uniform European trade-mark is not only of importance to the member States of the E.E.C. Each country which has commercial relations with the Common Market will be affected by it. The article by *Robert D. Lippmann* in the *American Journal of Comparative Law*, 1963, p. 255-265 points to the interest expressed by the United States in a European trade-mark. The author mainly discussed the existing pluriformity of the law of trade-marks in Europe and the measures to be taken by American enterprises.

*Dr. Karl Bruchhausen* has dealt with the illegal deprivation in the draft patent-convention in *Gewerblicher Rechtsschutz und Urheberrecht*, A.u.I.T. 1963, pp. 299-307. He compared the draft's provisions with those of the German patent law. The main point of protection of the patentee in the draft-convention does not lie in the application procedure, since the European Patent Office will not enquire whether the applicant is indeed the inventor. Bruchhausen deems it necessary that a definition of "good faith" will be inserted in the convention, in view of the differing content in each of the European legal orders.

*Competition*

In the *Business Lawyer*, 1964 pp. 493-509, *Frank W. Swacker* writes on "Foreign Business Operations under U.S. and Common Market Antitrust Laws". He presents a critical survey of the extent of U.S. interference in the activities of enterprises outside American territory and its conflicts with the conceptions embodied in the E.E.C. rules of competition. He considers that the U.S. Justice Department is tending to show a disturbing determination to impose U.S. anti-trust standards on the world,

even to the extent of using international agencies to further its ends. The author declares that there must be a compromise between the U.S. anti-trust laws, not only with the laws of other countries, but also in accordance with modern foreign trade requirements.

In the *Fordham Law Review*, 1963 pp. 247-278 there is an article by *Joseph J. A. Ellis* on "Source Material for Article 85 (1) of the E.E.C. Treaty". This is an illuminating study dealing with the origins of the rules of competition stemming from the Spaak Report and the Minutes of the Common Market Group under the chairmanship of Dr. von der Groeben. The original objectives were to eliminate the distortion of competition in order to protect the functioning of the common market. No one is apparently able to say why the words *prevent* or *restrict* were added to Article 85 (1) in the course of the deliberations of the Common Market Group. The phrase *distort competition* is used in other articles *simpliciter*, namely in Articles 92, 101, 107 (2) and 112. It is also used in Article 3 (f) which was drafted after Article 85. The author takes the view that Article 85 was intended to do what was necessary to further the needs of the common market, and not to lay down any general principles of competition for their own sake. He also expresses the opinion that the meaning to be given to the word "*affecter*" is not a neutral but a pejorative one. Article 85 (3) is also to be interpreted with a view to attaining the declared objects of the Community.

It is clear that the procedure to be followed in the administration of the European anti-trust law is of great interest to the enterprises and businesses concerned. Pursuant to Article 19 of Regulation No. 17 the parties to an agreement and other interested persons may be—and in some instances must be—heard by the Commission before any decisions, such as negative clearances, exemptions under Article 85 (3) or sanctions, are taken. Some time ago the Commission has enacted an implementation regulation in which the procedural rules to be followed are laid down (No. 99/63/E.E.C., O.G. 2268/63). M. R. Mok has commented on this regulation at *1 C.M.L. Rev. 1963-4* p. 327, the English unofficial text of which has been printed as an appendix at p. 335. *Dr. Tessin*'s commentary was already mentioned in the previous survey of literature at p. 383. In a critical analysis *Prof. Mulder* in *Sociaal Economische Wetgeving* 1963, pp. 633-646 voices many objections against the new regulation. In his opinion the legal protection of interested parties leaves much to be desired. He raises three points in particular: the regulation does not distinguish sufficiently between the various categories of decisions which are to be taken by the Commission under Regulation No. 17; sufficient guarantees for an impartial imposition of sanctions are lacking and finally there are no provisions for a compulsory hearing by the parties of experts and witnesses. *Jeantet* emphasized the right of defense as laid down in the regulation as well in *Jurisclasseur Périodique* 1963, I, No. 1785. His remarks were far less critical. One should consider the regulation in his opinion as a guide which applies the ordinary rights of defendants—in particular the customary rule of *audi alteram partem*—to the procedure in anti-trust cases. The final control in the observance of these rights, whether or not they are guaranteed in the regulation, belongs to the Court of Justice. Two principles prevail in the procedure: notification to the parties of all grounds of complaint *(griefs)* against them and the right to a fair defense. As to this latter point Jeantet mentioned the guarantee of certain time-limits within which enterprises will have to make their observations (art. 11; Prof. Mulder rightly criticized the fact that these can be far too short) and the problems with respect to oral proceedings (artt. 7-10). A further commentary was written by *Dieter Eckert* in *Der Betrieb* 1963, pp. 1311-1314. Attention should be paid to his remark that in case of non-compliance by the Commission of its obligation to provide written proceedings a distinction should be made between the parties and other interested persons. In the former case non-compliance can only result in a complaint of substantial violation of basic procedural rights in the main issue, in the latter case this can lead to a separate suit. Should the Commission refuse to grant an oral hearing it is his contention that no appeal is possible, since this decision constitutes

only a "verfahrensrechtliche Verfügung". This conclusion, however, does not seem to be justified, if one considers the right to an oral hearing to be a basic right. Finally mention must be made of the short note by *Dennis Thompson* in the *International and Comparative Law Quarterly*, 1964, p. 264-266, who has limited his observations to a summary of the most important provisions of the regulation.

Both procedural and material questions are examined in *Prof. Steindorff*'s contribution in *Aussenwirtschaftsdienst* 1963, pp. 373-361 in which he gave an exhaustive analysis of the problems to which Article 3 of Regulation No. 17 can give rise. This provision contains the procedure to be followed in cases of infringement of Articles 85 or 86 of the E.E.C. Treaty. Member States and natural and legal persons can request the Commission to give a decision to put an end to such infringements. The Commission can also act on its own initiative. Prof. Steindorff rightly considers this procedure as one of the key instruments in the cartel policy of the Community.

The remarks of *Dr. Eberhard Günther*, president of the B.K.A., published in *Der Betriebs-Berater* 1964, p. 3-4 under the title "Harmonisierung der Wettbewerbsbedingungen—Voraussetzung der Wirtschaftsunion", were an appropriate call to action for the new year in the area of competition. Emphasizing the Community commitment to "reasonable competition", he noted that among the greatest obstacles to its realization from now on would be national differences in economic and tax legislation, subsidies, industrial property rights, and unfair competition rules. Urged is progressive approximation in these areas at a rapid enough tempo to prevent growing dissatisfaction with the degrees of market integration thus far achieved by the competition rules of the E.E.C.

Drawing attention to national law divergencies in another context is the article of *H. v.d. Heuvel*, "Civil Law Consequences of Violation of the Anti-Trust Provisions of the Rome Treaty", in the *American Journal of Comparative Law* 1963, pp. 172-194. It is a useful, if cursory and sometimes cryptic, guide to the range of questions confronting the civil judge, but left open by the Treaty and Regulation 17, in cases resting wholly or partly on application of Articles 85-86 E.E.C. One point is clear, the author asserts: despite varying national emphasis on bad faith on one or both sides, and on mere existence *versus* enforcement of obligations, in contracts for illegal ends, the Treaty draftsmen intended as a sanction "invalidity in its full force" without such distinctions. National rules, however, must determine: whether invalidity can be asserted in a claim or defense with or without a prior decision in Court; whether invalidity of certain obligations requires invalidity of the whole contract, or whether severability and the reconstruction of the parties intent is possible; how to dispose of an action relating to the period *prior* to a notification made within the deadline, upon which the Commission has ruled adversely, or to the period *during which* a notification might still be made. It is interesting to note that for the "light cartels" relieved of notification obligation unless they wish to benefit from Article 7 of Regulation 17, the notification deadline has been postponed three years to 1 January 1967. (See note of Dr. C. Tessin in *Aussenwirtschaftsdienst* 1963, pp. 338-339). Thus, the problem as to the role of the national courts with regard to them also is by no means abstract. On this last question, while the possibility that an agreement not notified in time might have met the *material* requirements of Article 85 (3) is irrelevant as to its present validity, such a finding may well bear on the establishment of fault or causality necessary to a tort award of damages to third parties. For this finding Van den Heuvel would require a court to defer to the Commission, by virtue of the exclusive competence over application of Article 85 (3) granted it by Article 9 (1) of Regulation 17. He also urges the alternative of reference to the European Court under Article 177. It would seem, however, that a question of factual evaluation rather than Treaty interpretation would be in dispute and, even where an exemption for a notified agreement is refused, this finding would not be decisive in a civil damage suit in all the member countries, as the author himself indicates. As to the questions raised by Article 9 (3) of Regulation 17, the author correctly asserts that

judicial authorities retain all competence but for the application itself of Article 85(3) and thus *need not* suspend litigation merely because the Commission has initiated proceedings: Accordingly, incorrect is the decision of the Appellate Court of Amsterdam of 28 June 1962 (N.J. 1963 No. 218), summarized with a comment by *Dr Gapski* at *Wirtschaft und Wettbewerb* 1963, pp. 1012-1014, in which the court rejected the defense of a price-cutting outsider based on invalidity of the exclusive dealing arrangement under articles 85(1) and 86, and Article 1 of Regulation 17, because neither Dutch cartel authorities nor Commission have yet declared against it. Yet, at the same time, he apparently rejects the solution of the *Maison du Whisky case* in issuing a restraining order only, but staying the award of damages until the Commission decide on the application for exemption. See the article by *W. Alexander*, *supra* p. 431 of this issue of C.M.L.Rev.) for a more complete discussion of this problem. Also raised are the questions whether individual outsiders, even the ultimate consumer, may initiate a private tort action independently, or in conjunction with the public law proceeding under Article 85 or 86, and the role of the doctrines of unjust enrichment and undue influence.

The very prevalent special rates contracts between electricity, gas, and water suppliers on the one hand, and largescale consumers and re-distributors on the other, are examined under German and Community law by *Ernst Niederleithinger* in *Wirtschaft und Wettbewerb* 1964, pp. 15-22. The all-requirements and no-independent-production restrictions, usually a part of these contracts, are excluded from the benefits of the special regime of Article 103 G.W.B. While they do not fall under Article 1 G.W.B., because the interests of the contracting parties are generally opposing, Article 18 sentences. 1 and 2 will apply, requiring a declaration of invalidity by the B.K.A. Article 85 E.E.C., making no distinction for vertical agreements, applies in principle, however, to all these utility contracts, except for the situation envisaged in Article 90(2). The author asserts that production restrictions will regularly not influence inter-State trade, so long as they in fact serve only to protect the supplier. On the other hand the all-requirements restriction may fall within Article 85(1), not because putative competitors are thereafter precluded from supplying the consumer-party, but whenever the restriction goes beyond assuring the supplier of reasonable sales to justify high-cost long-term investment. The author seems to overlook the point that Article 85(1) does not rest on intent only.

Another category of agreement is discussed by *Dr. Norbert Menges* in *Wirtschaft und Wettbewerb*, 1963, p. 783-799. The "rationalization" agreement is examined under its different objectives: improved administration techniques, research and plan development, production and warehousing, purchases and sales. In view of the limited jurisprudence in the area and the absence of more specific Community guide-lines, no certain conclusions are possible at this time, asserts the author. His discussion of the applicability of Regulation No. 17 Article 4 and Article 85(3) E.E.C., based on many useful examples from business practice, is an example of the analysis required. He envisages difficulty under Article 85(1) for, inter alia, "condition"—agreements, regulating other than price factors; research-sharing and joint ventures in research or production entered into by powerful competitors in the same market; and joint sales or purchases agreements. The joint-venture as such is neutral, but ancillary agreements may be objectionable.