General

While the interest has been focussed in recent months primarily on the proposed fusion of the Communities' executives, the increasing of European Parliamentary budget powers, and the finding of a single central seat for the major Community institutions, other aspects of the Community organs continue to receive wide attention. Addressing himself to one of the solutions often suggested as a means to breaking the "political deadlock" of the Six and advancing the position of the European Parliament, *Prof. P. J. G. Kapteyn* reaches a negative conclusion in a brief contribution on the possibility of partially direct elections of the European Parliament in *Sociaal Economische Wetgeving*, 1964, pp. 78-83. Article 138 E.E.C. with its requirement of election of members to the European Parliament out of and by the national legislatures, and a unanimous decision of the Council to adopt a uniform system of direct elections, already provides a formidable legal obstacle. Even if the other five member States were willing to adopt elaborate internal procedures to circumvent the first requirement, the political gains, given the fundamental French opposition would be largely illusory.

A general analysis of the structure and organization of the European Parliament, with a description of its powers and functions has been published by Political and Economic Planning as *The Parliament of the European Communities* (1964), pp. 119.) This useful broadsheet was written by *Murray Forsyth* in association with a Committee. The Stationery Office translation of the Rules of Procedure of the European Parliament is set out in an appendix. The limitations of the Parliament are clearly demonstrated. It has the right to dismiss the executives, but has no control in the appointment of their successors. It has powers of deliberation, but its deliberations bind no one. It is required to be consulted in the process of the making of Community acts, but after it has given its views there is no way in which the Commission or the Council are compelled to adopt them. "What is found useful and agreeable in the Parliament's views is incorporated in the final texts by the Council and the Commission; the rest is ignored." This is not to say that the work of Parliament is fruitless, for it has been a considerable "inspirational" organ for the Communities, and has kept to the fore subjects such as the political aspects of integration, the fusion of the Communities, and the European University. It must, however, be admitted that in the agricultural development its influence has been negligible.

The author makes some useful observations on the inadequate coordination between the European and the national Parliaments and it is becoming almost impossible for an individual to be a member of both. Proxy voting in the national Parliament may have to be universal in order to make the position tenable at all. With the movement towards the fusion of the executives and some form of political organisation, the need for increased powers of the Parliament is very real if the same degree of parliamentary control is to be observed in European affairs as is practised on the national level. It is asserted that direct elections and increased powers for the Parliament are two sides of the same coin, and the author stresses the need for three particular reforms. These are that the Parliament should not only be able to censure the executives but should also play a major part in their appointment, that the Parliament's opinion on proposed legislation should be final and decisive, and lastly that Parliament should have some powers in respect of the initiation and approval of the budget as well as over the raising of funds. Such proposals would no doubt find acceptance with the broad majority of the member States, but until there is a change in the present Gaullist attitude no progress can be expected to be possible.

The sometimes acerbated G.A.T.T. negotiations during the present Kennedy Round, and the disparate views expressed by representatives at the U.N. World Conference on Trade and Development, underline again the question whether the E.E.C. will be "open" or "closed". That the member States have rejected the notion of an inward turning customs union is aptly demonstrated by the clear declaration of Article 110, the example of associated overseas territories in Articles 131-136, and the mechanism for accession in Articles 237-238. Yet, as *Baron Snoy et d'Oppuers* points out in "Les mécanismes institutionnels européens et l'ouverture sur le tiers monde", *Journal des Tribunaux* 1964, pp. 257-261, the goals announced at the time of signing have been scarcely realized. On the other hand, despite the considerable internal tensions resulting from the requirement of unanimous vote in many areas, the increasing external pressures to develop common policies vis-à-vis the outside world have unexpectedly forced the Community to take a stand on various issues. Main benefactor on the institutional level after the compromise of December 23, 1963 has been the Commission, whose leading role in preparing the common commercial policy was already announced in Article 111. It has now been charged in the name of the Community with the conduct of the negotiations in the Kennedy Round. The task and position of the Commission in the structure of the E.E.C. was sketched in somewhat more detail by *Wirsing* in *Europa Archiv*, 1964, pp. 77-90. When discussing the relationship of the Council to the Commission, he points to the fact that the Commission is not only the executive of the Community, but also the protector of the Community interest as well as those of the small member States. The Commission's role in the preparation of the Community legislation may well be strengthened after the second stage of the transitional period, when the unanimity rule does no longer prevail with respect to many Council decisions. Other activities, such as the drafting of working programmes add to the dynamism of the Commission. The article hardly deals with the dangers which derive from the close collaboration between Council and Commission and the growing number of Management-, Advisory and Consultative Committees composed of representatives of the member States, which tend to hamper the Commission's independent administrative task.

The discussion on the relationship of Community law to the law of the member States which has been started both in Germany and in Italy on occasion of judicial decisions relating to a) the presumed inconstitutionality of the agricultural marketing regulation No. 19 and b) the precedence of a posterior national law over E.E.C. Treaty-provisions, referred to before (1 *C.M.L.Rev. 1963-4*, pp. 389-390 and pp. 473-474), continued. *Dietrich Ehle's* contribution in the *Neue Juristische Wochenschrift* 1964, pp. 321-326 contains an analysis of the constitutional control in Germany of Community law. He discussed the conformity of the law incorporating the E.E.C. Treaty into German law with the Basic Law (*Grundgesetz*) and the delimination of competences between the Court of Justice in Luxembourg and the *Bundesverfassungsgericht*. The European Court is competent both to interpret Community law and to express itself on the conformity of regulations, directives and decisions with the Treaty. It cannot, however, abrogate any provision of the Treaty or its implementation measures as violating the German Constitution. A second part—on the conformity of E.E.C. regulations with the Constitution—deals with the possibilities of legal protection according to the E.E.C. Treaty. This protection excludes the protection of rights under the German Constitution. The competences of national courts, besides those of the Court of Justice to protect individuals, are summarily discussed. As Daig (in von der Groeben-Boeckh), Ehle is of the opinion that Article 177 has been written only for the "normal" judicial authorities and not for the Bundesverfassungsgericht (contra: Knopp and Schröcker). The Bundesverfassungsgericht cannot annul a regulation which has been deemed to violate the Constitution, but it can abrogate its direct applicability in internal law. Only if one (still) deems the national legal order to be strictly separated from

the Community sphere, can this view be compatible with the obligation of Germany to ensure the direct applicability and binding effect in every respect of regulations. This same issue of *Neue Juristische Wochenschrift* (February 20, 1964) contains the first part of an interesting study by *Ernst Werner Fuss* on "Rechtssatz und Einzelakt" on the law of the European Communities. In the next survey the whole article will be discussed. In the *Aussenwirtschaftsdienst* 1964, pp. 65-69 *Prof. Ophüls* defends a view opposite to that of Ehle. He attacks in particular the decision of the Finanzgericht Rheinland-Pfalz of November 14, 1963 (1 *C.M.L. Rev. 1963-4*, pp. 463-465) in which the constitutionality of Regulation No. 19 had been denied. Ophüls speaks of a "series of misunderstandings" on the part of the Finanzgericht, which he successively eliminates. In the first place the court does not seem to have realized that the E.E.C. Treaty has limited the freedom of action of national authorities (including judicial authorities). In areas where Community institutions have been declared competent, German organs are no longer able to invoke the constitutionality of their acts. Secondly, the Council has not been "authorized" to legislate by the German ratification law of the Treaty. It has derived its power to legislate solely from Community law (Article 189 E.E.C.). Furthermore the regulations of the E.E.C. are no "Rechtsverordnungen" in the sense of the German Constitution; they should be compared with laws and rank highest in the Community order. The Council is not the executive but the main legislative organ of the Community. Neither the principle of separation of powers, nor any other democratic principles have been violated by the Treaty. These and other grounds are forwarded by Prof. Ophüls to demonstrate that the conception of the Finanzgericht would unsettle the operation of the constitutional structure of the Communities. It is fortunate that the Verwaltungsgericht Frankfurt in a decision of December 17, 1963 explicitly confirmed the constitutionality of the Treaty (see above p. 102).

Surveys of European legal developments were written by *Nicolaysen* in *Neue Juristische Wochenschrift*, 1964, pp. 343-344 and by *Suetens* in the Belgian *Rechtskundig Weekblad*. Nicolaysen analysed the position of the Council of Ministers in the decision-making process of the Communities and the problem of parliamentary control on the expenditures of the European Agricultural Fund. Suetens' first chronicle (pp. 1229-1233) deals with the main legal instruments of the E.E.C. Treaty (regulations, directives, decisions, recommendations and opinions) as well as with the internal organisation of the Community. In an annex the schedule of the administrative services of the Community has been printed. The second survey (pp. 1433-1436) is devoted to the rules of competition and contains a short description of the main principles of the Treaty and its implementation measures, including the dumping article and the provisions on state-subsidies. Finally in pp. 1623-1628 the free movement of persons, services and capital is treated.

Agriculture

After the interesting study of *Jaenicke* in the *Zeitschrift für ausländisches, öffentliches Zecht und Völkerrecht*, referred to in the previous survey (1 *C.M.L. Rev.* 1963-4, p. 473), the *Neue Juristische Wochenschrift*, this time, 1964, pp. 473-477 contains an article by *Ditges* and *Ehle* dealing with practical legal questions of the agricultural regulations. They describe the Regulation Nos. 19-24 as "real European laws", which should take precedence over conflicting national laws because of the nature and function of the Community. In a second paragraph the connection of these agricultural regulations with commercial policy, free movement of goods, tariff quotas of Article 25 (3) E.E.C., competition rules (Regulation No. 26) and other chapters of the Treaty (establishment, transport, social policy, harmonisation of taxes) is discussed. A description of the agricultural legislation (cf. Olmi, 1 *C.M.L. Rev.* 1963-4, p. 118) is then given. Three particular legal questions are

mentioned in a final paragraph: (1) The lack of legal certainty since neither the foundations nor the objectives of the market organisations are sufficiently clear; (2) The changing policy aspects, which tend to falsify the expectations of the business world (e.g. the imports of frozen chickens from the United States) and (3) the problem of insufficient legal protection, because enterprises must have recourse mainly to the Court procedure of the E.E.C. Treaty, which admits only limited access to private persons and enterprises. Attention should be paid as well to the article of *Georg Cordts* on the fruit and vegetables regulation in *Aussenwirtschaftsdienst* 1964, pp. 36-38. His description of the system of permissible quantitative restrictions, the application of minimum-prices according to Article 44 E.E.C. and the general marketorganisation laid down in Regulation No. 23 is both accurate and complete. In Political and Economic Planning, Vol. 30, No. 480 of May 11, 1964 an article has been devoted to *Commodity Agreements and E.E.C.-Farm Policy* (pp. 149-209). This contains a study on the effect of international agreements on the harmonization of conflicting national agricultural interests. The existing international tin-, sugar- and wheat-agreements have as their object production-restriction and -division and price-fixing. In the wheat-sector in particular it is of the utmost importance that a co-ordinated price policy is arrived at, not only for Western-Europe but for the world in general. The negotiations of the past years have proved beyond doubt that an automatic formula can no longer be used. Prices of farmproducts have become more and more an instrument to regulate incomes. This has resulted in agricultural prices within the E.E.C. being much higher than those prevailing on the world-market. Producers outside the Common Market area are concerned about the new system of variable import-levies, which has replaced the previous system of fixed rates and import-quotas. Furthermore a relatively high price-level will stimulate production within the E.E.C., which will both reduce imports and cause a stiffer competition on the world-market. Much will depend on the level on which prices will be fixed. The study discusses a number of proposals for international agreements, which would align the E.E.C.-agricultural policy with those of third countries. The Baumgartner-plan of 1961 providing for an increase in world-market prices to such extent to assure the small European farmers an adequate income, is rejected. One should rather strive to achieve a situation which approaches free competition. This would avoid an unnecessary high and expensive overproduction.

Harmonisation of laws

Prof. Eric Stein has written a new study on "Assimilation of National Laws as a Function of European Integration", which appeared in the *American Journal of International Law* 1964, pp. 1-40. This is a masterly survey of the various ways in which harmonisation of the national laws is proceeding under the provisions of the Treaty, and, in the patent field, outside it. Not only are there the articles dealing directly with approximation of laws (Articles 100-102) but there are provisions for harmonisation elsewhere, as for example customs measures under Article 27, company guarantees under Article 54 (3) (g), tax measures under Article 99, social provisions under Article 117, as well as in the agricultural and transport fields. There is also the work on the conventions contemplated under Article 220. Professor Stein examines the great task in these technical spheres, and points out that much of the groundwork had fortunately already been carried out by other international organisations, such as the Rome Institute, the Council of Europe and O.E.E.C. It required the dynamism of the Communities however to put the results of these researches into practice. The author points out that the work is still too heavy for the staff of the Commissions, and collaboration with institutes and other research bodies outside is still required. Where the Commission has a policy choice this is made so as to achieve the best technical result while forwarding the objects

of the Treaty. It is sometimes difficult to overcome the prejudices and practices of the national states, and for this the authority of the European Parliament is necessary as a support for the Commission. He therefore urges that the powers of Parliament may be strengthened to give it authority to decide the final measures.

The draft-directive of the Commission on the co-ordination of guarantees demanded in member States from companies, which was submitted to the Council on February 21, 1964 (see Legislation Section 1 *C.M.L. Rev. 1963-4*, p. 467) has evoked a number of criticisms. In particular the rather stringent requirements of publicity for the protection of share-holders and third parties have been attacked. *Klaus Lamberth* referred to this first draft-directive in *Aussenwirtschaftsdienst* 1964, pp. 69-70. He expressed his regret that "Gesichtspunkte und Vorstellungen" of German Company law were only very incompletely taken into account in the draft-directive.

Court of Justice of the European Communities

A number of recent decisions of the Court have again been discussed in various law journals. *Dr. Roland Schibel* commented upon the preliminary ruling in the Internatio-case of February 19, 1964 in *Aussenwirtschaftsdienst*, 1964, pp. 87-88 (consolidated cases 73 and 74/63, reported above at p. 95 with annotation Sk. and in [1964] *C.M.L.R.*, p. 198). He devoted particular attention to the question raised by the Federal Republic, whether the Court, in a procedure under Article 177, could give its opinion on the validity of a decision addressed to a member State. The Court did not reply to this question, but did examine the validity of the decision. One may therefore presume that the Court (as well as Advocate-General Roemer) will follow the opinion expressed by *Gotschlich* in *Aussenwirtschaftsdienst* 1964, pp. 43-45, even before this ruling. Gotschlich rejected any interpretation of the word "validity" in Article 177 par. 1(b) which would restrict it to "formal validity". The restriction in Article 184 E.E.C. (exception of illegality) to the non-applicability of *regulations* only is not determinative. One should rather argue that the nature of Article 177—similar as the German "Normenkontrollverfahren" of Article 100 Basic Law—is opposed to an encroachment on the legal protection of individual private and legal persons. Gotschlich therefore concludes that a national Court can demand a preliminary ruling on a question of material validity of an E.E.C. decision which serves as basis of a legal act of a member State.

The judgment on the import-restriction of Italian refrigerators in France (case 13/63 of July 17, 1963, *Recueil* IX, p. 335) has been annotated twice in the *Neue Juristische Wochenschrift*. At pp. 374-375 *Dietrich Ehle* deals mainly with the various aspects of the Italian discrimination charge which the Court rejected. *Professor L. Constantinesco* devoted an elaborate discussion to the significance of Article 226 and to the criteria of its application (pp. 331-336).

Two decisions of the Court of Justice of December 1963 concerning the E.C.S.C. Treaty were annotated by *Jean Robert* in the *Recueil Dalloz*, 1964, Jur. p. 173. They were the consolidated cases Lemmerz-Werke a.o. (cases 53 and 54/63 of December 5, 1963, *Recueil* IX, p. 487; reported in 1 *C.M.L. Rev. 1963-4*, p. 359 and in [1964] *C.M.L.R.* p. 162) and Macchiorlati Dalmas (case 1/63, December 16, 1963, *Recueil* IX, p. 613; reported in [1964] *C.M.L.R.*, p. 124). These decisions are interesting in that they indicate which criteria are posed by the Court to a "decision". Although the High Authority itself had laid down some rules on the form and content in its general decision No. 22/60 of September 7, 1960 (O.G. 1248/60), the Court nevertheless did not admit any restrictions on its independent control whether or not a decision had been taken. It may be presumed that the Court will use these same criteria in respect of E.E.C. decisions.

An interlocutory ruling of the Court of November 14, 1963 in the case of Lassalle v. European Parliament, gave rise to a critical consideration of the collective

defense of the interests of the European official in the European Communities by *Marcel Slusny* in *Journal des Tribunaux* 1964, pp. 121-125. The main thrust of the article lies in its examination of the possibilities and desirability of admitting representative personnel organs of the Communities before the Court, either directly on behalf of officials ,or indirectly by way of intervention. Amongst these organs, the personnel committee established pursuant to Article 9 of Regulation No. 31 (Personnel Statute, O.G. 1385/62) is the most important. The Treaty texts and the Personnel Statute exclude any direct appearance before the Court by this Committee or any other collective organs. More possibilities are left open for intervention, but the Court has in the Lassalle-decision closed this entry as well to the Committee, by arguing that the Committee is an internal organ only, the acts of which can have internal effect only. The author then discusses the feasibility of trade-unions of personnel intervening on their behalf, and concludes that this might be possible, although he expresses doubts as to its desirability. Slusny favours the institution of a procedure of conciliation which would satisfy demands of a greater collective security, without altering the present regulations.

Finally two belated annotations on the First Tariff Commission case (26/62, 1 *C.M.L. Rev. 1963-4*, p. 82, with annotation Sk.) should be mentioned. *Jean Breban* has dealt extensively with all aspects of the various competences of the Community Court and national courts respectively in *Recueil Dalloz* 1963, Jur. pp. 621-625. The annotation by *Stefan Riesenfeld* and *Richard Buxbaum (American Journal of International Law*, 1964, pp. 152-159) is useful in that it contains a wealth of documentation and refers to the main previous annotations.

Similar to the procedural laws of the member States, the E.E.C. Treaty in its Articles 185 and 186 refers to summary proceedings (interim measures). *Dietrich Ehle* gives in a short study in *Aussenwirtschaftsdienst* 1964, pp. 39-43 a survey of the relevant Court practice in this respect. He comes to the conclusion that the Court has been very reluctant sofar in admitting interim measures. The various conditions of admissibility and the procedure to be followed are discussed.

To conclude this section on the Court an article by Professor *Seidl-Hohenveldern* on "The Foreign Litigant before the Court of Justice of the European Communities" in the *Journal of Business Law*, 1964, pp. 179-185 should be mentioned. The writer contends that any enterprise within the meaning of Article 80 of the E.C.S.C. Treaty has a right of action before the Court even though it "belongs" to a British firm. Furthermore under the E.E.C. Treaty, Articles 173 and 175 give a right of action to "any natural or legal person", irrespective of nationality. A British person resident outside the Community would therefore be entitled to challenge an act of the Commission in the Community Court if a decision were made against him in respect of restrictive practices under Regulation 17; he would also be entitled as an interested party to intervene as having a legitimate interest in the outcome of a case before the Court. The author doubts, however, whether a British Court even if it found itself having to apply Community law under conflict rules would be entitled to refer a question to the Court under Article 177.

Trade marks

Whereas the draft for a European patent law has been published already quite some time ago and has caused innumerable reactions in literature, the law of trade marks is lagging behind. In the *Revue du Marché Commun*, 1964, pp. 32-36, *M. Röttger* demonstrates that the law of trade marks can be of influence on the trade between the member States and their competition rules. He discusses a part of the law of trade marks, namely, the "accompanying" mark. This is a mark which has been granted for a raw material which is used not only by the producer of this material, but also by the manufacturer of the finished product. The legislations of the E.E.C. countries do not contain separate provisions for this "accompanying"

mark. One may presume that it is permissible to use such a mark providing that it does not mislead the general public. It is of course necessary that the owner of the mark has given its consent for such use. The consenting agreement may be compared with a trade mark licence, but is, however, not identical, since the licence is granted only for finished products, the right to use an accompanying mark for a raw material. Consent on the part of the owner of the trade mark is not required in English law. The author hopes that attention will be paid to this point within the framework of a uniform law on the trade marks in the E.E.C. countries. It is desirable to grant the producer of a raw material certain powers of control. This could be done in the form of a publication by such producer of the general requirements which he demands when his material is manufactured. Such publication could be registered in the Trade mark Register.

Competition

This issue's survey of cartel literature shows a continuing exploration of most of the same, still unresolved matters discussed throughout our first year of publication. The allocation of tasks between national and Community institutions, for example, remains controversial, as evidenced by the article of *Jean Materne*, "Le Problème des compétences respectives des Tribunaux nationaux et de la Commission de la C.E.E. en matière d'ententes" in *Revue du Marché Commun* 1964, pp. 37-42. He discusses primarily two questions: whether the national courts as well as the administrative authorities are indicated by Article 9 (3) of Regulation 17; and whether Article 85(2) ("Any agreement or decision prohibited by this article is automatically null and void") could convey an autonomous power on the national courts, or one merely accessory to a prior administrative finding based on Articles 85(1) and (3). Materne chooses the solution enabling the courts to make more speedy determinations. With *Deringer*, in 1 *C.M.L.Rev. 1963-4* pp. 30-40, "Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty", he is willing to let the Court in Luxembourg decide any conflicts between national decisions and those of the Commission, when they are appealed by way of a resort to Article 177. Approximately at the same time as Alexander's article, which appeared in this review (1 *C.M.L. Rev. 1963-4*, pp. 431-456), *Richard M. Buxbaum* wrote a comprehensive survey of the powers of the Community organs and the national authorities of the member States entitled "Incomplete Federalism: Jurisdiction over Antitrust matters in the E.E.C.", which appeared in *California Law Review* 1964, pp. 56-94. The author comes to the conclusion that there has been a too early withdrawal of competence under Article 85(1) from the member States, accentuated by timidity on the part of the national authorities. A more positive approach by the national courts would have strengthened the enforcement provisions, without hindering the functioning of the Community organisations. It was a small risk to take, he suggests, that the Commission might subsequently find an agreement to be retrospectively valid. This view is worthy of attention particularly in the light of the present indecision and delay in enforcement on the part of the Commission.

Foremost among the issues of material law is the scope and application of Article 85(3). Not only representatives of industry and the legal profession, but also the Economic and Social Committee and the European Parliament, stressing the aims of certainty in the law and efficiency in administration found in Article 87(2)(b), have urged the use of the group or category exemption. While there had been some question as to whether the Council only, or also the Commission, was competent to issue such a quasi-legislative directive, the Commission chose the usual route of a proposal to the Council, probably required anyway by Article 87(1) (see the objections raised in November 1962, when the Commission made an effort to formulate a group exemption on its own for sole agency contracts). The contents

of the "Proposal of a Regulation for the Application of Article 85 (3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices" (Doc. No. VI/ Kom 64 (62 of the Commission) are discussed by *Deringer* and *Tessin* in *Aussenwirtschaftsdienst* 1964, pp. 71-72. The Commission has clearly tried as much as possible to follow the procedure and structure of Regulation 17 with regard to notification of old and new, "heavy" and "light" cartels, and the possibility of retroactive exemptions and the timely curing of offensive agreements. In keeping with the wider-embracing legislative character of such categorical exemptions however, there are additional guarantees for the hearing of interested persons, the Consultative Committee on Cartels and Monopolies of Article 10(3) Regulation No. 17 and the member States, before a category exemption is to be definitively established, changed, renewed, or allowed to lapse. The authors suggest that the European Parliament might well here also be consulted. They note further that a definition of "category" is essential; and that, given the constitutive character of a categorical exemption, exceptional individual agreements not conforming to the conditions of Article 85(3) can be attacked only prospectively. In the next issue of *Aussenwirtschaftsdienst*, 1964, p. 114 *Tessin* makes a short observation on the first negative clearance by the Commission which was given in the form of a decision (see O.G. 915/64 and 1 *C.M.L.Rev. 1963-4*, p. 388). Previously *Peter Wendt* had remarked in the same journal at pp. 20-22 that such a decision can be revoked only in case of annulment by the Court of Justice. In view of the fact that these negative clearances grant rights to their addressees, a discretionary retraction may not be assumed.

The quest to provide the legal adviser with firm guide-lines for the satisfaction of the broad conditions for exemption is continued in "L'Interdiction des Ententes: A la Recherche de critères—Six cas de bonnes ententes dans la jurisprudence antitrust britannique", *Revue du Marché Common* 1964, pp. 86-95. Despite the obvious differences in text and spirit between the British Restrictive Trade Practices Act of 1956 and the Treaty of Rome, the structural similarities of both (a priori condemnation of certain agreements, with similar tests for "exemption") suggest the utility of a review of the only six cases of approved agreements to date. In the course of his brief summaries and analysis, *Fontaine* notes that certain agreements accepted by the Restrictive Trade Practices Court (e.g. *Standard Metal Window Groups' Agreement case*), which is more amenable to the theory of countervailing forces where the public interest is served, would probably fail under the Treaty test that competition must not be eliminated for a substantial portion of the market. The highly particularized market studies undertaken in each case are, moreover, a preview of the detailed studies which will be required of jurists and economists under the Treaty of Rome.

Among the jurisprudence and related discussions of interest in the competition field, the following deserve special note: Two cases before the Court of the Hague on 20 and 22 February 1963, reported at *Bijblad bij De Industriële Eigendom* 1964 pp. 66 and 68, involved successful attempts by two well-known German manufacturers, Grundig and Liebherr respectively, to protect their exclusive Dutch representatives or licence holders against competing dealers receiving goods outside of the exclusive arrangement. In both cases, *outsiders* attacked the validity of the agreement of transfer of trade-mark partially on the basis of conflict with the E.E.C. competition rules. The Grundig transfer was upheld primarily on a reading of the Bosch case: Articles 85-86 are not directly binding on nationals, and no action had been taken by a cartel authority (or the Commission) since the closing of the transfer agreement, which occurred prior to enactment of Regulation 17. In the Liebherr case, Article 85 was considered "not to be applicable to agreements as the one at hand, which can be viewed as a normal commercial and industrial consequence of the rights of industrial property bestowed by the national legislations". The absence of analysis to support this conclusion is unfortunate. Another case arising in a similar market setting, *Trockenrasierer* case, Bundesgerichts-

hof opinion of June 14 1963 (see 1 *C.M.L. Rev. 1963-4*, pp. 461-463; [1964] *C.M.L.R.*, p. 59), is now receiving extensive commentary. It will be remembered that, besides elaborating on the burden of proof to show an allegedly "closed" distribution system (with re-export prohibitions), the case ruled that old cartel agreements notified within the time limits of Regulation 17 are "temporarily valid" in German law, upon the Bosch case, even though in violation of Article 85 (1)—until an actual decision by the Commission or the Bundeskartellamt. (The Court had rejected the contrary view of the Bundeskartellamt in favour of "pending non-effectiveness", and refused to apply for a further interpretation from the Luxembourg Court under Article 177). Challenging the Bundesgerichtshof literal reading of the Bosch case, *Prof. Steindorff* in his annotation in *Juristenzeitung* 1964, pp. 219-226, cites the special difficulties of interpretation raised by differences of language and juridical background on the European and among the national courts. A teleogical application of Regulation No. 17 would have led, he argues, to the interpretation espoused by the Bundeskartellamt, more consistent with German law, and a better solution to the problem of damage awards. The evidence and Article 177 procedural questions are also discussed.

The recently-decided *White Motor Co.* case (372 U.S. 253, U.S.S.C., 1963) is the occasion for an analysis in E.E.C. context of a cloudy, much discussed area of cartel law, the permissibility of exclusive territorial distributor-agencies, by *F. K. Beier* in *Gewerblicher Rechtsschutz und Urheberrecht, A.u.I.T.* 1964, pp 84-92. Under German law, G.W.B. § 18, these agreements are in principle accepted, interventions of the Bundeskartellamt being possible only when the double conditions of both unfair restriction of economic freedom of the contracting parties or other firms and substantial damage to competition are met. Contrariwise, the exclusive territorial agency agreement, especially when linked with export and re-import prohibitions, would seem to fall under Article 85 (1). Yet, the clear advantages in setting up a distribution system in new markets (for example) should lead to the maintaining of many such arrangements with an Article 85 (3) exemption. The legality in the U.S. is studied at length not only in the light of *White Motor*, but against the background of jurisprudence and literature preceding it. That great uncertainty still exists in both Europe and the U.S. is the conclusion.

Another aspect of material law, the impact of Articles 85 and 86 on the various national regimes relating to the protection of industrial property, and the significance of Article 36 as a possible exception from the rules of competition, has already received much attention in the literature (see, e.g., citations in 1 *C.M.L. Rev. 1963-4*, pp. 381-382). The communication of the Commission concerning licences and patents, of 24 December 1962, was seen to have raised as many new questions as it attempted to answer. An important addition to the discussion have been the contributions published during the last year, beginning with the article of *Guy Schrans* in *Sociaal Economische Wetgeving* 1963, pp. 305-338. He developed the thesis that Article 36 takes industrial property out of the reach of Articles 85-86. The letter of VerLoren van Themaat in *Sociaal Economische Wetgeving* 1963, pp. 428-430 (translated in: *Le Droit et les Affaires* 1963, No. 22; *Gewerblicher Rechtsschutz und Urheberrecht, A.u.I.T.* 1964, pp. 21-22; 1 *C.M.L. Rev. 1963-4*, p. 428) rebutted this position primarily on the basis of the function which Article 36 seemed designed to fulfil in the framework of the customs union. The debate is now continued in *Sociaal Economische Wetgeving* 1964, p. 83. Under the title "Précisions sur la Portée de l'Article 36 par rapport à l'Article 85 du Traité de la C.E.E., concernant les contrats de License de Brevets", a second letter of VerLoren van Themaat amplifies the first, and notes that the freedom to use industrial property ought also to be subject to public control and limitation, like other species of private property. The point of reference must be combatting restrictions of competition that exceed the privileges granted by national law: important thus is the specific content of the various national legislation. Though proceeding from the same premise and

frequently arriving at the same goal the differing judicial and doctrinal routes followed are deserving of further study. In this connection a decision of the Oberlandesgericht Hamm of January 17, 1964 (published in *Aussenwirtschaftsdienst*, 1964, pp. 124-125) must be mentioned. The case concerned a suit by the German holder of the trade-mark "Persil" instituted against a Dutch enterprise importing products under the same name into Germany. The defendant could not, according to the Oberlandesgericht, invoke Articles 85 and 86 E.E.C. because these provisions are not directed "against those limitations to inter-state commerce which follow from the trade-mark laws which are built up according to the principle of territoriality." The E.E.C. Treaty did not abrogate the law of trademarks: "In any case one could say that the legal position of trademarks ... equals in its result an agreement whereby territories are divided and which restricts trade between the member States. That is, however, the consequence of the applicable trade-mark law, and not an agreement which violates the prohibition of Article 85(1) E.E.C." The decision of the Oberlandesgericht has obtained "force of law" ("*rechtskräftig*"). This outcome must be regretted. Even before the Constructa-opinion of the Dutch Supreme Court (see above pp. 100) a chance to obtain a preliminary ruling from the Court of Justice on the relationship between Articles 36 and 85/86 E.E.C. has been foregone.

The relationship of cartel law to the law of industrial property has demanded attention as well in the E.F.T.A. countries. *F. Neumeyer* has written a series of articles in *La Propriété Industrielle* 1964, pp. 32-40, 46-56, 86-91 and 94-101, in which he gives a comparative analysis of this relationship in the Scandinavian countries, Austria, Great Britain and Switzerland. Both legislation and judicial practice in these countries are being discussed.

The article of *François Hepp* "Les Conventions de License Exclusive au regard des Règles de Concurrence de la C.E.E.", immediately following in *Sociaal Economische Wetgeving* 1964, p. 85, explores the Treaty framework once more, citing particularly Articles 31-37, Article 222 which guarantees existing property rights as between the member States, and Article 234 which would seem to secure the integrity of the Union of Paris signed at the International Convention of 1883 (revised most recently at Lisbon in 1958). He refuses the proposition of VerLoren van Themaat's earlier letter that Article 36 has no limiting effect on the application of Articles 85 and 86, on the basis of the logic and spirit of the Treaty itself. The network of licences and agreements created by a patentee-licensor to take advantage of a legally created monopoly cannot be viewed technically as "restrictive agreements", but merely as logical extensions of the patent rights; certain licence agreements may be concluded for fraudulent purposes, but *a priori* determination is impractical.

It is not surprising that most of the comparative national cartel-law studies omit barest mention of the Italian practice. As *V. G. Venturini* is at pains to indicate in "Monopolies and Restrictive Trade Practices in Italy", *I.C.L.Q.* 1964, pp. 612-664, Italian industry since World War I has been characterized by a high degree of concentration and centralized control—first by private parties, then increasingly by the dirigistive corporatism of the Fascist Government. The response to the crisis of the Thirties resulted in measures, like compulsory cartelization and partial state-ownership, not unknown elsewhere in Europe at the time. The Civil Code of 1942 contained several interesting rules, such as an obligation to deal laid on monopolies and a compulsory registration of certain consortia, but was "totally insufficient for a serious modern and effective regulation of the matter". Fifteen years of proposals, drafts, and study projects since the adoption of the 1948 Republican Constitution have to the present yielded no Italian anti-trust law. The only means for any protection of competition has been Article 2598(3) of the Code, which condemns as acts of unfair competition the use of "directly or indirectly any.... means not conforming to the principles of correct professional

behaviour and tending to damage somebody else's business concern." Yet, a review of the leading decisions shows little eagerness to strike down restrictive agreements, at least as between the parties. Further, the dirigistic sections of the Code of 1942 are presumably still in effect, while the Courts divide on the present applicability of special economic laws dating from Fascist times. Attempts to defeat several of these on the basis of Article 41 of the new Constitution, embodying a guarantee of economic initiative, have also failed. Venturini sees much of this as the product of the different Italian economic and political heritage, alien to the mythology of free competition.

The British Institute of International and Comparative Law has also issued a supplement on "Commercial Agency and Distribution Agreements in Europe" (No. 3, 1964) which is based on the report of a one-day conference on the laws in Germany, Switzerland, France, Italy, Belgium and the Netherlands. The relevant codes are printed in the appendix, together with a translation in English. This publication serves to emphasise the unfortunate position of the agent in England who is completely unprotected by legislation of any kind. There are no requirements for a contract to be in writing, for any specific period of notice, or for any compensation payable on the determination of the contract.

Taxes

During 1963 lively discussions took place in Germany concerning the relationship of Articles 12 and 95 E.E.C. Some conflicting German judicial decisions of Courts of Finance (Bremen, April 4, 1963; Nuernberg, April 23, 1963—1 *C.M.L. Rev. 1963-4*, p. 364) and the ginger-bread decision of the Court of Justice of the European Communities of December 14, 1962 (consolidated cases 2 and 3/62, E.E.C. Commission v. Belgium and Luxembourg, *Recueil* VIII, p. 853; 1 *C.M.L. Rev. 1963-4*, p. 211) gave rise to these discussions. The main dispute centers around the question of conformity of the compensatory turnover taxes with the E.E.C. provisions just referred to. The German tax aims at abolishing the advantages which imported products enjoy to the extent that they were not subjected to turnover-tax. One has first to decide whether Article 12 or Article 95 is applicable to the situation at hand. Should Article 95 apply, it is necessary to find out whether the products concerned are subject to the levy-system of the E.E.C. agricultural regulations: The system of import levies which these regulations foresee, equalizes if not all, at least the most important price differences between the imported and the home made product. *Dieter Kuhn* who discussed these two questions in *Aussenwirtschaftsdienst* 1964, pp. 33-36, came to the conclusion that the compensatory tax is not contrary to the E.E.C. Treaty.

In an article in *Aussenwirtschaftsdienst* 1964, pp. 104-107, *H. Mesenberg* gave a survey of the activities of the Commission in the field of harmonisation of indirect taxation in the member States. The Commission has instituted a number of working-parties, consisting of experts in the national fiscal services and a president who is nominated by the Commission. At present nine of these groups are operating. They deal respectively with: 1. harmonisation of turnover-tax and; 2. of compensatory levies on imports and restitutions on exports; 3. problems of other indirect taxes; 4. differences in the basic foundation of some direct taxes; 5. tax problems of foreign investment in the Community; 6. harmonisation of taxes on capital transactions; 7. harmonisation of taxes on insurances; 8. the recommended common system on the "added value" tax; 9. a study of financial and fiscal statistics. Of each of these working parties Mesenberg mentions their programme and the present state of affairs. Some provisional conclusions are published as well. The same author has given a survey of present situation with respect to the draft-directives of the Commission of October 31, 1962 on the harmonisation of turnover

taxes (*Aussenwirtschaftsdient*, 1964, pp. 187-190). He discusses the various positions taken by the Economic and Social Committee, the European Parliament, the German Federal Government and Parliament respectively. He notes that the idea of an "added value" tax has been basically accepted in Germany, which may be called an important step on the road towards a general tax reform. Opposition has been raised, however, against the idea to institute first different non-cumulative turnover tax systems, which will be subsequently changed into a uniform, common tax. This idea is being considered as irrational and cumbersome. It is rather necessary to embody the final objectives of this harmonisation in the first stage.

Commercial Policy

It cannot be denied that progress in the field of the elaboration of a common commercial policy has been less than in other areas of the E.E.C. Treaty. As long as the Common external tariff has not yet been completed, numerous complications can arise during the accelerated abolition of internal restrictions in the trade between member- and third States in products from these latter states. For this reason Article 115 E.E.C., which enables the Community and the member States to take the necessary measures against deflections of trade and against the economic difficulties which are caused by such deflections, is during this stage of utmost importance. *Thomas Oppermann* has analysed the text and application of this provision in an instructive commentary in *Aussenwirtschaftsdienst*, 1964, pp. 97-103. Unlike Article 226, the applicability of Article 115 is not limited to the transitional period. Although by its nature this provision contains a safeguard clause, which, according to the general framework of the Treaty, must be interpreted restrictively, its applicability is not limited to the situation in which disparities have already taken place. The article has been invoked successfully in cases of serious threats of economic difficulties. Nor is it necessary that the difficulties must relate to the same products as those which were subjected to the rules causing disparities. Diverging import regulations for oil, for example, can cause difficulties in the coal sector. Oppermann carefully describes the procedure, which the Commission and the member States—should they want to act independently—have to follow. The relationship between the Commission and the member States has received special attention in this respect.

Dr. Ivo Schwartz, *Deutsches Internationales Kartellrecht*, Carl Heymanns Verlag K.G., Köln, 1962. XX, 325 pp. DM. 42.50.

The launching of the European Coal and Steel Community and the European Economic Community, beside putting into operation two new sets of "cartel and concentration" rules, has stimulated the adoption of domestic legislation on this subject in a number of nations. Since the operations of many firms constantly extend over national boundaries, the proliferation of national rules was bound to raise questions with regard to overlapping and conflicting application of those rules. These problems, not unfamiliar in other areas of law, have indeed been confronted earlier in the context of competition regulation: one has only to note the American experience in the "extra-territorial" application of its anti-trust law (upon which the author draws freely), and the Dutch reaction to such thrusts, Article 39 of the Statute on Economic Competition of 1957/1958. The possibilities for resolving or minimizing such difficulties in the application of German cartel law are the specific context of Dr. Ivo Schwartz's able study, but it also suggests techniques for attacking these problems in other jurisdictions.

The central question is posed in the Introduction: What is the meaning of Article 98(2) of the Gesetz gegen Wettbewerbsbeschränkungen, which provides the guide for international application of the Statute, and its relation to the general

rules of conflicts and public international law? The three parts of the inquiry deal more or less separately with the three categories of sub-question here implied: the actual reach of the G.W.B. in cases with foreign contact, the function of Art. 98(2) G.W.B. as "Kollisionsnorm", the limits set by Public International Law on "extra-territorial" applications of cartel law.

Art. 98 (2) G.W.B. reads: "Dieses Gesetz findet Anwendung auf alle Wettbewerbsbeschränkungen, die sich im Geltungsbereich dieses Gesetzes auswirken, auch wenn sie ausserhalb des Geltungsbereichs dieses Gesetzes veranlasst werden".

Criteria for application of this section are derived by the author from analysis of both the legislative history and the text of the entire statute. "Auswirkung" relates to both of two interdependent political-legal and economic aims: the protection of competition and the market economy, as a system, against inroads of private economic power; and the protection of individual freedom of economic activity (particularly freedom to compete and of contract) for all market participants—and the securing of thereby the social and national order of a democratic Federal Republic. "Im Geltungsbereich" is construed to restrict application of the law to protection of the domestic market only. Contrary to the scope of the U.S. Anti-Trust law, the statute does not extend to restraints of competition in foreign markets, although German nationals may there be injured. The macroeconomic effects of restraints in external markets on the domestic economy are conceded, but excluded from consideration because too difficult to quantify, not inevitable, and "indirect", while freedom of activity on the domestic market is not specifically restricted. Further, the effects must be actual, and not merely potential: art. 98(2) has no preventive, but only a defensive function. And there is no requirement of intent; the objective result is enough. Thus the ability to increase or decrease exports, by means of a foreign international cartel affiliation, may affect the *strength* of the German firm at home, but has no *necessary effect* on the *intensity of competition* and is no "direct" restraint on the firm's *freedom to compete or contract* on the *German* market. The exclusion in Art. 6 G.W.B. of pure export cartels from the coverage of Art. 1 is adduced by Schwartz as a proof of the correctness of his analysis.

On the basis of the above described reference points, a wide range of practical examples are analyzed to see where Art. 98(2) actually requires application of the G.W.B. Thus, resale price maintenance agreements which prevent a domestic party from underselling his competitor's price abroad would not come under Article 15 G.W.B., as the restraint does not inhibit freedom of contract in the domestic market. The main varieties of international vertical agreements (exclusive-dealerships, tying clauses, etc.) and individual license agreements (export prohibitions, transfer-back of improvements, etc.) are also scrutinized and the applicability of Art. 98 (2) is repeatedly made to turn on the criteria of domestic affects outlined above, regardless of place where agreement was entered into, and of the nationality of the parties. As an example, where a foreign licensee is prohibited from dealing with other domestic firms, Articles 20 and 21 G.W.B. are inapplicable, because the foreigner acts as a buyer on an external market only: nothing is here being offered or supplied for disposal on the domestic market. Where a domestic licensee is required on the other hand, to buy only from foreign sources, his freedom of movement on the domestic market is injured and competition between the foreign licensor and domestic suppliers is shut out. The treatment of international cartels as such, in view of their multinational participation and reach, requires further sophistication: only that part of the cartel affecting the domestic market could be brought under the G.W.B. by Art. 98 (2); what law applies to the foreign market aspects would be determined by the rules of international private law.

The two areas subsumed under the German concept of *international Zuständigkeit* (competency to decide in the face of opposing claims to competency by foreign states), namely, jurisdiction over person and over subject matter, are elaborately and systematically developed in Part II. The question of personal jurisdiction is

further subdivided as to civil and public proceedings. As to the former, requirements of venue and the "location" of the act and the actor are among the elements limiting the competency of the German Court, under German law, in many civil cases otherwise covered by Article 98(2) G.W.B. On the other hand, the parties to a contract in restraint of trade, are prohibited from choosing their own judicial forum (Article 96 I) or arbitration (Article 91 I sent. 1), lest the legal interests, protected on the domestic market be thereby undermined. As to personal jurisdiction in administrative and criminal cartel cases, Schwartz concluded that the reach of Article 98 (2) G.W.B. is broader than the practice under the American Anti-Trust laws: Broader, because despite Article 36 I (appointment of domestic representatives by foreign companies), Article 98 (2) does not require a tangible presence in Germany. Yet, the territorial limits on capacity to enforce and considerations of fairness, similar to those underlying American "due process", will according to the author inhibit excessive application.

Whether a case may be entertained depends further on substantive international competency ("jurisdiction over subject matter"), which is determined by reference to the relevant conflicts rules. For the three varieties of proceedings embodied in Articles 51-97 G.W.B., administrative, economic-penal, and civil, Article 98 (2) G.W.B. is asserted to be the conflicts rule. (a) Thus, whether cartel partners must notify certain agreements (as under Articles 9 II, 16 IV, and 23) or furnish information to the authorities (Article 46), and whether the authorities are required to act when permission is sought for certain agreements (Article 15 II, sent. 3, 5 III, and 20 III) or to oppose notified agreements (Article 2 III and 3 III) and abuses of dominant positions (Article 22 IV)—all this turns on the effect in the domestic market on the protected legal ends outlined above.

(b) For the imposition of penalties in the case of violation of the administrative-legal norms, Article 98(2) forms a *lex specialis* in the general rules of German international penal law (Articles 3 and 4 St. G.W.B.), which refuse punishment for deeds "done abroad" but not illegal there. Domestic impact, irrespective also of the nationality of the actor, is here decisive. This criterion, however, is said to honor the traditional territorial limitation on the applicability of public legal norms. Where, finally, Article 98 (2), as conflicts rule for cartel ("public") law, forces a different solution from that afforded by private law conflict rules, that solution ought to be accepted simply on the grounds that public law objectives are thereby served—independently of recourse to the traditional "ordre public" exception.

(c) In the area of cartel private law—for example, when cartel partners have chosen a "friendly" foreign law to govern their organisation, or an action for compensation based on Article 35 G.W.B. is brought—Article 98(2) likewise directs immediate application of German substantive law where there are domestic affects, without appeal to "ordre public". Again referring to American practice Schwartz notes the recent trend in both compensation and equity cases to approximate the "any direct domestic affects" reference point of Article 98(2), although the coverage of foreign commerce in the American law makes it broader than the German. On the first point, parallel to his comments on the touchstones for personal jurisdiction, the author would limit applicability of German norms to cases which stand in a spatially close connection to the Federal Republic.

Part III discusses the question whether there is a principle of public international law against which Article 98(2) offends. This formulation and the answers that follow are derived largely from Dr. Schwartz's reading of the *Lotus Case*, Permanent Court of International Justice 1927. Thus, while no state may exercise jurisdiction or may enforce a decision on the territory of another state, there exist no limitations in public international law on the right of each state not only to decide the conditions of procedural competency for its courts, but also to make applicability of domestic cartel norms (jurisdiction over subject matter) depend on the *domestic*

effects of acts committed by foreigners abroad. That the state where the act has been initiated may also, under its own penal or administrative rules, prosecute the actor raises a problem of concurrent jurisdiction. Similarly, public international law does not limit the power of a state, acting within its territory, from achieving indirectly affects abroad, which it could not have done directly. For example, U.S. courts have occasionally forbidden practices occurring outside the country, relying on their access to resources or persons in America to apply pressure to conform to the decision. In the true conflict situation, where a party is required by one group of authorities to do that which is forbidden by the authorities of the other jurisdiction (as in the famous Du Pont—I.C.I.—British Nylon Spinners series), the author can at last counsel only self-restraint, in the absence of public international legal restraints.

Whether or not one may agree always with his conclusions, almost as of much importance as these, the author's vigorous analysis and methodology deserve close attention. While directed primarily at the German legislation the work has benefited from extensive reference to the American practice. Dr. Schwartz's study should undoubtedly influence the direction of future inquiry and application in other countries as well as in the E.E.C.

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Dt. Otto Gandenberger, *Was ist ein Unternehmen?* Quelle & Meyer, Heidelberg, 1963, 162 pp.

Dr. Gandenberger's compact study, volume 16 of the Publications of the Research Institute for Political Economy of Mainz University, is an interesting contribution to the resolution of problems raised by the concept "enterprise" appearing not only in various national legislations on competition, but also in articles 85-86 E.E.C. Treaty. No lawyer, the author has avoided as much as possible more purely legal questions, in favour of practical economic analysis. His approach comprises three steps: a determination of the objectives of the statute; an examination of individual situations in the light of the statutory objectives; finally, the testing of his conclusions against the results dictated by the statute. The primary inquiry is the G.W.B. (Gesetz gegen Wettbewerbsbeschränkungen), but a wealth of comparative material is inserted (at the end of each section, and in an appendix of 18 decided cases) showing treatment of the concept enterprise in other German legislation and by courts in other jurisdictions.

Acknowledging the dual role of the G.W.B. in protecting both individuals in the market and the institution of competition itself, the author asserts that "enterprise" must be seen as a functional concept. The decisive question for application of the G.W.B. is whether a particular unit participates in market-economic competition—in the buying or selling of goods or services: that is, the question is not "is X an enterprise?", but "does X exercise the *function* of an enterprise?" An enterprise is described, in economic terms as: an economic unit which produces goods or services for an economic market and thereby independently plans and decides, within the framework of given legislative controls. This definition further implies that legal form is irrelevant; that economic independence is crucial; and that all services, even those performed by self-employed in the higher professions, are in principle included. Thus, the argument that the tightly-regulated private, mixed, and public producers, who operate under legally fixed prices, health regulations, compulsory service requirements, etc., as well as the "free professions", like lawyer, doctor, or artist, all form exemptions from the reach of the G.W.B. is refuted. They are all "enterprises", coming under its sweep, to the extent that they are still able

to compete on a market for goods and services, even if that room for free play is relatively small. By the same reasoning, governmental bodies, although they may be operating purely for the general interest, when producing goods and services for a competetive market are enterprises in the sense of the G.W.B. Rejecting the oft-made analogy to the private consumer, Gandenberger also insists that the purchasing activities of large state bodies, like the army, fire-brigade, police, or municipality, are likewise within the statute, even if they do not also produce for a particular market. The application of this "one-front" theory (economically active only on a purchase, not a sales market) is justified by the purpose of the Statute, which was surely to prevent these often most-powerful buyers from abusing their market power.

Given the functional nature of the concept as the author has outlined it, problems of refinement enter of the following nature: Is there a sale or a gift? Is there a sale, or a mere administrative or regulative function? In a case to case approach, such elements as failure to cover costs over a period of time, peculiarity of the service done or the goods sold by the particular dispensing organisation, and the substitutability of other goods or services on the market will be crucial. The consumption of private households will regularly be excluded; but not the activities of consumer unions or joint-purchasing of several producers. Single or occasional purchase or sales activities may well be activities of an "enterprise", when influence on market relationships in the sense of G.W.B. article 1 is substantial. In principle the offer and supply of labour should come under the G.W.B., at least to the extent that employer-employee relationships are not expressly regulated by other legislation, contends the author; but the G.W.B. expressly exludes this market from its purview.

The important question of "intra-enterprise conspiracy", whether two or more legally independent producers owned wholly or partly in common are to be considered parts of the same enterprise, is already resolved by Gandenberger's definition of enterprise. Crucial is whether in fact the legally independent producers are also economically independent or whether their activities are planned and directed by a centralized decision-making body. Although the G.W.B. seems to rest on the notion of juridical independence, the requirement of article 1 G.W.B. that "market relationships be influenced by a restraint of competition" will hardly be met by several economically dependent subsidiaries that are therefore not able to compete. For the gradations of economic independence that exist in reality, a factual inquiry will be required; but, to the extent that the firms do retain a certain independence, they are to be considered enterprises responsible to the norms of the G.W.B.

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