General

In the Editorial Comments (pp. 253-258) reference was made to the new document which the E.E.C. Commission has published on October 2, 1964 under the title "Initiative 1964". This may be compared with the Action Programme for the Second Stage which was published by the Commission in October 1962, although under different circumstances. The action programme made an effort to stimulate the Community even further in a period of expansion. The publication of the proposals contained in Initiative 1964 on the other hand was motivated by the desire to break through the present atmosphere of crisis which has prevailed since the suspension of British negotiations with the E.E.C. in January 1963. In this connection *Dr. E. Horn* discussed mainly the proposed acceleration of the common customs tariff in *Aussenwirtschaftsdienst* 1964, no. 10, pp. 315-318. He deems it absolutely necessary that the low tariff countries (Benelux and West Germany) should not be forced to raise their external tariff. If the acceleration is to be further proof of the liberal commercial policy of the E.E.C., it must be preceded by a successful Kennedy-round negotiation, *i.e.*, a pronounced drop in the common external tariff. According to Horn, however, the Commission is more inspired by the French or Italian point of view in its judgment of the GATT-negotiations than by the Benelux or German standpoint. In general he is of the opinion that the Commission proposals —in which the tariff proposals take a key position—are acceptable to the Federal Republic.

Covering the whole field of European organisations is the series of lectures given by *Hahn* on "Constitutional limitations in the law of European organisations" in *Recueil des Cours* 1963, I, pp. 189-306. The word "constitution" comprises according to Hahn all rules relating to formation, objectives and structure of a political organisation, as well as the rules which indicate the instruments at the disposal of its organs in order to realise its objectives. These rules may be found in the Treaty establishing the organisation, the rules of procedure, financial regulations, the Statute of Personnel etc. Hahn does not limit his example to the principal organisations such as E.C.S.C., O.E.C.D. or N.A.T.O., but includes also the lesser known institutions such as the European Centre for Nuclear Research, the Bank for International Payments and Eurochemie. Hahn's conclusions are that the states have realised the expediency and even necessity of cooperation through international organisations, but that they continue to strive to limit any decrease in national sovereign powers as much as possible. Nevertheless the executive organs have managed to acquire a considerable influence, the more so if the organisation concerned has mainly a technical character. He is of the opinion that the E.E.C. Commission possesses a strong position although the Council of Ministers is able to follow closely each initiative thanks to its own secretariat. Most other international organisations remain highly dependent on the cooperation of member States for the implementations and observance of their recommendations or regulations.

Agriculture

The replacement in respect of various agricultural products of national market organisations by a uniform E.E.C. market organisation has necessitated the insertion of a number of escape clauses in the E.E.C. regulations. These are contained in Articles 22 of Regulation 19 (cereals), 15 of Regulation 20 (pork), 12 of Regulation 21 (eggs), 12 of Regulation 22 (poultry meat), 10 of Regulation 23 (fruit and vegetables) and 16 of Regulations 13, 14 and 16 (dairy products, beef and rice). *Dietrich Ehle* has described the principles underlying the application of these escape clauses in *Aussenwirtschaftsdienst*, No. 10, 1964, pp. 311-315. In wording and contents

they appear similar. In general they can only be applied during the transitional period. Only in a few instances can they also be invoked after that period, namely in relation to trade with third countries (Articles 22 para. 5 of Regulation 19, 16 para. 5 Regulations 13/64 and 16/64). Naturally agricultural products not subject to a marketing organisation are subject only to the escape clauses of the Treaty itself (Articles 44 (minimum prices), 46 (countervailing duties)). However, these latter provisions have lost much of their significance since Regulation 26 made applicable the subvention possibilities of Article 93. Ehle discusses successively the material conditions of applicability, the measures to be taken, the procedure to be followed and the legal protection against escape clauses. Contrary to the procedure of Article 226 (which provision, according to Ehle, continues to apply even though the agricultural regulations contain derogating clauses) the member States themselves are authorised in the first place to take the necessary measures. Only after the measures have been taken does the Commission decide in summary proceedings whether to maintain, to modify or to abolish them. This decision is enforceable without delay, and may include an authorisation for other member States to apply protective measures. It is ultimately for the Council to decide upon the proposals of each member State within three days after notification of the Commission decision, whether to maintain, modify or abolish this latter decision.

Establishment

In the *Aussenwirtschaftsdienst*, 1964, No. 9, pp. 274-279, *Dr. Le Tallec* has analysed the directives adopted by the Council on February 25, 1964 (O.G. 845/64 and O.G. 850/64) and on March 25, 1964 (O.G. 981/64) concerning the conditions of residence, travel and entry for foreigners in the European Economic Community (see Legislation Section in 2 *C.M.L. Rev.* 1964-5, pp. 105-106 and Lewin in this issue at pp. 300-324). These provisions aim at strengthening the legal position of nationals of member States of the E.E.C. when they enter another member State. Their importance is clearly demonstrated by a decision of the Administrative Court of Appeal *(Oberverwaltungsgericht)* Münster of September 10, 1963 (reported in the same issue of Aussenwirtschaftsdienst at p. 302). The Court evicted an E.E.C. national who had been convicted for not having paid his taxes. The Court motivated its decision *inter alia* by stating that a criminal conviction remained a ground for eviction even after the entry into force of the E.E.C. Treaty and Regulation No. 15; since these provisions do not limit the grounds of public policy, order etc. mentioned in the German legislation on the admission of foreigners. It is therefore very interesting that Article 3 para. 2 of Directive No. 64/221/EEC enacted less than five months later contains the provision that criminal convictions shall not constitute in themselves grounds of public policy etc. As has been stated elsewhere in this issue (p. 349) this will entail a modification of the German legislation on this point. Dr. Le Tallec first describes the various groups of persons to whom the directives will apply. He then treats the right of admission to and of residence in the foreign member. State Exceptions to these rights remain possible, but are now subject to limiting criteria, which will also secure an effective operation of the increased legal protection granted to foreigners. Henceforth they have the same appeals as those open to nationals.

Competition

Despite the abundance of literature on Articles 85 *et seq.* E.E.C. the interpretation of numerous terms still poses difficulties in view of the absence of case law of the Court of Justice or of sufficient administrative decisions by the Commission. Thus, in a short note in *International and Comparative Law Quarterly*, 1964, pp. 1468-1470, *E. J. Cohn* draws attention to the difficulties of translation, referring to the various English translations of the French "susceptibles" in Article 85 (1). It is the author's opinion that "capable of" would be the best translation. He draws this

from his analysis of the four official texts that Article 85 requires only a mere possibility, not a likelihood, that inter-State trade be affected, and that this possibility should be considered from the point of view of the nature of the agreement, decision, or concerted practice in question.

Another phrase of Article 85(1), the prohibition of "concerted practices", has been subjected to a comparison with the German prohibition of recommendations *(Empfehlungen)* in Paragraph 38 of the German Cartel Law (G.W.B.) by *Dietrich Ehle* in *Neue Juristische Wochenschrift* of August 27, 1964, pp. 1593-1596. From a formal point of view there exists an essential difference between both concepts: the G.W.B. is directed against the recommendation, the *cause* of the non-contractual restrictive relationship between enterprises, whereas the E.E.C.—Treaty prohibits the *results* of the relationship, *i.e.*, the concerted practice. Analysing both systems further the author concludes that they are less far apart, but that Paragraph 38 G.W.B. contains nevertheless a stricter prohibition in three instances. According to him these material differences are distorting competition and violative not only of the obligation imposed on member States by Article 5 E.E.C. but also of the discrimination prohibited by Articles 7 and 90 E.E.C. In order to limit these differences he proposes a "gemeinschaftskonforme Auslegung" of Paragraph 38 par. 2(2) G.W.B., which could be based on Articles 3f and h, 5, 7, 90 and 100 E.E.C.

The relationship between Article 85 and exclusive distributorship agreements is discussed by *Nicola Catalano* in *Recueil Dalloz* of September 16, 1964 (Chron. XXV pp. 173-180). He argues that these agreements coupled with promises by dealers not to distribute competing products, do not fall within the prohibition of Article 85. He reasons that such agreements are the most efficacious means of penetrating new markets, and that they enhance inter-product competition. Only by allowing such agreements can the small producer compete with the large producer who has a vertically integrated enterprise, and can thereby reap the advantages of an exclusive distributorship. The author suggests that if these agreements, contrary to his opinion, do fall within Article 85(1), then the Council should adopt a group exemption for such agreements under 85(3), while reserving to the Commission powers similar to those provided in Article 8 of Regulation 17. As is known, the latter solution has been proposed by the Commission to the Council with respect to bi-lateral agreements.

The situation may be different when sole agency contracts are accompanied by export prohibitions, as the recent Grundig-Consten decision has demonstrated. Yet, A. *Baetens* (one of the lawyers for Grundig and Consten) has argued in *Annales du Marché Commun*, 1964, pp. 13-16 that these agreements are not *a priori* excluded from the benefit of an exemption under Article 85(3). He thereby attacked especially *Suetens* who has defended this thesis in an elaborate contribution in the Belgian *Rechtskundig Weekblad* 1962-'63, pp. 2201-2226. According to Baetens Articles 85 and 86 E.E.C. have an identical purpose, although they are phrased differently. They are directed respectively to groups of enterprises which have kept their autonomy ("*ententes*") and those which have lost it ("*trusts*"). Consequently he reasons that the decisive element for an exemption under Article 85(3) is whether or not there exists an abuse. A sole agency contract accompanied by an export prohibition which does not have an "abuse character" would therefore qualify for an exemption. Although the argument is stated by Baetens with fervour, it is nevertheless not very persuasive. The burden always remains on the applicant to show that the export prohibition was "indispensable" in achieving the justifiable end of market entry, a requirement which the Commission will clearly examine very closely.

The Hearings Regulation 99/63/EEC of the Commission (commented upon in 1 *C.M.L. Rev.* 1963-4, p. 327) to be followed in cartel proceedings was applied for the first time in March 1964. *A. Baetens* in *Annales du Marché Commun* of June 1964, pp. 111-116 and *Pierre A. Franck* in *Journal des Tribunaux*, September 27, 1964, pp. 517-520 have reported on the experience of practitioners with the new rules during

the first sessions before the Commission. The impressions of the two authors are very similar. They give a detailed sketch of the organisation, preparation and procedure of the hearings of interested parties. Objections from a procedural point of view are that it is an inquisitorial rather than an accusatory system, whereby one of the parties (*i.e.*, the Commission) is at the same time charged with giving a decision and the fact that the Commission does not have to show its *dossier* to the persons concerned. In one of the cases, the private parties raised a formal protest against the "inequality of the procedure" before the Commission and have reserved their right to appeal to the Court.

Among the Community cartel jurisprudence, the Grossfillex-Fillistorf decision, O.G. 1964, 915/64 (1 *C.M.L. Rev.* 1963-4, pp. 237, 388 and 2 *C.M.L. Rev.* 1964-5, p. 107), the first negative clearance awarded by the Commission under Article 2 of Regulation 17, receives comment by *Gleiss and Hirsch* in the above cited issue of *Neue Juristische Wochenschrift*, pp. 1604-1606. The authors approve the Commission's limitation of the reach of "liable to affect trade between member States" in Article 85(1) by requiring "perceptible" (*spürbar*) restrictions of that trade, rather than merely theoretical or remote ones. The double tariff barrier to the prohibited reimport to the Community by the Swiss was the practical economic reason why no perceptible restriction was found. Criticized, however, is the independent analysis of purpose alongside effect, which would mean the penalizing of mere unrealized ambitions, whereas Article 85(1) is designed rather to penalize restrictive effects whatever the innocent purpose. Further, the prohibition on Fillistorf, the Swiss firm, against competing within the Common Market should not in any case fall under Article 85(1), because the purchase of goods in a member State by a foreign firm transforms any future trade in those goods into trade between the Common Market and third countries—which is not protected by Article 85(1) despite possible internal effects. Although the Commission was silent on the point, the same reasoning should apply to Grossfillex' agreement not to deal with other possible dealer-exporters to Switzerland, since only trade between a member State and a third country would here be affected.

The Grundig-Consten decision, O.G. October 20, 1964, 2545/64 (reported in the Legislation Section of this issue at p. 352; see also the comments by De Keyser at pp. 271-299), the most elaborate and important to date, is the first to declare an agreement forbidden under Article 85(1) E.E.C. and not exempted under Article 85(3). The sole-agency agreement between Grundig and the French distributor Consten was accompanied by several elements resulting in a projected absolute protection of the French market: Grundig was prohibited from exporting directly or indirectly to other French dealers; French law recognizes immediate "*opposabilité au tiers*", namely suits against parallel importers disregarding the sole agency contract; all Grundig sole-agents possessed exclusive national rights over use of the GINT trademark, which was also placed on Grundig products sold in Germany, so that infringement actions were possible against parallel importers. A French parallel importer, U.N.E.F., had earlier raised the invalidity of the Consten sole-agency agreement under Article 85(1) as defence; the suit was suspended by the French court, pending decision by the Commission. *Deringer and Tessin*, in *Aussenwirtschaftsdienst*, 1964, no. 10, pp. 329-33, annex an extremely sharp commentary to an excerpt of the case. Stylistically, they find that the absence of references to national jurisprudence and the somewhat abstract handling of the factual data is not reassuring to legal practitioners. The operational part of the decision is criticized for its apparent inclusion of Grundig's export prohibition on its German dealers, which was not a part of the case, and for the failure to consider separately under art. 85(1) the sole-agency and competing-products clauses of the agreement. With regard to the application of Article 85(1), the authors mainly object that the Commission did not limit itself to the *content* of the „Gint" trademark transfer agreement itself, but decided rather on its *capability* as an instrument of abuse—in contradiction to the

reach currently given to Sec. 1 G.W.B. The application of „indispensability" to the aspect of territorial protection, under Article 85(3)b, it is hoped, will not be so strict as to make all such arrangements *per se* prohibited, since they may serve justifiable economic ends. As it stands, however, they are of the opinion that the decision is probably the strictest in the world on the point, even going beyond the U.S. Supreme Court's *White Motor Case*. Here the authors meet opposition from *Dr. Kurt Markert* who came to the conclusion in *Aussenwirtschaftsdienst*, 1964, No. 11, p. 362 that both the American cartel practice concerning territorial restrictions and the case law of the Cour de Cassation of Paris (1 C.M.L.Rev. 1963-4, p. 359 Nicholas/Brandt, judgment of July 11, 1962) go further than the Commission in their condemnation of refusals to deal. The latter has indicated in the Grundig-Consten decision that it did not consider territorial protection as being *per se* prohibited.

Interest in the relationship of industrial property law to the rules of competition continues unabated. Among recent contributions of interest because of their comparative aspects may be numbered „Antitrustpolitik und Gewerbliche Schutzrechte in der Europäischen Wirtschaftsgemeinschaft", by *Gerard Weiser*, in *Wirtschaft und Wettbewerb*, September 1964, No. 6 at pp. 719-746. The article, a reworking of the original contribution to 38 New York University Law Review (May 1963) 3, is rather a survey of the points of contact of agreements whose subject is industrial property rights with the rules and jurisprudence developed to date under the E.E.C., than a detailed analysis of possible anti-competitive affects of such agreements. Thus, the author's review of the impact of Articles 85-86 and the Commission's declarations of 1962, his discussion of the overlap of Community and national cartel law in this area, and his analysis of the Bosch case are not likely to provide fresh information to those already familiar with the scope of the problem. Interesting is, however, the suggestion that the defense of „abuse of patent" (*Patentmisbrauch)*, long familiar in American patent infringement cases, could be based on Article 36 E.E.C., which precludes the use of industrial property rules "as a means of arbitrary discrimination (or) as a disguised restriction on trade between member States." Query, whether a patent infringer can draw any comfort from this prohibition directed apparently toward the member States, and not toward individuals? Also pointed is the conclusion, based on German and French practice, that the Commission, in applying Article 85(3) to such agreements as may fall under Article 85(1), may well pay more attention to the proportionality of mutual restrictions between parties, rather than to a standard of absolute necessity of the restriction to achieve the desired end. A reading of the Grundig-Consten case, however, suggests otherwise.

Finally mention should be made of a stimulating symposium on unfair competition in the light of the recent *Sears*, *Roebruck* and *Compco* cases in the Supreme Court, in the *Columbia Law Review* of November 1964 pp. 1178-1242. Entitled "Product Simulation: a Right or a Wrong" it contains contributions by Daphne R. Leeds, Milton Handler, Walter J. Derenberg, Ralph S. Brownetr and Paul Bender.

Taxation

In the July issue of *La Fiscalité du Marché Commun*, 1964, pp. 208-212, *Prof. Schendstok* gives a survey of the Netherlands tax system and the modifications required by the E.E.C. Treaty. The total proceeds for the fiscal year 1964 will amount to some 13.400 million guilders, of which the share of direct taxes is roughly 60 per cent. The income tax rates are especially outdated, in view of the depreciation of money values; on the other hand, since the present cyclical situation prevents a decrease in direct taxation without counter measures, he favours a higher turnover tax rate. Moreover, this is indispensable in view of the Community plans for a harmonisation of turnover taxes. It is therefore necessary that the Netherlands take a decision within a short period.

Given the primarily economic and social objectives of the E.E.C., it may at first seem surprising that the Community is concerned also with the problem of harmonisation of private and procedural law. So begins the contribution of *Prof. Hallstein* President of the E.E.C. Commission in Rabels Zeitschrift, 1964, pp. 211-231, a lecture delivered on July 8, 1963, in Hamburg under the sponsorship of the Max-Planck-Institute and the Wissenschaftlichen Gesellschaft für Europarecht. The growing integration of a common market readily discloses, however, the need for eliminating distortions arising from both private and public law, between which no distinction is made in Article 100. The limit to the process of harmonisation must be set at that point where freedom and equality of economic actitity and the formation of common economic policies are no longer impaired by the national legal or administrative rules. Not only the motivation of achieving and assuring an unfalsified competition plays a role here, but also the need for rationalising the bewildering array of law and regulations, with an eye to improving legal security and saving time and money in proceedings. Whether to harmonise by means of approximating national norms, or by means of introducing a single uniform law in any area, is also left open by Article 100, but depends materially on the difficulties created by the limited territorial reach of national law itself. Clearly an area where uniformity was desired, Community cartel law has been implemented by regulation, however, pursuant to the special provision of Article 87. Where the power of regulation has not been given the Community, then the classic means of international convention are at hand, as for the protection of industrial property (*e.g.*, draft patent convention), the formation of a European Company, and the reciprocal recognition and execution of judgments and bankruptcy proceedings. Already begun is work on the determination of competency (where suits may be brought), in order to eliminate multiple proceedings A central problem to be dealt with, perhaps not completely covered by Article 177 E.E.C., is the uniform interpretation and administration of the law in all the above areas. The numerous difficulties, concluded Prof. Hallstein, do not obscure the grand vision of a functional legal federation, for the first time in European history within reach without the use of force.

One of the subjects discussed by Prof. Hallstein, the reciprocal recognition and execution of judgments by the various Courts of the member States is discussed by *Martha Weser* in „Litigation on the Common Market level" (*American Journal of Comparative Law* 1964, pp. 44-60). This author had already written elaborate comparative studies in this field (*A.J.C.L.* 1961, pp. 324-344, *Revue critique de droit international privé*, 1959, pp. 613-649, 1960, pp. 21-41, 151-172, 313-333, 533-556). This article deals with an interesting question which the author raises in connection with proceedings in the national courts of the Community. She points out that owing to the varying rules of private international law and the differing bi-lateral treaty relations the result of proceedings brought, by say a U.S. plaintiff against a Belgian, French and German firm jointly will depend on whether the venue is a Belgian, French or German Court. Dissimilar results will also arise when the convention on the Competence and Execution of Judgments (based on its last draft) is put into effect. Such differences the author contends ought to be eliminated and the problems resolved „on a Common Market level" by a harmonisation particularly of the rules of private international law.

In the literature on the directive proposed by the Commission under Article 54(3g) with respect to the coordination of guarantees for third parties provided by various forms of companies, the main question so far discussed has been whether the Council of Ministers is indeed empowered by this article to enact a directive, or whether only Article 100 can serve as the legal basis. See in this connection also the contribution by *Fikentscher and Grossfeld* in this issue, pp. 259-270.

The new convention and protocol associating the Netherlands Antilles to the Community on the basis of Part IV of the E.E.C. Treaty (see Legislation Section in this issue at p. 354) is discussed in a short note by *Dr. K. Wockenfoth* in *Aussenwirtschaftsdienst*, no. 10, 1964, pp. 324-325. In particular the admission of the imports of petroleum products from the Netherlands Antilles in the Community has been the reason for the protracted negotiations for association.

Case Law of the Court of Justice of the European Communities and of National Courts

Both national and international courts are confronted with the problem of the application of general principles of law wherever the relevant texts are silent. See, for example the civil codes of various countries, and the famous Article 38(c) of the Statute of the I.C.J. which refers to „the general principles of law recognized by civilised nations" as a third source of law after international treaties and international customary law. *Werner Lorenz* has devoted a study to the elaboration of these principles by the Court of Justice of the European Communities (*American Journal of Comparative Law*, 1964, pp. 1-30). In the particular case of the Communities the general principles are those proper to the member States alone. He makes it clear, however, that it is certainly not necessary that the laws of *all* member States are in agreement on a certain principle; not even in the case of Article 215(2), although this provision refers to "the general principles common to the laws of the member States" for determining the rules of tortious liability (contra: *Heldrich*, Die allgemeinen Rechtsgrundsätze der ausservertraglichen Schadenshaftung im Bereich der EWG, 1961). On the other hand, „no particular national law of the Six should claim any preference over the others, unless it can offer a superior solution to a problem, one best fitted to serve the aims of the Treaties" (p. 10). Lorenz rightly pointed out that the administrative law of the member States provide most of the materials for the Court's decisions (e.g. *détournement de pouvoir*, *faute de service*). But principles and rules derived from the private laws of the Six play an important role as well: Their influence is not limited to questions of liability for damages, but extends to areas such as contracts for services, unjust enrichment, and reservations of title.

The distinction in Community Law between general and individual acts is primarily of importance for establishing entry into force with respect to the interested parties (publication is required for general acts; notification for individual acts) and for determining the right of appeal of natural and legal persons (enterprises in the E.C.S.C.) Pursuant to Article 173 para. 2 E.E.C. (33 para. 2 E.C.S.C.) these persons have only a limited right of appeal against Community acts. *Dr. Fuss*, *Privatdozent* in Hamburg, has analysed closely the existing practice and case-law of the Community organs on this point in three issues of *Neue Juristische Wochenschrift*, 1964, No. 11, pp. 327-331, No. 21, pp. 945-951 and No. 35, pp. 1600-1604. In the third part of his study Fuss discusses in particular some problems which present themselves in a number of borderline cases. Still to be looked upon as general acts are acts having a limited scope *ratione personae*, *materiae* and *temporis*, as long as they do not designate the addressees, acts in the form of a general regulation but in effect limited to a specific group of persons, acts directed only to subjects of one member State (contra: *Rabe*, Das Verordnungsrecht der EWG, 1963, pp. 32 and 45) and the refusal by a Community organ to enact a regulation of a general character. On the other hand, even very complex measures are to be considered as individual acts if only the number of addressees at the moment of enactment has been fixed and does not change afterwards. Similarly Community decisions obliging or authorising third parties (either member States or private persons) to take certain measures are of an individual nature. In this respect Fuss follows closely the case-law of the

Court of Justice (cases 18/57, Rec. V, p. 250 and 25/62, Rec. IX p. 197). Thus the decision of the Commission authorising a member State temporarily to suspend certain tariffs is an individual act, although the effect of the decision may be somewhat undetermined.

The decision of the Court of Justice of the European Communities in the consolidated cases 73 and 74/63 (concerning the Dutch firms Internatio and Puttershoek, Rec. X, p. 5 *et seq.*, 2 *C.M.L.Rev.* 1964-5, p. 3 *et seq.* with annotation Sk) has also attracted attention in Belgium. *Prof. Rigaux* paid special attention in the *Journal des Tribunaux* of September 27, 1964, pp. 521-527 to the fact that the original decision of the Commission authorising the German and Dutch governments to take certain measures with binding effect on private persons on the basis of Article 226 E.E.C. had not been published in the Official Gazette. Such lack of publication on the part of Community organs would have compelled the Belgian government under Belgian law—had it been involved—to publish the decision on its own initiative in the Belgian Official Journal. Rigaux specifically approved the fact that the Court of Justice rejected the German thesis that it is not empowered in a proceeding under Article 177 to test the validity of a decision directed to a member State in an appeal by a private person and in case the normal time-limit for a "direct" appeal had long expired.

Through this decision the "indirect" legal protection of individuals has certainly expanded, as has been stated as well by *Dietrich Ehle* in a short but very instructive article in the *Monatschrift für Deutsches Recht*, September 1964, pp. 719-722. He mentions three categories of indirect protection: (1) the exception of illegality (*exception d'illégalité*) under Article 184 against regulations; (2) the appeal as to the validity of decisions directed to a member State pursuant to Article 177 (b) (see above); and (3) the appeal against a Treaty provision itself. An action under this latter category cannot be instituted before the Court of Justice as Ehle rightly stated, since Article 177 admits only an appeal relating to the application or interpretations of the Treaty, not to its validity. In Germany such an action could be brought, however, before the Constitutional Court (*Bundesverfassungsgericht*), as a Treaty can be tested as to its conformity with the Constitution (*Grundgesetz*) through its ratification law. In other countries, such as the Netherlands under Article 60, par. 3 of the Constitution, such an action is not possible. It is clear that the priority of Community law over national law which has been confirmed by the Costa v. Enel case (2 C.M.L.Rev. 1964-5, pp. 197 *et seq.* with annotation Sk.) is opposed to such legal review.

Turning now to pertinent national jurisprudence, the *Rechtskundig Weekblad* of October 11, 1964, carries at pp. 314-334 the report of a case decided in "summary proceedings" (*kort geding*) in July before the president of the Commercial Court of Antwerp. A group of Antwerp tugboat and salvage companies, enjoying together a factual monopoly attempted to exclude in advance a new comer soon to begin operating. The technique was to force their clientele to enter into exclusive dealing agreements, with the incentive of retroactive rebates for "remaining faithful", while clients who did not enter such agreements were charged at considerably higher rates. The court found that, although neither the Rome Treaty nor the Belgian Competition Law of May 27, 1960 had expanded the procedural competence of the courts, if could nonetheless apply the substantive criteria therein, under Article 88 E.E.C. and Article 9 of Regulation 17, as long as the Commission had not initiated any proceedings. So doing, the court held, *inter alia*, that those criteria were indeed violated, and that the exclusive agreements were void, for abuse of a dominant position under Article 86 E.E.C. Curiously, the opinion does not explicitly deal with the questions of interference with trade between member States, the complementary character of the Treaty and the Belgian law, and fixing the relevant market. Apparently a positive result is assumed for all these, probably correctly; but most

space is given to the abusive nature of the suspect conduct, and the defences thereto. An appeal has been entered.

Another Belgian case decided by the Court of Appeal of Brussels on June 25, 1964 has been annotated by *Prof. Rigaux* in *Journal des Tribunaux*, October 18, 1964, pp. 576-585. The court dealt with the question whether the court below, the Commercial Court of Tournai, had rightly decided in its judgment of January 10, 1964 (*Journal des Tribunaux*, June 25, 1964, p. 400 with annotation Rigaux) that it did not have to suspend its decision on the validity of an agreement concluded in 1936 between producers of Portland-cement and other cement either in connection with Article 9 par. 3 of Regulation no. 17 or with a request for a preliminary ruling by the Court of Justice of the European Communities under Article 177. The Court of Appeal, however, was of the opinion that a suspension had been required. In the meantime the E.E.C. Commission had decided on January 17, 1964—just after the Commercial Court judgment—to institute proceedings against the agreement pursuant to Regulation no. 17. The Court of Appeal nevertheless did not base itself on Article 9 par. 3. It rather reasoned that a general rule prevents a Belgian court to decide if an indispensable part of its decision depends on another court (in this case, however, not the Court in Luxembourg but the Commission). Rigaux has criticized this reasoning in his annotation. It remains strange that there have been so many conflicting decisions in different member States on the interpretation of Article 9 par. 3, without its having been felt necessary to invoke the opinion of the Court of Justice of the European Communities on the interpretation of this controversial and key-article.

Die Europäische Aktiengesellschaft in der E.W.G. by Dr. MARIO WANG, 1964 (152 pages)

European lawyers remain interested in the problem of the European limited company. This is shown again by the study of Dr. Mario Wang, which was issued as publication no. 27 of the Universitätsverlag, Freiburg (Switzerland). His work is divided into two parts: I. The development of the problem of the international corporation and II. The European limited company.

In the first part he gives a historical survey of the development of the international corporation in general. This survey starts with 1910, the year in which the Congrès Mondial des Associations internationales met for the first time in order to discuss a draft of a supranational statute for international associations. Also the drafts of the Institut de Droit International (1923 and 1950) and the conferences of the International Law Association, where the subject of International Companies appeared on the agenda (1948 and 1954), are treated. Then, the work of the Hague Conference on International Private Law in 1951 which resulted in the Convention concernant la reconnaissance de la personalité juridique des sociétés, associations et fondations étrangères, of 1st June 1956, is mentioned. Finally, Dr. Wang's survey deals with the drafts on European Companies made by the Council of Europe, the Entreprises Communes which appear in the Euratom-Treaty and several international corporations established by or in pursuance of a Treaty "ad hoc", such as the Bank for International Settlements, Eurofima, Société Internationale de la Moselle, Eurochemie and Saarlor.

The last example is particularly interesting for the actual subject-matter of his study. This Franco-German company, established in pursuance of the Treaty concluded on October 22, 1956 between Germany and France for settlement of the Saar question, has legal personality in both countries. Its memorandum and articles of association are given priority over both countries' law; and, for the solution of questions that have not been provided for and for the interpretation of the provisions of the memorandum and articles of association, they refer to "die gemeinsamen Grundsätze des französischen und deutschen Rechts". Thus, these "gemeinsame Grundsätze" are given priority over the national legislations in both countries.

In the second part Wang comes to his actual subject-matter: the European limited company in the E.E.C. His study of this subject has apparently been inspired by the Congress held in Paris in 1960 on the Création d'une Société Commerciale de Type Européen.[1]. Here many questions dealt with in the first part, the historical survey of the development of the international corporation, recur. As appears from the title of his study, Wang puts his considerations within the framework of the E.E.C. . Can the European limited company contribute to the accomplishment of the aims of the Common Market?—a question which he answers affirmatively. However,he rightly deems the institutional framework of the E.E.C. insufficient to accomplish the concept of a European limited company. The E.E.C. does not constitute a political unity and cannot act as a supranational legislator in this field.

The E.E.C. Treaty tries to provide practical solutions for the difficulties which may arise when companies subject to a certain national legislation extend their activities beyond the national borders. A solution may be found by negotiations between the States on certain subjects, such as the three mentioned in Article 220. It may also be found by means of a partial adaptation of the national law systems.[2] All this means pragmatic solutions for specific purposes. The concept of a European limited company, that is one general construction effective in the various countries besides the existing national forms of limited companies and in „peaceful coexisttence" with these national forms, is not found in the E.E.C. Treaty. Dr. Wang also deems it impossible to materialize such a solution within the present E.E.C.-framework. At best, the Community could assert its moral authority by way of a relevant recommendation, which, however, has no obligatory effect.[3]

Wang too regards the European limited company as a construction next to the already existing national constructions. The time of unification of company law in the various countries is far distant. On the contrary, I am afraid that the development of the last few years shows an increasing divergency of the national regulations. As far as I know, the reform of Company Law which is in course in several E.E.C. countries hardly takes into account the company law of the other countries.

Nevertheless, I think that it should be possible to agree on a construction for the European limited company. It should be possible to reach an agreement on essential issues such as the method of incorporation of the European limited company, the power of representation of its management, and the extent of the obligatory publications, as well as the various organs of the European limited company and the distribution of powers among these organs. The example of the Saarlor cited above demonstrates this on a modest scale. However, the main difficulty, in my opinion, will become the representation of the labour factor in the organs of the limited company. On this point, in particular, different views appear in the various countries, as politics plays an important role here. Wang only refers to this question briefly in note 2 on page 136, where he mentions the "Mitbestimmung" as a subject incapable of unification. It is true that, even if agreement is reached on a general set of rules for a European limited company, this subject will not be a part of them and will be left to the national legislators to be regulated or, as the case may be, not regulated at all, according to the different political outlook in the various countries.

Within the E.E.C. the principle of freedom of establishment prevails: equal treatment of nationals and foreigners. Once the European limited company will be

1. On this congress, see *inter alia* "Le Droit Européen" 1960, nos. 21 and 22.
2. The E.E.C.-Treaty refers in many articles to the harmonisation, coordination or adaptation of legal rules. The Draft, based on art. 54, paragraph 3 under g, presented by the E.E.C.-Commission to the Council on February 21, 1964 and published with the Advice of the Economic and Social Committee in the *Journal of the European Communities* of November 27, 1964 (no. 194) could not be dealt with in Dr. Wang's Study. The Draft deals with a partial harmonisation of company law.
3. Wang, p. 150.

achieved, it may claim national treatment. In all countries accepting the European company, this company will be considered a national corporation. At the same time however, in whatever country it wants to operate, it will have to comply with the national requirements. A European limited company that wants to run a mining industry or a steel-mill in Germany will have to conform with the requirement that among the management (Vorstand) and the board of directors (Aufsichtsrat) the labour factor shall be represented. The European limited company will never be a way to escape from this requirement.

Much attention is given by Wang to the method of realizing the concept of a European limited company. Already in the Introduction the author states that there are two ways of approaching the problem :the adoption of a Société de Type Européen in the national law of the E.E.C.-countries and what is called by him the supranational solution: by the conclusion of an international Convention between the E.E.C. partners. The former solution has apparently been inspired by the Paris Congress of 1960. For the latter solution the author refers to the publications of Thibierge and Sanders issued in 1959.[4] The author does not make a clear choice, although his conclusions, notably on page 149, tend to the supranational variant.

I cannot see an essential difference between the two methods. It is in the first place a technical question which method is to be decided on. The adoption of a Société de Type Européen in the countries' national law must also be preceded by a Convention; the provisions to be adopted in the national law would be set forth in an annex consisting of the uniform law. In the other solution, the uniform law is part of the Convention itself. Thus, in either case an international convention is necessary—which, I suppose, in either case will be open to accession of other than the contracting parties. In either case a solution will have to be provided for the danger of diverging interpretations.

The European Company would offer trade and industry an extra possibility to be used under circumstances that justify this special form of company, next to the already existing national limited company constructions. It is certainly not so that every enterprise would be capable of being constituted in the shape of a European limited company.

In this regard also it would appear wiser to choose what is called by the author the supranational solution and to have one central authority to decide whether in the special case the requirements for the constitution of a European limited company are fulfilled.[5]

In a relatively small compass Dr. Wang's study gives a rather complete survey of what, until now, has been thought and written about the concept of the European limited company. He enters upon many questions, all of a legal character. These provoke further consideration. His is a legal study, which considers only from a legal point of view the preliminary question *why* we should strive for the creation of a European limited company besides the existing forms. As one of the advantages the author mentions that many problems of international private law, such as recognition, the transfer of seat and amalgamation, can easier be solved. The economic point of view is referred to only incidentally, in the sense that especially medium-

4. Thibierge, p. 360-362 of the reports to the 57th Congress of French notaries public, collected under the title "Le Statut de l'Etranger et le Marché Commun", published by the Librairies Techniques, Paris 1959. Sanders, *Naar een Europese N.V.?*, published by Tjeenk Willink, Zwolle 1959, also published in *Rivista della Società*, Nov.-Dec. 1959 "Vers une société anonyme européenne?" p. 1163 seq., and in *Aussenwirtschaftsdienst des Betriebs-Beraters*, Jan. 1960, "Auf dem Wege zu einer europäischen Aktiengesellschaft?", p. 1 *seq.*

5. See p. 14 of my inaugural address cited in note 4, where I mention the Office Européen de Sociétés Anonymes, that could serve also as a central Companies Registry for European limited companies.

sized enterprises will benefit from such a solution. Practice shows that the big international concerns can very well do without this new legal construction. This purely legal approach of the author leaves open the perhaps even more important question of the economic need for such a new construction.

The last point is not meant as criticism of this interesting study. It is only illustrative for the complexity of the subject. Our grateful acknowledgments are due to Dr. Wang for this comprehensive work, which will form an extremely useful base for further study of this subject, on which the last word has certainly not been said.

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JURA EUROPAE, Part I, *Droit des Sociétés / Gesellschaftsrecht.* Verlag C.H. Beck, München and Berlin / Editions Techniques Juris-Classeurs, Paris 1964.

This is the first of four Parts which are meant to give the lawyer—in two languages, French and German—a clear and fairly detailed survey of particular subjects of the law in the six Common Market Countries. The three Parts yet to appear will deal with taxation law, commercial law and labour and social law; the first Part which has now appeared, deals with company law. It has six divisions, each of which contains a description of the law in one of the six countries, followed by an alphabetical index in the two languages. Each division is written by a different author, and although there is a certain diversity of style, their names guarantee expert treatment: for Germany Professor Hefermehl of Heidelberg, for Belgium Professors del Marmol and Dabin of Liège, for France Professor Bastian of Strasbourg, for Italy M. Colombo under the direction of Professor Rotondi of Milan, for Luxembourg M. Delvaux, Attorney at Luxembourg, and for the Netherlands Professor van der Grinten of Nijmegen.

One might ask, whether there is, apart from the advantage of having the whole subject matter in one book, much sense in publishing a work like this, as there are excellent and more detailed text books on the law of each country available in those countries. The answer, in my opinion, must be, without any doubt, in the affirmative, for several reasons. First of all, the language barrier, which prevents the law of some of the Common Market Countries from becoming known to any important extent outside its own frontiers, is broken, when a work like this is published in the French and German language at the same time. In the second place one does not easily find textbooks in the different countries, in which exactly the same subject matter is treated with the same degree of thoroughness and minuteness and, above all, with the same division into chapters, making it easy for the reader to make comparisons. In the present book the chapters are indicated by the same numbers, facilitating reference to a particular legal subject in the law of more than one country, the main division being as follows, in the French language:

—.00 = Généralités sur le droit des sociétés
—.10 = Société anonyme (S.A.)
—.20 = Société à responsabilité limitée (S.a.r.L.)
—.30 = Société en nom collectif (S.N.C.) et société en commandite simple (S.C.S.)
—.40 = Société civile (Sté. civ.)
—.50 = Association en participation (Ass.part.)
—.60 = Sociétés diverses et formes mixtes.
—.70 = Groupements de sociétés.
—.80 = Régime des sociétés étrangères.
—.90 = Frais de fondation.

It is clear from this enumeration, that attention has been given not only to the company limited by shares, public and private, but also to other forms of co-operation in business and even outside business. Those interested in international law will find much to their liking in chapters 0.90, i.e. the different contributions on the treatment of foreign companies. Also chapters 0.70, dealing with mergers, holding

companies, the forming of groups, etc. contain much which is not found elsewhere at any rate not in such an easily comparable context.

Each chapter is concluded with a list of authors on the subject, facilitating further orientation. Not all of the contributors have added forms for articles of association. The Belgian contributors unfortunately considered it sufficient to mention only authors in the French language on Belgian law, forgetting that there are many Flemish- and Dutch-speaking lawyers in the Common Market Territory who would like to be informed on Belgian literature in that language. As JURA EUROPAE is published in the loose-leaf form, there is ample opportunity to repair these small deficiencies which do not detract in any way from the general usefulness of this book. It will certainly find its way into the libraries of many lawyers, and also outside the Common Market.

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ULF BERNITZ, *Swedish Anti-Trust Law and Resale Price Maintenance*, Industrial Council for Social and Economic Studies (Studieförbundet Näringsliv och Samhälle) Stockholm 1964, 54 pp.

The appearance in June of this year of this booklet by Mr. Bern, LL. M., M.C.J. (New York University), a Swedish anti-trust specialist, is most timely: we note the recent passage of the Resale Prices Bill in Great Britain, with its broad extension of the former prohibition against collective enforcement; and the action taken by the Dutch Minister for Economic Affairs against resale price maintenance with respect to a number of durable consumer goods. An enumeration of the basic principles of the overall Swedish system of anti-trust law would surprise especially the American and German proponents of prohibition legislation: The rule of reason is extensively applied, with the emphasis on effects, rather than power or purpose; no presumptions are employed to shift the burden of proof onto the suspect. Unique is the technique of negotiation between government and business, which has resulted from the enactment of less stringent cartel legislation and is reflected in the (Damoclean) suspension of price control legislation, all in return for business promise of selfrestraint. Publicity of cartel information and stimulation of popular price consciousness are also central.

Two types of restrictive practice have, however, been considered nearly always incompatible with the public interest and made criminally punishable: joint tendering of bids, and resale price maintenance. The slowness of modernization and rationalization of distribution—an outgrowth of war-time business co-operation, legality of horizontal price-fixing, and the principle of small-retailer security—led to the inclusion of the latter prohibition in Article 5 of the Anti-Trust Act of 1953. It turns on the presence of a restraint on competition, specifically provable harmful effects, and incompatibility with the public interest evaluated in concrete policy objectives for a given sector. The prohibition embraces, in addition to resale price contracts, suggested prices unaccompanied by a disclaimer of any binding effect and refusals to deal following failure to persuade a re-seller not to cut prices. On the other hand, simple refusals to deal because of probable price-cutting, although having the same economic effects, are not prohibited—a dichotomy similar to that in the *Miles* and *Colgate* jurisprudence in the U.S., and likewise based on the freedom of contract. Further, defences based on objectively valid criteria, such as failure to service customers, or a policy of selective marketing have been allowed. Despite the fact the most complaints have arisen in this sensitive area, the technique of negotiation has continued to work. Mr. Bernitz concludes that the law has certainly stimulated increased price competition and greater efficiency in distribution, with savings probably being shared by the consumers in the long run. The Swedish business community has by now accepted the principles of the system, and continues to co-operate. Whether the system is applicable in other national contexts, except with

similar economic structures, is appropriately answered with a cautious negative. Seen against the comparatively modest objectives of the Swedish legislation most of the author's evaluations are well-balanced and realistic. Although one may question the optimistic tone and a treatment perhaps too schematic for the inquisitive foreign jurist, the survey provides a provocative introduction to a novel technique of economic control.

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Antitrust Developments in The European Common Market. Report of the subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate. Pp. 511. U.S. Govt. Printing Office, Washington 1964.

This report largely written by Professor Herman Schwartz of the State University of New York is based on investigations carried out by himself and the late Senator Estes Kefauver in Europe and the U.S. It contains an account of the development of the Community anti-trust law and a survey of the national laws. It also includes an appendix containing a print of numerous official documents and articles by legal authorities of different nationality. It has the merit of including even the recent Consten/Grundig decision of the E.E.C. Commission.

The majority view of the Senatorial Committee is that although there are many horizontal cartels in the Common Market, *all* observers agreed that despite this competition in Europe was keener than ever. Competition was more attractive and more prevalent, due to the revival of the European economy, and particularly so in the distribution of consumer goods.

As to the extent to which American interests have been affected by the Community anti-trust law great emphasis was placed upon the view expressed by Dr. Behrman, U.S. Assistant Secretary of Commerce for Domestic and International Business, who told Senator Kefauver's Committee that his general experience was that there had been no substantial complaints that any part of the Community anti-trust laws impeded American businessmen from doing business there.

The concern of the American businessman seemed to be his own anti-trust laws rather than the laws of others. The majority view of the sub-Committee was that an international treaty for co-operation against international restraints was the best long-run solution for international trade, and it welcomed any rigorous action beforehand by the U.S. Antitrust Division against international cartels.

On the other hand the minority of three (Senators Dirksen, Hruska and Keating) consider that American business is considerably inhibited abroad by uncertainty and conflict between the various anti-trust laws, particularly in the field of joint ventures and industrial property licences.

DENNIS THOMPSON