General

The problems raised by the European Communities are usually of such a practical nature, that the literature in this field deals mostly with very direct and concrete questions, be they legal, economic or political. Very rarely is attention paid to a theoretical evaluation of the integration process or to an analysis of the concepts underlying the European Communities. This is done, however, in the contribution by *Dusan Sidjanski* in *Annuaire Européen*, 1962, pp. 69-91 entitled "Le processus d'intégration dans les Communautés européennes" (with an English summary, pp. 91-99). A short introduction is given on the various definitions used to describe the concept of "integration". Sidjanski distinguishes further five stages in the integration process. His main thesis is that this process of necessity encompasses ever wider circles of activities. Every act has repercussions in new sectors and in turn engenders new processes. This may be seen not only in the development of the institutions which tend to create a "eurosphere" around themselves; but also in the areas touched by the creation of the Common Market as an economic entity. On the other hand forward progress is not guaranteed; disintegration would happen in a similar automatic and multiplying way should the Communities encounter serious difficulties. The integration process is, however, not automatic in the sense that political unity will necessarily follow economic integration: here a separate agreement is required. Although this contribution is provocative, the reader should not expect to find in it solutions for currently pressing problems. It should be viewed rather as an experimental effort in the study of the conceptual basis upon which the more pragmatic superstructure of the Communities is to be erected. Related also to the theory—but more connected with day to day reality—is the interesting discussion between the author of the above article and *Jean Siotis* in *Journal of Common Market Studies*. It may be recalled that Siotis' main thesis in "Some Problems of European Secretariats" (1964, pp. 222-251) is that the High Authority and the E.E.C. and E.A.E.C. Commissions with their services do not essentially differ in nature from "classical" international secretariats such as I.L.O. or U.N. *Sidjanski* wrote a detailed commentary on this paper: "Some remarks on Siotis' Article" (1965, pp. 47-62). His main argument against Siotis is that the latter's approach has been too one-sided. More particularly the general "image" of the Communities as such has been lost sight of. Thus, the secretariat's function is considered out of the context of the structure of the organisation itself. Although one can agree with much of this criticism the objection against a primarily functional analysis of an international secretariat is not very persuasive, especially in the light of the successful books written from that viewpoint. Moreover, whereas Siotis may have underestimated the novel aspects of the European executive bodies, Sidjanski has not taken enough into account that the Community executives have evolved from the traditional secretariats and ought not to be treated as completely different in kind.

The importance of Article 5 E.E.C. (obliging the member States to take all appropriate measures in carrying out their obligations under the Treaty) was underlined by *R. M. Chevallier* and *G. Rasquin* in *Revue du Marché Commun* 1964, pp. 489-495. In the face of several—what they considered as clearly—wrong applications of Community law by national courts, they rightly pointed out that Article 5 is not a mere political declaration of desiderata. It contains binding law which must be implemented and taken into account by the organs of each member State, including national courts. In this light the report by *Dr. F. Sieveking* of the October 1964 meeting of German constitutional lawyers in Kiel deserves special attention (*Monatschrift für deutsches Recht*, 1965, pp. 21-24). The first theme of the congress was "Continuity and change in democratic and legal constitutional ("rechtsstaatliches") structure in the international Communities". Both speakers, Prof. Kaiser and Prof. Badura, stated that national concepts, such as "democracy" and "Rechtsstaat" cannot be transplanted without modification into the law of the Communities. In the development of Community law, it is less important to establish a parliamentary democracy, than "alle Formen und Möglichkeiten demokratischer Legitimierung in Anspruch zu nehmen" (Kaiser). Prof. Badura spoke in particular of the relationship of the new law to German constitutional law. The German Constitutional Court *(Bundesverfassungsgericht)* would be competent to decide on the constitutionality of the ratification law of the E.E.C. and also whether the German Government was indeed competent to create an authority (öffentliche Gewalt) which is not bound to respect the German Constitution. Should the Constitutional Court decide here in the negative, the Federal Republic would naturally remain bound under international law to observe its E.E.C. obligations, but the E.E.C. Treaty, would have no effect in national law. According to the rapporteur Sieveking the participants did not consider it impossible that the Constitutional Court would take the negative view but the consequences thereof were not taken too seriously ("... es handele sich um ein altes Dilemma des Völkerrechts, das hingenommen werden müsse"). Hopefully the Constitutional Court will not itself share the pessimism of the meeting of German constitutional lawyers when it renders an opinion on the Finanzgericht Rheinland-Pfalz case (1 C.M.L.Rev. 1963-4, p. 463). The effectiveness of Community law in Germany would indeed be at stake. From Prof. Ipsen's article in this issue of C.M.L.Rev., pp. 379 one may learn, however, that other tendencies exist in Germany as well.

In the Belgian *Annales de Droit et de Sciences Politiques* 1964, pp. 149-169, *Silvio Marcus Helmons* discussed the consequences of the law of the European Communities on Belgian law and the attitude which the courts must adopt. He made the relevant distinction between "self sufficient" and "self executing" Treaty provisions. The former do not require any implementation by a Community organ, but on the other hand they are not necessarily self-executing, *i.e.* they need not have direct effect in the internal legal order of the member States. Whether this is so, is a question of Treaty interpretation, and should be considered separately. Helmons analyses the various categories of national and Community acts which may conflict. In practice the relationship of national posterior law to conflicting Treaty provision is the most pregnant. Although he cites the address by the Belgian *procureur-général Hayoit de Termicourt* with approval (see 1 C.M.L.Rev. 1963-4, p. 376) he advises the Belgian courts to follow the traditional rule of the *lex posterior* until either Parliament or the Cour de Cassation has established a clear position. In a second part of his contribution Helmon dealt with the various aspects of cooperation and division of competences between the national Courts and the Court of Justice. Apart from the provisions of Article 41 E.C.S.C. and Article 177 E.E.C., he draws attention to Article 66 para. 5 E.C.S.C. Pursuant to the latter article the Court of Justice alone supervises the acts of the High Authority whereby the dissolution of concentrations is ordered. A provision for cooperation is Article 6 of the Supplementary Rules of the Court. Where a witness or expert has committed perjury before the Court in Luxembourg, national authorities may be asked to undertake the criminal prosecution. Helmons emphasises the autonomy of the latter. It remains up to them whether to prosecute or not and to evaluate the seriousness of the crime. Finally Articles 92 E.C.S.C. and 192 and 187 E.E.C. where the rules for the enforceability of Community judgments are laid down are considered. In this case the national authorities have only little discretion.

The *Revue générale de droit international public* 1964, pp. 708-718, contains a contribution by *Florent Bonn* on the legal aspects of language problems in the Communities. These problems arise mainly because of the authenticity of the texts in each of the four languages. Included is a description of Regulation No. 1 on the use of languages in the E.E.C. (O.G. 385/58; 1 C.M.L.Rev. 1963-4, p. 94) and of the relevant articles in the Rules of Court. *Otto Riese*, a former judge of the European Court, undertook a similar analysis of the language problems with which the Communities are faced in *Festschrift Hans Dölle-Vom Deutschen zum Europäischen Recht*, Band II, 1963, pp. 507-525. His instructive article was especially directed to a study of this problem in relation to the Court of Justice. A first part was devoted to the procedure before the Court and the manner in which the Court itself has dealt with the language difficulties. Riese confirmed that the Court's own deliberations take place in French, thereby providing those judges whose mother tongue is French with a significant advantage. He immediately adds, however, that to his knowledge this advantage was never abused. All draft-judgments are prepared also first in French, even though the language of the proceedings is another. After having been approved by all the judges, the draft is then translated into the language of the proceedings and the translation constitutes the authentic text! In the second part of his article Riese mentioned several concrete interpretation problems which the Court had to solve, resulting from diverging treaty-texts. Special difficulties arise when technical expressions, such as *détournement de pouvoir* or *faute de service* are used. The author noted the Court's tendency to deviate gradually from the French administrative law concepts from which these terms originally derive; instead the Court has endeavoured to provide a true "Community content".

Agriculture

The article by *Michael Butterwick* entitled "Before and after December 23, 1963", which appeared in the *Journal of Common Market Studies* for October 1964, pp. 62-74, contains a survey of the second series of E.E.C. agricultural decisions. To a certain extent his proposals and evaluations have been superseded by the uniform cereal price decision of December 1964. But his discussion of the first regulation of January 1962 and the additional market regulations for beef, rice and dairy-produce form a useful introduction to a complicated field. He pays much attention to the importance of agriculture for the total economies of the Six and to the impact which these decisions have on the position of the European Commission. Finally he pointed to certain aspects of special significance for Great Britain. On the one hand little room for negotiations with Britain has been left open, since the regulations cover 85 per cent of agricultural production. On the other hand the agreements indicated internal preparedness of the member countries to make concessions which was certainly greater than at the time of the negotiations for British entry.

The peculiarities of the rice market in the E.E.C. are that, while Community production could cover 80 per cent of consumption, intermember trade in rice is minimal, so that vast amounts are imported from and exported to the outside world. Leading producer is Italy, second, well behind, is France; leading seller to the Six is the United States, with 90,000 tons or 25 per cent of Community imports. 200,000 persons are connected with the rice industry, which is the object of national market organisations in both southern countries. Exports are more or less subsidized, and a surplus of conversion capacity exists. National tastes vary as to preference for short or long grain types. So begins "Le marché du riz dans la C.E.E.", by *P.C.*, in *Revue du Marché Commun* 1964, pp. 496-501. The author notes that protection of conversion capacity and national production, fear of higher Community than world market prices, and desire to maintain payments relations with developing countries and the U.S. were the more important divergent interests attempted to be resolved by Regulation No. 16/64/EEC, entering into force February 1964. The techniques are similar to those employed in the cereal grains regulations. Levies will replace tariffs; threshold and intervention prices will be set; intra-community trade will be encouraged by allowing producer states to fix prices at non-producer threshold levels, while export will be stimulated by subventions. Novelties are the fixing of a common price for the four non-producers in the first year, to prevent enjoyment of levies collected on transshipment alone and the elaboration of standards and qualities, due to the fact that most trade is based on already processed rice. As with the recent settlement of the uniform wheat price, the importance of the solution for rice lies rather in the demonstrated willingness of the member States to agree on Community techniques, than in its impact on the Community economy.

Although the grains price decision is already history, an outline of the problems preceding its adoption and also those pertinent to other products can help in an assessment of the tasks still remaining in agriculture. "Le Marché Commun dans une Passe Difficile; Les Problèmes Agricole" at *Revue du Marché Commun* 1964, pp. 474-479 explains from a French point of view the reasons why December 15, 1964 was chosen as deadline for agreement on the single-step approximation of wheat prices. Not only the oft-discussed political reasons, but also the lagging pace of suppression of inter-member levies played a role. The importance of a beef price sufficiently high to stimulate production; the relation of the beef price to the milk price, as an inducement to either slaughtering or retaining for dairy purposes; the proposed market organisations for fruit and vegetables, sugar, and oils; and financial aspects are briefly enumerated. A kind of package deal could be arranged for the most important commodity prices, in order to balance off various national objections. With regard to financing, Italy may be expected to press for a fairer sharing of the burden. The overall outlook is deemed, however, quite positive, an optimism already in part borne out.

Competition

E.E.C. Commissioner for Competition, *Hans von der Groeben*, wrote an article on the objectives of competition policy for the Common Market and for the Atlantic partnership (*Wirtschaft und Wettbewerb*, 1964, pp. 1001-1018). The text is based on two lectures which he delivered in the course of 1964. He discussed the general problem of the direction of economic development in the Common Market and its effect on the trade with third countries. The function of free competition in the building of the Common Market and the requirements and conditions for the existence of free competition were analyzed, accompanied by an elaborate survey of the various kinds of restrictive trade practices. The E.E.C. cartel policy has a two-fold task to fulfil: "to promote the integration of markets by combating restrictions of competition and to secure the rate of economic progress on the integrated market". Less emphasis is given to the role of a projected Atlantic competition policy. In his view this policy would be limited in scope: "to protect the greater freedom of action which has resulted from a lowering of tariffs, against unfair competition, restrictions and distorsions".

An elaborate survey of the E.E.C. cartel policy by *Jean Materne* appeared in *Chronique de Politique Etrangère* 1964, pp. 169-224. In the first chapter an introduction is given to the most important questions concerning Articles 85 and 86 and the existing divergencies of opinions. Special attention was paid to the relationship between the E.E.C. Competition regulations and existing relevant national legislation. The second chapter contains an article by article analysis of Regulation No. 17. Although lucidly treated, some of the problems discussed by Materne, have by now lost much of their practical significance. For instance, his opinion that the so-called negative clearance of Article 2 Regulation No. 17 must be issued as a recommendation or an opinion, has been undercut by Commission use of the decision form. Further open to question is his view that an "existing" cartel agreement, insufficiently modified to be able to benefit from Article 85(3), becomes a new agreement, which may still benefit from Article 7 of Regulation No. 17 if it is notified in time (p. 204).

The relationship of the individual to the group exemption procedure is described by *W. Alexander* at *Sociaal Economische Wetgeving* 1964, pp. 569-590. The main outlines of the current system under Regulation No. 17 and of the projected group declaration under the Commission proposal recently passed by the Council

(No. 19/65/EEC, O.G. 533/65, after Alexander's article was written) are set out, with an argument for a lenient application of the retroactive exemption. In numerous situations firms will find it useful to notify and pursue an individual exemption for added security, even where a group declaration seems pertinent: Thus where the judge who will decide especially on "light" cartels, finds that the cartel is not covered by the terms of the group exemption, the Commission may still hold otherwise. Another example is the "heavy" cartel formed after publication of the group declaration. The incentive to notify may be that the cartel agreement is of longer term than the exemption, or that unfavourable conditions have been attached to the exemption pursuant to art. 7 of the Regulation, or that there exists doubt as to coverage itself. With regard to erasing the "evil past" for the period before March 13, 1962, Alexander regrets the limitation to bilateral agreements only, in Article 4 of the Regulation. Further, he advocates a broad solution which would cleanse all past action of the exempted cartels, not merely that "closely related" to the specific category. Simplified procedure as well as improved behaviour by the concerned firms would be the result. They would be encouraged to conform to Article 85(1) in order to gain definitive validity. Old "light" cartels may want to notify as long as doubt about validity remains, but especially if they are multilateral. In general, Alexander expects the group exemption to bring about a real reduction of the Commission burden, the furtherance of planning security for the firms, an increased role for the national judge, and the diminution of the problem of "temporary validity". Although the Council has limited the scope of the regulation to bi-lateral sole-agency and industrial property licensing agreements, this expectation seems to be warranted for the definitive regulation as well.

The commentaries on the first decision of the Commission applying Article 85(1) to a sole-agency agreement (Grundig/Consten, September 23, 1964, O.G. 2545/64, see Legislation Section 2 C.M.L.Rev. 1964-5, pp. 352-353) all underline the importance of this decision. Not surprisingly, they vary, however, in their evaluation. One may recall the first reaction, a very critical one, by *Deringer and Tessin* in *Aussenwirtschaftsdienst* (see 2 C.M.L.Rev. 1964-5, p. 358). Equally critical, but for different reasons was the review by *Jeantet* in *Jurisclasseur Périodique*, November 25, 1964, Doctrine 1871. His main objection concerned the reasoning of the Commission: He doubted its compatibility with the Court's judgments of November 16, 1963 (Dalmas e Figli v. H.A., case 1/63, Recueil IX, p. 613, 1 C.M.L.Rev. 1963-4, p. 193) and of July 15, 1964 (Neth. Government v. H.A., case 66/63, Rec. X, p. 1049). The point was made in particular for the interpretation given to the price differences for Grundig-articles existing in France and in Germany. This criticism is mainly based on the view that it is doubtful whether Article 85(1) applies to so-called vertical agreements. The position has been already previously defended in French literature by *Plaisant* in *Rev. trimestrielle du droit commercial* 1964, p. 19 and by *Chapira* in *Journal du Droit International* 1964, p. 495. See also *H. Drion* in 1 C.M.L.Rev. 1963-4, p. 152 stating that Article 85(1) is operative only in respect of certain vertical agreements. Jeantet is of the opinion that Article 85(1) applies only to sole-agency agreements, prohibiting sales outside the national territory for which the sole agent has been appointed. Such contracts would lead to a restriction of competition in the Common Market as between similarly placed distributors and therefore fall under Article 85(1). Other (vertical) agreements would not necessarily be thereby affected. This viewpoint, however, is not shared by the Commission. Several other points raised by Jeantet can be retraced to the fundamental disagreement on coverage of vertical agreements in principle. Far less critical is *A. Braun* in his comment in *Journal des Tribunaux* of November 22, 1964, no. 4466. Most interesting is his annotation on the relationship of Article 85 and industrial property law. In the present case this aspect played an important role because Consten's position on the French market was further protected by a licence of the trade-mark "Gint". Finally the commentary by *Dr. P. de Vroede* in *Rechtskundig Weekblad* of

February 14, 1965 must be mentioned. This comment is again very critical. In the light of these divergent annotations it will be interesting to read the judgment of the Court of Justice. Both Grundig and Consten have appealed against the decision of the Commission.

Dr. Friedrich Kirschstein has annotated certain aspects of the four negative clearances issued until now by the European Commission (Grosfillex, Bendix, Vitapro and DECA. See Legislation Section C.M.L.Rev. 1963-4, 1964-5) in *Wirtschaft und Wettbewerb* 1965, pp. 87-92 in the light of their effect on cooperation with firms outside E.E.C.-territory. Kirschstein made three comments in particular: The Bendix decision was similar to the Grossfillex decision, except that the Commission is silent on the question of *susceptibility* of the Bendix agreement *to influence* trade between the member States. Since the agreement was found not to *effect* or *intend a restraint*, etc. of competition within the Common Market, the second test need not have been applied. On the other hand, the fact that the producer had his *siège* outside the Common Market did nevertheless not prevent the Commission from an examination under Article 85(1). As for the Vitapro decision, it did not clearly show whether the examined agreement was considered not *restrictive* under Article 85(1), *or* whether the restriction it contained was *not* seen as *important* enough to justify Commission refusal (*de minimis* rule). As such the decision lacked proper reasoning, required under Article 190, and could be attacked for violation of rules of form under Article 173(1) E.E.C. The DECA decision was structured as the first two named, and for the same reason as Bendix was silent on the test of "susceptibility to influence trade between member States". The Commission's emphasis on the application of the agreement external to the Common Market is correct. It need not consider the possible indirect effects on competition within the Common Market under Article 2 Regulation No. 17, although these may be later important, as long as such effects are not inevitable.

Dealing with the concept of "enterprise" in cartel law and the relationship between cartel and company law is the article of *Dr. Peter Axmann*, "Kartellrechtliche Prüfung des Vertragssystems abhängiger Gesellschaften unter besonderer Rücksichtigung von Organverhältnissen", in *Wirtschaft und Wettbewerb* 1964, pp. 1025-1042. The central question is whether completely controlled subsidiaries (Organunternehmen), although retaining independent legal personality, are to be treated under the G.W.B. and E.E.C. in the same way as firms possessing more economic and managerial freedom. While *Gandenberger* (see 2 C.M.L.Rev. 1964-5, pp. 123-124) approached the problem primarily from the point of view of functional economic analysis, Axmann considers the various legal interpretations put forth both in German and American literature and case materials. Yet Axmann reaches the similar conclusion that lack of economic independence of the "Organunternehmen" must be crucial in cartel law, although not in company or tax law. Further problems are, however, raised when there are agreements between several "Organunternehmen" on the one hand; and several "parent companies", or another non-participating company belonging to the same controlling Konzern (Concern), or a joint-venture, on the other hand. Here the questions are whether the community of interest is so great, and the legal relationships are so close, that the exclusion of competition can be justified. Import and export prohibitions and licence agreements, among others, are analyzed on these grounds.

Following their earlier chronicles on European law (esp. Neue Juristische Wochenschrift 1964, p. 1608 et seq.) *Prof. Ipsen and Dr. Nicolaysen* have written a new contribution in *Neue Juristische Wochenschrift* 1965, pp. 2336-2341. Ipsen reviewed several questions concerning Article 90 E.E.C. This provision, which contains special rules for public enterprises, was inserted in the Treaty text only at a late stage of the negotiations and at the request of the French and Italian governments. The four different concepts of enterprise mentioned in this provision indicate its compromise character. Whereas paragraph 1—as *lex specialis* of Article 5—is directed to states and not to undertakings ("... fasst den Herrn, nicht den Knecht"), paragraph 2 is addressed to enterprises. The latter paragraph enables certain exceptions to be made to the general rule that all Treaty articles are applicable to public enterprises. Unlike Article 85(3)—in the interpretation of Regulation No. 17—Article 90 para. 2 is phrased as a *Legalausnahme.* No prior Commission decision is necessary in order for an enterprise to fall under the exception. Following the French conception of "*service public*" fulfilment of a public *function* by the undertaking is the relevant text. It is important to note that Article 90 takes into account a variety of economic activities organised under public law, without altering this situation (according to Article 222, moreover the E.E.C. Treaty does not affect the existing systems of ownership). The only exception is the control exercised over the commercial function of fiscal monopolies.

Although most attention has been given recently to the E.E.C. competition rules, the following two contributions dealing with Articles 65 and 66 E.C.S.C. should not be overlooked. A speech given by *Dr. H. Matthies* before the Union Internationale des Magistrats, published in the above cited number of the *Annales de Droit et de Sciences Politiques* 1964, pp. 123-137, treats problems created by application of Article 65 by the national judge. His consideration of possible conflicts in material coverage and procedural niceties lead to the following conclusions. Only the High Authority is competent to interpret and apply Article 65(4)2; as long as the H.A. has not spoken, however, the national authorities (judges included) may decide on questions such as the extent of individual damage claims and the consequences of the invalidity of an agreement. Further, the national authorities are bound to give internal effect to Article 65, in the sense that they must not assume competence where the H.A. remains competent, and must suspend proceedings where a preliminary decision has been requested of the H.A. *ex* Article 65(4)2. A cogent treatment of the E.C.S.C. price publication policy and the capacity of the Treaty provisions to secure effective competition in the oligopolistic coal and steel market is to be found in *Wirtschaft und Wettbewerb* 1965, pp. 3-15. In "Die Wettbewerbspolitik der Hohen Behörde der Montanunion", *Dr. B. Griesbach* restates an earlier conclusion that the presence of a few important producers on one side and numerous unorganized buyers on the other side permits a limited competition by means of price-differentiation. This has been confirmed by the H.A. report on cartel and concentration policy of April, 1964, in E.C.S.C. Bulletin No. 47 which can be found also in the same number of WuW verbatim at pp. 31-48. Such market flexibility explains the tendency of firms to seek restrictive agreements; its limits, however, prevent the H.A. from doing more than merely counteracting severe restraints going beyond the broad provisions of Articles 65 and 66. Under Article 66 the view that concentrations creating comparatively similar size and type of units are capable of strengthening competition has prevailed.

Further, publication of prices and emphasis on non-discrimination according to Articles 4 and 60 also limit the range of applicability for Articles 65 and 66, and are decisive for the competition policy of the E.C.S.C. A review of the experience in this area shows how the obligation to adhere to listed prices and total non-discrimination can eliminate all competition, once the threat of outsiders is removed. In this connection, the decision of the European Court of July 16, 1964, case No. 66/63, supporting the decision of the H.A. to erect two instead of three coal sales-syndicates because of sufficient competition from oil, is reviewed and approved. The importance which firms attach to retaining the system of Article 60 will emerge in the context of the fusion of the Communities and the Kennedy Round negotiations.

Association

As with many other areas of Community law, discussion of the problems connected with association never seems to lose its facet of immediacy. This is the impression received from two pertinent articles in the *Revue du Marché Commun* of

December 1964. In "Le pouvoir de la C.E.E. de conclure des accords internationaux" (pp. 529-537), *J. Megret* points out that the somewhat obscure text of Article 238 E.E.C. results from the fact that, at the time of its drafting, the experience of the E.C.S.C.—U.K. accord was still fresh. It was not expected that a completely different sort of development would occur. The author comments in unfortunately rather brief review on several other issues connected with the foreign affairs of the E.E.C.: the general competence of the E.E.C. to enter international agreements is desired, primarily on the basis of its pre-federal character; conflicting or overlapping competences would be best resolved by the so-called "mixed agreements", signed by the Community and member States together; general principles of international law and customary law will continue to play a role.

Special attention to the legal character of the association between Greece and the European Community was paid by *S. Varouxakis* in *Revue du Marché Commun*, 1964, pp. 537-543. This association, the first under Article 238, entered into force on November 1, 1962. An association agreement was chosen in this case, as the form best-suited to maintain a legal equality between partners in many respects materially unequal. The bilateral character of the Greek association is demonstrated by the composition of and voting procedure in the Council of Association, based on equivalent participation. The association is autonomous in the sense that its legal order is separate from that of the Communities and of Greece. Decisions taken by the Council of Association bear a "classical" international law character and have to be transformed into internal Community and Greek law, respectively. On the other hand the Council is more than a framework for diplomatic negotiation, since it does have the power to take decisions. To this extent one can say that institutionalisation is a characteristic of association. Is association a limited form of admission or only a means of cooperation? Varouxakis tends to the latter view, even though he admits that this cooperation can be very close. The main difference between admission and association is that an associated state remains always an outsider (third person) to the Community as such, whereas an adhering state acquires the same rights and obligations as the original member States.

Very different in scope and depth is the review given by *Ulrich Everling* of the new association agreement between the E.E.C. and the eighteen African States in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1964, pp. 472-574. In this 100-page article full attention is paid to all legal questions concerning this association. In Everling's opinion the new agreement does not contain clear cut divisions of competences. Also the requirements of various Treaty provisions have not been fully complied with. More specifically he states that the Council has not fully observed Article 228 empowering the Commission to conduct negotiations between the Community and states or international organisations. This rule ought to apply also to association agreements like the present one; at least, it is not contrary to Article 136 E.E.C. The very fact that the Yaoundé agreement has been signed by the E.E.C. Council of Ministers and by the plenipotentiaries of the member States does not imply in his view that revision of the agreement would always require a formal ratification procedure in the member States. Only to the extent that this association agreement necessitates amendments to the Treaty of Rome, should the member States be considered parties to the agreement. For the remaining (and major) part of the agreement the Council had full treaty-making power. Any future modification not entailing amendment of the E.E.C. Treaty would consequently not need the approval of the national parliaments. The financial and commercial policy aspects are dealt with more briefly, but these paragraphs contain valuable material and information as well.

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

The Costa-ENEL judgment (reported in 2 C.M.L.Rev. 1964-5, p. 197 with annotation Sk.) of July 15, 1964, a preliminary ruling in which the Court of Justice confirmed and even expanded its previous opinions on the relationship of Community law to national law, has also been commented upon by *Dr. Dietrich Ehle* in *Neue Juristische Wochenschrift* of December 10, 1964, pp. 2331-2333. Like *Frowein* (in his comment in *Aussenwirtschaftsdienst* 1964, pp. 233-238) he wrongly assumed that the Italian Constitutional Court had already expressed itself on this same case in the judgment of March 7, 1964. This was not so. No judgment has yet been given on the reference by the Giudice Conciliatore in the case 6/64. It is still possible—and this should be welcomed—that the Constitutional Court will modify its previous opinion in the light of the decision of the Court of Justice. Ehle summarised the Court's judgment in three points: In the first place, the Community legal order is an independent and separate order which must be uniformly applied in each member State. At the same time, the Community law, without having lost its own nature, has been "integrated" into the national legal systems. Within this integrated legal order, however, a distinction must be made between the competences of the national and of the Community authorities: The competences of the latter reach only so far as the member States have abandoned their "sovereign rights". According to Ehle the Court of Justice could express itself on the priority of Community law from a Community point of view. To the extent that Community law has become part of the national law systems, however, this question should be answered by the national courts and in accordance with the constitutional law of the member States. In support of his viewpoint Ehle cites Article 87(2e) pursuant to which the Council is competent to determine by regulation the relationship of Community cartel law to domestic cartel legislation. This article forms an exception in Community law. The general rule is that the question of priority is finally determined by national authorities. A uniform solution can therefore be obtained only by increasing the competences of the Communities or by constitutional amendment. To those who have read earlier contributions by the same author, it is clear that Ehle's thinking on this subject has undergone some modification. The same judgment has been annotated by *L. P. Suetens* in *Rechtskundig Weekblad* of December 6, 1964, col. 734. He gave a useful summary of the background of the case and indicated that Belgian courts may be placed in the same dilemma as the Italian: to uphold the Constitution or the Treaty. The well-known speech of Procureur Général Hayoit de Termicourt has so far not been confirmed by any judgment.

The continued fragmentation of the European energy market and increasing competition from oil and low-cost coal imports have complicated the High Authority's problem with regard to the Ruhr coal selling syndicate. Under Article 65 E.C.S.C., it will be remembered, the H.A. broke up the existing single selling organisation in 1956 into three parts. In 1960, the three organisations were allowed to combine into two in face of requests to return to the original situation. The Dutch government challenged even this concession, however, which was nonetheless upheld by the European Court in case 66/63 of July 15, 1964 (Recueil X, p. 1049). This case is briefly reviewed under the title "Zum Kartellrecht des EGKS-Vertrags" in *Der Betriebsberater*, 1964, pp. 1191-1192. The decision turned here, as in the earlier decision (case 13/60, May 1962, Recueil VIII, p. 177), on the interpretation of Article 65(2)(c) E.C.S.C. In the first case, the Court had ruled that the market share of the single selling organisation was so great that it possessed a power to fix prices which exceeded even the freedom of manoeuvre which could be tolerated in an oligopolistic market. In the second case, the Dutch government had argued that the two selling organisations, because of similar structure and size, were in a position to follow concerted pricing policies and hence should be considered as a unit. The Court argued in reply that, as long as there were no underlying argument, similarity and stability of prices of the two organisations with opposing interests, resulting from publication of prices and their similar market power, did not violate the Treaty. Further, given the substitutability of competing energy sources and the structural changes in the coal market, rationalisation of marketing can play an important role without yet excluding all competition on the coal market. The complaint that neither organisation complied with Article 65(2)(c) was refuted by comparative analysis of market power in relation to other similar organisations.

Finally mention should be made of several national court decisions in which Community law was applied—rightly or wrongly. To the latter category belongs the curious decision by the Tribunal de Commerce de Marseille of May 13, 1964 (reported by *Jeantet* in his chronicle of European law in the *Jurisclasseur Périodique*, of October 21, 1964, Doctrine 1863). The Marseille Court decided to grant an exemption pursuant to Article 85(3) E.E.C. This was done in clear violation of Article 9 para. 1 of Regulation No. 17, declaring only the Commission to be competent to apply Article 85(3). In his chronicle Jeantet strongly opposed the application by French courts of the theory of the "*acte clair*" to Community law. Both the Shell/Berre decision of the Conseil d'Etat (June 19, 1964, 2 C.M.L.Rev. 1964-5, p. 221) and the Riff case decided by the Chambre criminelle of the Cour de Cassation (February 19, 1964, this issue, p.) have demonstrated the dangers involved. It seems, however, that Jeantet's objections were rather that an unwise application of the "*acte clair*" theory was made, than that this theory was applied at all.

The request for interpretation of Article 85(1) made by the District Court of Zutphen (Neth.) to the European Court under Article 177 was commented upon by *M. R. Mok* in a short note in *Aussenwirtschaftsdienst* 1964, pp. 397-398. From the general point of view of development of Community law, it seems a pity that the case has recently been settled out of court. Interesting questions were raised, the answers to which would certainly have clarified the position of sole-agency contracts under Article 85. The Zutphen case involved the cancellation by a German producer of photo-chemicals of a sole-agency contract with a Dutch distributor, without sufficient notice. The German firm defended the plaintiff's claim for damages on the ground that the contract fell under Article 85(1), had not been notified in time, and thus was anyway void; and, secondly, that no damages could be proved, as the Dutch firm had as yet shown only losses. The Zutphen court rightly pointed out that past losses were no rebuttal to the possibility of future profits, but refused to dispose of the case on the remaining question of proof of damages. Had it done so, as Mok suggests, it might have avoided the reference to Luxembourg. Being free under Article 177(2) to determine for itself the necessity for reference, however, the Zutphen court asked four questions on the "influence on inter-State trade" of a sole-distributorship agreement, citing a presumed inconsistency between the Bosch-judgment and the Commission declaration of 1962 with regard to exclusive-dealership arrangements. Mok notes that the defence of invalidity under Article 85(1) was anyway irrelevant under the Bosch decision for the time of termination (October, 1962) of the agreement, as no decision by a national authority of the Commission against the agreement had yet been taken, nor had the period for notification yet elapsed (January 31, 1963). Further, the Bosch case dealt with an agreement including an export-prohibition, here not in issue, so that inconsistency with the Commission's declaration seems questionable.