General

The February issue of the *Journal of Common Market Studies* is devoted almost entirely to the proceedings of the second Carnegie Endowment Conference on International Organization, held at Bellagio from June 12 to 16, 1964. (Vol. III no. 2 February 1965). The text of the papers presented to the conference by *Hoffmann*, *Cox*, and *Kitzinger*, and the reports by *Czempiel* and *Suchecki* on study and research methods in Germany and Poland, is reproduced in full. An overall report of the conference was written by *Alan Burr Overstreet*, "The nature and prospects of European institutions" (pp. 124-169). (A brief version of this report was presented earlier, as a paper at the sixth World Congress of the International Political Science Association). The report summarizes the introductory remarks on the papers presented (it does not give a resumé of the papers as these are reproduced in full elsewhere), and presents the general trend of the discussion and the relevant issues.

Roughly, it seems possible to divide the conference into two parts: General discussion of the political nature and the prospects of the European institutions, centred eventually, via specific study of certain processes in the Communities, on questions of research and teaching methods. Hoffmann's paper introduced a discussion of the major obstacles now presented to European integration by the American Barrier on the one-, the French barrier on the other hand. The German problem was mentioned as a further complicating factor. A more general debate on power patterns was set off by *Goodwin*, who posed the problem of the leeway left to institutional activity by the present or future structure of international relations. The pessimistic portrayal of the European state of affairs, given by Hoffmann, was somewhat allayed by *Genton*, the second rapporteur at the conference, who emphasized the political nature of the Communities and evidence of the will to continue among the member States. Discussion at the conference was wide-ranging and diffuse but emphasized one issue with great insistence: the question of the uniqueness of the European institutions. (This survey of literature earlier mentionned the debate on this question between *Sidjanski* and *Siotis;* the Bellagio conference went into the question repeatedly and extensively.) Originality of the European institutions was suggested and examined on a number of points, such as—the motives of the "founding fathers", prospects of spillover, the decision-making process, voting procedures, the European civil service, the interpenetration of bureaucracies and its national repercussions. The outcome was a certain consensus on the formulation that there is uniqueness in the European institutions only of degree and intensity, and that originality is an operative myth, rather than an explanatory reality. As such however, it needs to be maintained in this "heroic age".

With these working points established, the conference focussed on an appraisal of research and teaching practices and methods. Emphasis was placed on the need for contextual studies, supplemented by comparative analyses (strongly favoured by *Claude).* It was deemed particularly necessary, to study European institutions in a larger setting of all international organizations, now that the concept of originality had been substantially limited.

The report is a most valuable contribution to the papers of the conference. It gives not only the overall view of issues and discussion but manages to pinpoint crucial opinions of individual participants, thus facilitating further research for the reader; it conveys the stimulating impact that is the essential core of such a meeting of the minds.

Of the paper presented by *Hoffmann*, a separate review is given below. Further

papers included in the Common Market Journal are "The study of European institutions: some problems of economic and political organization" by R. W. *Cox*, (pp. 102-118) and Uwe *Kitzinger* "Regional and functional integration—some lessons of Brussels" (pp. 118-124).

The reports on teaching programmes by E. O. *Czempiel* "Research and teaching programmes on international organization and european integration in the federal republic of Germany" (pp. 169-180) and Wiktor *Suchecki* "Research on European institutions in Poland" (pp. 180-183) list lectures, seminars and courses offered at the several universities and institutes and give catalogues of dissertations or other reserach work completed or in preparation. Programmes in Poland are understandably limited.

Analytically the two currect most crucial problems facing the Communities, namely, Atlantic cooperation and internal institutional development, may perhaps be kept separate. Political realities have, however, once again demonstrated in recent months the strong interconnection of these issues. In the view of *Prof. Stanley Hoffmann*, emphasis on the study of the integration of the Six as an economic process has been responsible for the underestimation of the impact of integration on the future of the Atlantic Alliance. In the paper delivered at the Bellagio Conference on International Organisation (see above), now published in *Journal of Common Market Studies*, 1965, No. 2, pp. 85-101, under the title "European Process at Atlantic Crosspurposes", he notes that the possibility of a conflicting or independent European policy was inevitable, once integration proved viable, "in a world in which nations, or groups of nations, (still) compete for power, influence, prestige and ideas ... in which the problem of who commands remains crucial." Conceding at least a limited validity to E. B. Haas' "spill-over" theory of integration for the area of economic welfare, he argues that economic integration only limits, but does not eliminate the "political function". In the ever-present realm of high politics, comprising security and defense, common institutions will not be capable of bridging the different national views, because an "objective" or "superior" common interest is in practice here incapable of definition. The controversy over the institutional future of the integration is thus a false one, in so far as the oppositions over substantive policy are thereby obscured. In effect, De Gaulle will never accept a supranational Europe capable of arriving at a policy diverging from his own; the problem of direction that he has raised, however, will not die with him. The content of De Gaulle's vision for Europe is explored by *Edmond Jouve* in "Die Europa-Politik Frankreichs unter de Gaulle", *Europa Archiv*, No. 7, April 10, 1965. French policy since 1958 with regard to European unification passes in review, and the apparent contradictions in de Gaulle's political statements are explained away, in terms of Europe "from the Atlantic Ocean to the Urals". The Europe of the Six has therefore only contemporary technical significance.

It is in the light of French policy that the movement towards European political union and the possibility for wider Atlantic solutions must be appraised. A second article in the same number of *Europa Archiv*, "Politische Aktionseinheit—Europäischer Neubeginn", by *Hans Joachim von Merkatz*, is devoted primarily to the most recent initiatives. His own plan, corresponding to the report "Politische Aktionseinheit" which he prepared for the W.E.U. Assembly, requires, first, agreement on fundamental political aims, and then a gradual institutional development as experience dictates. The Belgian, German and Italian proposals and the standpoint of the Commission are reported, and the problems of defense, Germany and Britain are described. Although the analysis is not profound, the article is a useful introduction. The reticence towards political union and the relationship of NATO and the Communities in the political thinking of Holland, the leading proponent of supranationalism among the Six, has recieved the attention of *Willy Zeller*, in "Die Niederlande als 'Neinsager' der Europa-Politik?",

Europa Archiv, 1965, No. 6, pp. 212-220. The Dutch opposition to a watered-down political union could, however, be overcome if England were admitted to the Communities. In that case, the problem of defense could more easily be resolved on a broader Atlantic basis, within the context of NATO. The occasionally negative-seeming position of the Netherlands can be explained by the inflexibility of its adherence to the principles of openness of the Community, supranationalism, and the Atlantic Community. On the other hand, the Netherlands has taken the initiative in institutional matters such as strengthening the European Parliament and fusion of the executives. The notion that a true Atlantic Community can be encouraged by and requires an Atlantic Parliament is examined critically by *Joseph Harned* in "Zur Idee eines Atlantischen Parlaments", appearing at pp. 221-227 of the same issue (No. 6) of *Europa Archiv*. French and English texts may also be found, respectively, in the *Revue du Marché Commun*, 1965, No. 78, pp. 120-124, and the *Journal of Common Market Studies*, 1965, pp. 183-189. At the NATO meeting of 1962, it was recommended to expand the conference of NATO parliamentarians into an Atlantic Assembly. In this way Austria, Ireland, Sweden and Switzerland could be involved in closer cooperation with the West. Secondly, certain differences in competence between NATO and OECD could be handled in broader context. Moreover, the need for an Atlantic Parliamentary organ has been felt in the OECD, which is indeed a purely executive instrument. Reviewing the two basic institutional possibilities, the author emphasizes that there is a consensus among all parties that an Atlantic forum is necessary, whatever its type.

That Parliamentary ambitions are difficult to realize, even in a smaller context, is amply demonstrated by the present debate over Community finances and the creation of a genuine Community control thereover. The background to this debate is provided in a short review of the development of the budgetary procedures and the position of the Parliament, by *Vierdag* in *Ars Aequi*, No. 7, 1965, pp. 174-181. Since 1958 a series of procedural improvements have been introduced, but the Parliament has not been able strongly to influence either the size or the application of funds.

In a contribution to *Nederlands Juristenblad*, 1965, No. 11, pp. 241-252, *Prof. P. J. G. Kapteyn* has pointed out that increased Parliamentary budget power will not have much significance, as long as expenditure under the European Orientation and Guarantee Fund for Agriculture remains the more or less direct result of pricing policy decisions taken earlier, in which the Parliament scarcely plays a role. The same conclusion was drawn by *Druker* in a general discussion of revision of the overall budgetary system previously appearing in this journal, 2 *C.M.L. Rev.*, 1964-5, at p. 180, and shared by *Maas*, in "Parlementaire Democratie in de Europese Gemeenschappen", *Internationale Spectator* 1965, No. 11, pp. 883-901. *Kapteyn*, after examining the interplay between Commission, Council and Parliament in agricultural policy-making, therefore explores the possibilities of ensuring more influence at this stage for Parliamentary opinion. He considers it highly unlikely that the Council will relinquish more decision-making powers to the Commission in this area or favour increased leverage of the Parliament over the Commission by giving the former a say in appointment of Commission members. On the other hand, he does urge, alterations in the decision-making process analogous to the Commission proposals for the budgetary regime: Council decisions deviating from Parliamentary recommendations would be rejected (or approved) within a fixed period by a simple majority of the Parliament, unless the Council has adopted a Commission proposal. In the latter case, the Parliament would have only a power of veto by two-thirds majority of those present and voting. If the Parliament were to take no action at all within the fixed period, the Council decision would automatically go into effect. A premium would thus be put on increased cooperation between Commission and Parliament, which would strengthen the bargaining position of the former vis-a-vis the Council. *Th. C. Esselaar* discusses

the implications of this plan in *Nederlands Juristenblad*, 1965, No. 15, pp. 323-326. "Nogmaals: medezeggenschap van het Europees Parlament in het Landbouwbeleid". The proposal, which would require amendment of a number of Regulations on agriculture, as well as the Treaty, could indeed increase Parliamentary influence on expenditure. But the Parliament, which has already revealed protectionist attitudes on agriculture imports, would still not carry the financial and political responsibility for the consequences of its decisions; were prices set too high, it would be the member States that would have to finance any deficits.

Competition

Among problems of more general interest associated with the administration of the E.E.C. competition rules is that of the eventual decentralization or delegation of the Commission's responsibilities in this area. At p. 252 of *Der Betriebs-Berater*, 1965, No. 6, appears a short provocative excerpt from *Der Verbraucher*, 1964, No. 51/52, journal of the (German) consumers' unions, on the desirability of a European Cartel Office separate from the current Commission division for competition. Not only the heavy work burden, but also the differences between the quasi-legislative and the quasi-judicial function require this development. An example of an area in which the Commission's tasks are bound to increase is that of agriculture, for which Regulation 26 (J. O. 20-4-1962, 993/62), especially Article 2, provides not so much an exemption from the competition rules, as an expression of market policy. This is the view of *Siegfried Büttner*, in a closely reasoned study of the implications of that Regulation entitled "Wettbewerbsrecht für die Landwirtschaft im Gemeinsamen Markt", *Recht der Landwirtschaft*, 1965, No. 1, pp. 1-10. Here the Commission will be called upon to evaluate various "agricultural cartels" in the light of the contemporary requirements in this sector to restore a balance between fragmented producers and suppliers and large-scale processors and distributors. Regulation 26 Article 2, which permits to this end "voluntary cooperation" in a number of situations, should therefore not be interpreted strictly as an exception, but rather as a special regime to be elaborated consistently with overall Treaty objectives. A number of comparisons are made to Sec. 100 of the German Law on Restraints of Competition (G.W.B.); the form, content, and control of said agricultural cartels is reviewed; and the role of the national market organisations is alluded to.

To the studies of the concept "enterprise" may be added the discussion of *I. G. Torley Duwel*, "Het begrip onderneming in artikel 85 E.E.G.-verdrag m.b.t. afspraken tussen moeder- en dochtermaatschappijen en dochtermaatschappijen onderling", *Nederlands Juristenblad*, 1965, No. 6, pp. 129-139. On the basis of a comparative survey of case law and doctrine in the Six, the U.S., the U.K., and under the E.C.S.C., the author concludes that the content to be given "enterprise" under Article 85 E.E.C. depends on the determination of the primary object of that article. Thus, where the emphasis is on the preservation of competition between contracting parties, their real economic independence is crucial. Where on the other hand, prevention of growing monopolization or the protection of actual or potential outsiders is the goal, it is sufficient that the "enterprises" have merely independent legal personalities. It should be added, however, that since Article 85 can reasonably be read to cover both objectives, the application of either economic or legal criteria will vary from case to case, a tendency offering little solace to company counsel. Similarly troublesome is the concept of "concerted practices", the interpretation of which in Common Market context gains little assistance from the practice relating to the analogue under the U.S. Antitrust laws. *Helmut Henrichs*, in *Wirtschaft und Wettbewerb*, 1965, No. 2, pp. 95-105, rightly points out that the development of the notion of "concerted action" in Sherman Act cases was a response to the difficulties of proof of agreement or conspiracy.

Consequently, attention in the courts has focussed on the still unresolved questions of what degree of consensus constitutes an agreement, and what types of parallel conduct reveal mutuality or agreement. This obsession with the means by which restraints are achieved in oligopolistic markets has meant an unfortunate failure to deal with the restraints themselves and their effects, a gap which the E.E.C. rules have tried to fill. Most of the author's attention being given to analysis of the American cases, his conclusion that caution must accompany application of that experience in the E.E.C., although accurate, is almost the only justification for the article's ambitious title "Die 'Conscious parallellism' Doktrin des US-Antitrustrechts und der Begriff" 'aufeinander abgestimmte Verhaltensweisen' in Art. 85 EWG-Vertrag."

Evidence of the growing awareness of foreign and Common Market jurists of the implications of recent Commission decisions may be seen in a number of recent articles. Of only passing interest is the short introduction to the problem of industrial property licensing agreements with extra-E.E.C. contacts appearing in *Schweizerische Juristen-Zeitung*, 1965, No. 1, pp. 1-4. *Karl Kumin*, under the title "EWG-Kartellrecht: Einfluss der EWG-Wettbewerbsregeln auf Lizensverträge von Schweizer Firmen mit Unternehmen in EWG-Staaten", notes the distinction in Regulation 17 Article 4(2)2b made between bilateral and multiparty agreements, and urges a liberal interpretation of the material requirement that license agreements contain only such restrictions as are necessary to ensure justified exercise of the industrial property rights concerned. Worthy of special attention is the contribution of *Prof. W. L. Snijders* entitled "De alleenverkoopovereenkomst en artikel 85 van het E.E.G.-Verdrag", appearing in two parts in *De Naamloze Vennootschap*, 1965, Nos. 11 and 12, pp. 157-161 and 172-179. Models of clarity, the articles can serve as especially useful introduction to the problem posed in the Grundig-Consten case (J.O. 20-10-1964, 2545/64). Explicit clauses prohibiting, on the one hand, the distributor from carrying competing products and, on the other, the supplier from selling to others in the defined territory, add formal elements of restraint more extensive than those necessarily inherent in a simple exclusive dealership contract. The difficulties of competition in oligopolistic markets explains the prevalence of the "competition clause" as well as the relative tolerance with which the simple form of exclusive contract is treated in the legislation of the member States and England, as surveyed by the author. Persuasively refuting the view that Article 85(1) does not apply to vertical agreements, he argues, however, for a narrow interpretation of the phrase "... which are designed to ..." From its reach would be excluded agreements whose *main purpose* is the stimulation and creation of competition *where it did not exist previously*, even when incidental restrictive clauses are appended. Where this was not clear, examination of the effects of the contract would reveal whether actually existing or potential competitors were eliminated or denied access. The criterion would be whether the agreement itself created the possibilities for the increased competition which it is then (illogically) accused of restraining. In this analysis, the prohibition on carrying competing goods need not violate Article 85(1), but absolute territorial protection would always do so. Another conclusion drawn by Snijders is that "... unfavourably (ongunstig) ..." does not imply a "quantitative" investigation as to whether inter-State trade has increased in volume or decreased; on the other hand, the determination of "... influence (kunnen beinvloeden) ..." does require a quantitative measure.

This last conclusion, which was shared by the Commission in the Grundig-Consten decision itself, has been criticised by *P. De Vroede* in a generally unfavourable comment on the case entitled "Het Concurrentierecht in Euromarktverband ... Grundig-Consten", *Rechtskundig Weekblad*, 1965, No. 24, pp. 1198-1208. Further, he questions whether the Commission's argument that not every form of competition in all distribution phases need be excluded under Article 85(1) supports

a finding of violation, when only one distribution phase has been affected. Also, the Commission has failed to show that preservation of intrabrand price competition at the wholesale level actually results in the benefit of increased choice for consumers at retail. As for the refusal of exemption under Article 85(3), the Commission should not have compared the French prices with the German ones, but rather with those on the French market in the absence of the agreement in question. Clearly also the advantages which an exclusive dealer can assure, namely, advance ordering in volume, gathering of information on market technicalities, and provision of adequate spare-parts stock and service, are elements which should not be disregarded. The argument on this point is not unsimilar to that made in connection with the Faïence cartel recommendation, by *Nederburgh* in *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen*, 1965, No. 12, pp. 290-292. In the conclusion to an earlier begun article, "Beperkingen der concurrentie in E.E.G.-verband", the latter calls for an exemption from Article 85 (1), "whenever, although all the conditions of the third paragraph are not fulfilled, nevertheless the economic, social and societal advantages of the restraint are greater than the disadvantages". Finally, according to De Vroede, the decision ought to have been limited to those parts of agreement specifically offensive under Article 85(1) and to the agreement specifically in the case. *Prof. J. Schapira* shares several of *De Vroede*'s objections, and adds new ones of his own, in "La Décision Grundig-Consten", *Journal du Droit International*, 1965, No. 1, pp. 67-80. He notes that the emphasis on intrabrand competition not only ignores the reality of oligopolistic competition, and the role which the national distributor plays therein, but puts a further premium on vertical integration of the distribution apparatus. On the issue of price differentiation, the Commission has failed to show in its opinion that it also considered the many intangible costs and risks of the import operation, which may have justified higher French prices. On the criteria of indispensability under Article 85(3), he contends that the very benefits which the Commission ex hypothesi conceded are precisely the result of absolute territorial protection. In principle opposed to the inclusion of vertical agreements under Article 85(1), he nonetheless admits that even simple exclusive agreements without territorial protection will probably be brought thereunder, but may well receive the exemption.

More positive in his evaluation is *S. P. Ladas*, in "Les Accords de distribution en exclusivité et la loi antitrust du Marché Commun", *La Propriété industrielle*, 1965, No. 1, pp. 17-21. He shares Snijders' view, *supra*, that the simple exclusive dealership, unaccompanied by other restrictions, ought not to be challenged, in view of its commercial justifications. Grundig-Consten does not contradict this, and even does not *per se* reject protections of territory, but merely held the justifications which e.g. *De Vroede, supra*, defended to be inapplicable in the present case. Briefly noted are the practical problems connected with interpretation of "indispensable", "*absolute* territorial protection", and "between enterprises". Also accepting the basis of Grundig-Consten and sharing the view that simple ("imperfect") exclusive dealerships will be allowed by the Commission, *J. Materne*, in "Quelques réflexions sur la première décision de la Commission de la C.E.E. en matière d'ententes", *Revue du Marché Commun*, 1965, No. 77, pp. 79-89, goes on to explore other questions suggested by the case: The Bosch ruling with regard to limitation of a retroactive prohibition as from the entry into operation of Regulation 17 ought also to apply in any civil damage suits arising from the prohibition. The right to claim in a civil suit based on a violation of Article 85 (1)is variously determined under the doctrine of the member States, but is clearly granted in France under Article 1382 of the Civil Code. In any case, although the link of causality would seem evident in the Grundig-Consten situation, the calculation of damages and determination of the claimants who should benefit will be difficult.

Similar questions are treated in more detail by *Materne* in the context of another Commission ruling, the Recommendation to the Faience cartel (published in

Sociaal-Economische Wetgeving, 1964, No. 2, pp. 96-109, and *Wirtschaft und Wettbewerb*, 1964, No. 1, pp. 54-60, and then in E.E.C. Bulletin, 1964, No. 5, pp. 46-52). Among the additional points made in "La première recommendation de la Commission de la C.E.E. en matière d'ententes", *Journal des Tribunaux*, 1965, No. 4477, pp. 81-85, is that the national courts are not required to suspend civil actions pending a Commission decision. In support, he restates the familiar position that Regulation 17 Article 9 (3)does not include the courts nor prevent autonomous application of Article 85(2). On the other hand, once the Commission has found a violation and fixed a date, the national court should make a parallel determination of nullity and its effects. When proposing to issue a recommendation, based on a finding of violation, the Commission ought also to impose a time limit within which the suspect cartel may notify and amend, to eliminate future doubts as to retroactive nullity, and make it easier for the courts to act. The Commission has, however, eliminated doubts on this point, with regard to the "provisional finding" procedure of Article 15(6) Regulation 17. In the first application, announced at E.E.C. Bulletin, 1965, No. 12, p. 17, the participants of an exclusive dealings system like that of the Faience cartel were warned that continued adherence to their agreement, although notified, would make them vulnerable to fines from that date. As noted at *Aussenwirtschaftsdienst des Betriebs-Beraters*, 1965, No. 1, p. 21, the finding was not accompanied by a reasoned opinion, which indicates the Commission's view that the provisional finding is not an appealable decision in the sense of Articles 189-190 E.E.C. Other aspects of the general problem of timing with regard to competition decisions are also reviewed once more by *Walther Hadding*, at *Wirtschaft und Wettbewerb*, 1965, pp. 371-383, in "Die zivilrechtliche Wirksamkeit angemeldeter Vereinbarungen oder Beschlüsse im Sinne des Art. 85 E.W.G.-Vertrag." On the basis of the Bosch-case, the aim of Regulation 17 and the long delay in decisions, the author investigates whether the present legal situation conforms to the German concept of "provisional ineffectiveness" (schwebende Unwirksamkeit). The other solutions of "provisional validity", suspension of procedure, and judgment under reservations are noted. Analysis of a number of hypothetical cases leads to the conclusion that "provisional validity" must be accepted. Considering that many agreements will eventually receive an exemption, the application of "provisional ineffectiveness" would mean harsher treatment in the interim than in the long run.

Finally, the new regulation for group exemptions is described by *C. Tessin* at pp. 54-55 of above noted number of *Aussenwirtschaftsdienst* under the title "Gruppenausnahmen im EWG-Kartellrecht für Alleinvertriebs- und Lizenzverträge." The legislative history of the regulation, especially its compromise nature as evidenced by certain of the accompanying limitations on Commission autonomy, is briefly noted. The limitations will not, however, be important until broader ranging exemptions are planned than those at present contemplated. Associating himself with the favourable views of other commentators, he urges prompt action to benefit exclusive dealings arrangements. *Friedrich Kirschstein* also describes the background provisions of Regulation 19/65, in "Die E.W.G. Verordnung über Gruppenfreistellungen", *Wirtschaft und Wettbewerb*, 1965, pp. 361-370. According to him the Commission was already competent to grant group exemptions, although more specific rules were required. Interesting in particular is also his view that the Commission can still provide an individual exemption for an agreement that falls under a group exemption. Mention ought also to be made in this closing paragraph of an inquiry as to the remaining significance of the German Law against Restraints of Competition for German coal and steel producers, in view of the reach of the E.C.S.C. and E.E.C. cartel rules. This is the suggestive study by *A. Deringer* under the heading "Europäisches Gemeinschaftsrecht" in *Neue Juristische Wochenschrift*, 1965, No. 11, pp. 477-480.

Agriculture

Besides the articles already noted relating to financing of the common agricultural policy (see under "General") "Les obstacles franchis et à franchir sur la route de l'Europe agricole" also treats the problem, but without linking it to the issue of increased European Parliamentary control (*Revue du Marché Commun*, 1965, No. 78, pp. 112-119). Further details were earlier presented by *Cl. Berger*, in No. 76 of the same journal, at pp. 28-38, under the title "La Place du F.E.O.G.A. dans la construction de l'Europe". An article by *Büttner* on the reach of Regulation 26 was discussed under "Competition".

In addition, attention has also been paid to other material aspects: *R. Overmeire* has prepared the European law chronicle on agriculture appearing at pp. 1615-1619 of *Rechtskundig Weekblad*, 1965, No. 32. He offers a sketch of the content of the relevant Treaty Articles (38-47) and, after noting the principles upon which rest the major regulations for the common agricultural policy, reviews the structure of the market organisations. He concludes that success in the integration of agriculture, in view of all the difficulties, is the measure of the general will to integrate. One of these indicators is surely, "Les accords du 15 décembre 1964", which make it possible to create by 1967 a free market for grain, eggs, pig meat and poultry (*Revue du Marché Commun*, 1965, No. 76, pp. 9-16). This is the consequence of agreement over the fixing of the cereals price. A balance is here made of the advantages and disadvantages of the price regulation, and the prospects of the agricultural sector are reviewed. The setting of prices, regional pricing, compensations, financing, and national aids are also treated. The author considers it probable that the establishment of the single grains market will have a stimulating effect, also for the completion of the customs union for industrial products. Moreover, notes *Aussenwirtschaftsdienst*, 1965, No. 2, at pp. 59-60, under "Die Agrarfrage in der Kennedy Runde", the grains decision has removed the leading obstacle to GATT discussions. On the other hand, the Mansholt-plan system of agricultural protection has little sympathy from the U.S. The difference of views was demonstrated by the rejection of Wyndham White's call for a concrete offer, and the failure of Herter's conversations with the E.E.C. Commission.

Taxation

A short commentary entitled "L'Action en matière de taxe sur le chiffre d'affaires dans le cadre de la C.E.E. et du Benelux" appeared in *Revue du Marché Commun*, 1965, No. 77, pp. 76-78. The writer drew attention to the differences between the Benelux-system and the E.E.C. proposals for harmonization of turnover taxes. In addition, the principle provisions of the Benelux-convention are reproduced. The consequences of an eventual harmonization of these taxes for the practising lawyer in Holland are the subject of a contribution by *O. Leyendekkers* in the *Advocatenblad* of January 15, 1965, pp. 11-16. Switching over from the cumulative system to the system of added value will certainly almost by itself lead to an increase in the rates in Holland, since the possibilities for multiple taxation of the same goods and services will henceforth be eliminated. And the disposable income of the lawyer is "more sensitive to a one per cent change in the turnover tax rates than to ten per cent more or less of income tax." Further, approximation of the very low Dutch rates to other member rates will represent a sizable increase. The Commission opinion of June 3, 1964, opens, however, the possibility that advocates and others, the cost of whose services "have no noticeable influence on the prices of goods" in inter-State trade, be excluded from the proposed system.

A short notice concerning the relationship of German property taxes to the E.E.C. Protocol on Privileges and Immunities has appeared at *Betriebs-Berater*, 1965, No. 9, p. 365. The German rule involved (par. 51(1) LAG) provides that, upon departure for abroad, a taxpayer may be required to pay immediately the

property tax which is normally levied every four years. According to a decision of the Federal and State Tax Equalization Board, there would, however, be no objection against application of Article 13 of the Protocol, so as to exempt Community officials from the working of the above rule.

Harmonisation

In the harmonisation of legislation, the question is continually raised as to how far directives (as an instrument of harmonisation) may go to bind the member States in respect of the sought after goal. See on this point the early article of *Van Binsbergen* in *Sociaal-Economische Wetgeving (Europa)* 1961, pp. 223-228 ("Samenhang der artikelen 36 en 100-102 E.E.G.-Verdrag"). The contribution of *Joachim Kreplin* in *Neue Juristische Wochenschrift*, 1965, No. 11, pp. 467-471, contains an effort at more precise delineation of the problem. He demonstrates on the basis of current practice, that often very detailed provisions are necessary and that the member States are often willing to include very technical matters in the directives, especially after lengthy negotiation has been involved. Delimiting the directive, in comparison to a decision on the one hand and a regulation on the other, has led him to conclude that the binding effect of the directive depends upon the material content in each case. Further, in this analysis, it is never necessary to specify the formal legal instrument (law, administrative decree, etc.) by which the content of the directive is transformed into national norms. The unsatisfactory element is, however, the resulting uncertainty for the member States, as for example with regard to the draft-directive based on Article 54(3g) E.E.C.

The Chronicle for European law in *Rechtskundig Weekblad*, 1965, No. 25, pp. 1284-5, notes the first pharmaceutical directive of the E.E.C. Council under "Eerste richtlijn betreffende Farmaceutische specialiteiten". The importance of this directive becomes especially clear against the background of the pertinent national provisions, which, because of a national concern for public health, were numerous and various. It is the first step toward mutual adjustment.

Establishment; Movement of Services and Goods: Energy; Economic Policy

Sociaal-Economische Wetgeving 1965, No. 2, contains an analytic survey by *I. Samkalden* of the problems relating to establishment and the rendering of services in the Common Market, "Opheffing van de beperkingen tot vestiging en dienstverlening in de Gemeenschappelijke Markt". Many earlier treaties were concluded to diminish the limiting effects of measures taken mainly to protect nationals against the competition of foreigners. The author compares the reach of these rules with that of the E.E.C. provisions and directives, in connection with Art. 23 E.E.C., and also the effect of the various escape clauses. After analysis of the historical background and material content of articles 3c and 52-66 E.E.C., the General Programmes of December 1961 are reviewed. They aim at abolishing discrimination on the ground of nationality and at coordinating the legal and administrative regulations concerning access to and exercise of activities, and mutual recognition of diplomas. Articles 53 and 62 contain standstill provisions relating presumably, in line with the Costa-case (6/64 of July 15, 1964), *only to formal* discriminations against foreigners; Samkalden, however, points to a possible textual argument to the contrary for Art. 53. Paradoxically, the choice of directives as instruments of policy implementation here in principle results in a diminution of legal protection, for the subjects of the Community can derive claims only from self-executing Community regulations. Samkalden suggests, however, that direct effect be attributed to at least certain provisions of a directive, referring to cases 16-17/62 and 19-22/62, Rec. VIII, at pp. 945 and 987, and offering Art. 4 para. 3 of Dir. 64/221/EEC (O.G. April 4, 1964, 850/64) as an illustration.

Passing now to movements of goods, the necessity for origin designation of goods within a customs union is emphasized by *Kurt Wockenfoth* in "Probleme des Warenursprungs in der Europäischen Wirtschaftsgemeinschaft", *Aussenwirtschaftsdienst* 1965, No. 2, pp. 57-58. This task has implications both for the common commercial policy and the fair application of tariffs, and is important for the associated countries as well as for third countries.

Progress toward a common transport policy is reviewed by an anonymous contributor to *Revue du Marché Commun* 1965, No. 77, pp. 65-70, under the title "Le marché commun et les transports, Esquisse d'un bilan". Accompanying a short review of Treaty provisions and the activities of Commission and Council, is a discussion of the principles upon which the Commission proposals are based and the secondary technical problem relating to the weights and dimensions of vehicles. While the Commission desires to treat the transport sector as a whole, the Netherlands prefers a sector approach, to protect her interests. A similar absence of Community-oriented spirit may be discerned in the attempts to come to a common energy market. Atomic energy must be allocated its appropriate role, according to *Mario Pedini*, in "Atome communautaire ou nationale?", *Les problèmes de l'Europe*, 1964, No. 26. Yet, fundamental oppositions exist on, e.g., the open or closed character of Euratom, the use of national or enriched uranium, etc. He notes the means (directives, association contracts) by which Euratom policy can be re-oriented, and lists the elements of a progressive policy: a common program, industrial concentration, cooperation between industry and government, and cooperation with third countries.

We make special mention under this miscellaneous heading of two interesting articles touching upon problems of economic planning, which will effect conditions within the Common Market. *J. H. Derksen* has investigated the possibility of coordination of wage policy upon the European level in a two -part article "Loonpolitiek in Europees verband", *Sociaal Maandblad Arbeid*, 1965, Nos. 4 and 5. The views with regard to having wage policy directly managed by the State vary from country to country, while the E.E.C. authorities seem well-disposed toward it. The conditions for fully effective national wage policy are, however, not present; on the other hand, governmental influence on wage levels is possible. A European coordination of such influence ought to be attempted, at least by the fixing of national targets. A more general planning analysis may be found in *Ernst Kobbert*, "Mittelfristige Wirtschaftspolitik—eine neue Phase der Europäischen Wirtschaftsgemeinschaft", *Europa Archiv*, 1965, No. 4, pp. 127-138. The author considers the establishment in December 1964 of the Committee for Economic Policy for the medium-term as a sign of the "integration of the spirit" within the Common Market. The establishment of this body represented indeed a compromise between French "planification" and the German preference for a system in which free competition is the regulator. Hence, the choice of the medium-term, of five years, as an acceptable period for observation. The compromise does not represent a concession on economic philosophy, but rather a desire for the greatest possible rationality in reaching economic goals. Wage-policy coordination is one of the techniques urged.

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

The court in Luxembourg has played an important role in determining the formal requirements for Community acts. This is amply demonstrated, especially with regard to the decision directed toward an individual, by *H. H. Maas*, in "Vorm en Motivering van handelingen van de Instellingen der Europese Gemeenschappen", the text of a lecture delivered at the 1964 annual meeting of the Netherlands Association for European Law, now published at *Sociaal Economische Wetgeving* 1965, No. 1, pp. 1-17. This well-documented study of both treaty rules and daily

practice indicates the considerations governing the choice of legal instruments, where *lacunae* in the treaties exist. Unfortunately inconsistencies persist, and the requirements for a *reasoned* opinion are often only summarily fulfilled. He notes how important the last point is for an effective legal control by the Court. It is perhaps useful to note briefly here a comment on a recent decision not of the Court, but of the High Authority, signed by *M.*, appearing at pp. 310-311 of *Der Betriebs-Berater* 1965, No. 8. Criticised is the reasoning of decision No. 3/65 concerning the Community regulation for national support measures in the coal-mining industry. The decision is based on Art. 95 E.C.S.C., which empowers the H.A. to take the necessary measures "in those cases not provided for in this Treaty". The decision permits member States to grant subsidies to the mines, in deviation from the general subsidy prohibition. Since the latter is expressly included in the Treaty (Art. 4c), it is hardly correct to speak of a case "not provided for in this treaty".

The preliminary decisions of the court in two social security cases—namely, *Unger* 19-4-1964, No. 75/63) and "the case of the French widow" (9-6-1964, No. 92/62)—have already stimulated much commentary. Both are merely summarized in *Aussenwirtschaftsdienst* 1965, No. 1, pp. 32-33, but the *Unger* case is reviewed in more detail by *T. Koopmans* in *Revue du Marché Commun* 1965, No. 77, pp. 102-104, under "La notion communautaire de travailleur salarié ou assimilé". The solution of the case is satisfactory, but the reasoning is open to question. The historical origin of the controversial formulation, "employée or similarly situated", is ignored; and the Community-oriented interpretation of "similarly situated "under art. 51 E.E.C. is insufficiently supported by the reference back to a Community-oriented reading of "employée" under art. 48. The Court did not determine the content of "similarly situated", but at the same time observed that the national applications would not be decisive. The element of uncertainty is unfortunate. Another social security case, No. 100/63, has been annotated by *J. A. Huy* at *Sociaal Maandblad Arbeid* 1965, pp. 152-156. Involved was request for a preliminary decision, principally on the interpretation of article 28 (1) and (6) of Regulation No. 3 EEC, submitted by the Central Administrative Appeals Board at Utrecht. The Court has deviated from the practice followed until then by executive bodies, whereby Article 28 (pro-rata payments based on period in each country) has always been applied. The Commission's position is extensively reported, and criticized by *Huy*. The Court's opinion is seen, however, to raise a number of questions, particularly with regard to the construction of the relevant period entitled for coverage.

In *Journal du Droit International* 1965, No 1, pp. 85-93, *Charles Jeantet* has criticised two French cases decided by the Cour de Cassation involving transport and competition, but especially important for the preliminary decision under the EEC Treaty. These cases were reported in the previous issue 2 C.M.L. Rev. 1964-5 at pp. 448-9. In the first case, dated February 19, 1964, the ruling of the lower court was upheld, that it was competent to decide on *conflicts* between Community law and national law, even when *interpretation* of Treaty articles was necessarily involved. According to Jeantet, the Cour de Cassation apparently relied on the doctrine of "acte claire" in this connection, and seemed further to treat the case as one of ordinary conflict of laws, thus implicity denying the superiority of Community law. In the second case, dated 22 October 1964, another in the *Nicolas* and *Brandt* series, the Cour de Cassation also upheld what was in fact a Treaty interpretation made by a lower court, and declared a reference to the European Court unnecessary. Jeantet notes that, given the difficulty in delimiting "application" from "interpretation", the Cour de Cassation came dangerously close to accepting the "acte claire" here too. *Brinkhorst*, in a note in *Sociaal Economische Wetgeving* 1965, pp. 129-132 dealing primarily with the case of February 19, 1964, shares some of Jeantet's observations but thinks that the second case has somewhat limited the reach of the first. Further he describes the two principle notions current in the Community, critical of the "acte clair": that espoused by Catalano, *inter alia*, who would require a reference by a

national court in every case of Treaty, etc., interpretation; and the more liberal view of Samkalden *et al.*, who would not require a reference in genuinely clear cases.

Of specific interest in regard to the competion regime, is the case decided on June 25, 1964, before the Brussels Court of Appeal, reported at *Journal des Tribunaux* 1964, p. 576, and noted by *del Marmol* at *Wirtschaft und Wettbewerb.* 1965, No. 2, p. 123. That court refused execution of a lower court judgment which gave full effect to the "provisional validity" of an agreement not yet acted upon by the Commission. It instead suspended the collection of the damage award pending the decision of the Commission, which it deemed the only competent authority to rule on a violation of article 85 (1) EEC after notification. The first decision by a German court refusing a breach of contract claim, on the ground that the agreement violated article 85 (1), was summarized and noted by *Ernst Niederleithinger* at *Aussenwirtschaftsdienst der Betriebs-Berater* 1965, No. 2 pp. 60-62, under the title "EWG-Kartellrecht: Rechtsfolgen bei nicht angemeldeten Alleinvertriebsvertrag (Neukartell)". The case, Decision 22-1-1965 70 (Kart) 88/64 of the Landsgericht Mannheim, reported and annotated in this number of C.M.L. Rev. at p. 93, involved an exclusive dealings agreement with territorial protection, which had not been honoured by the dealer once faced by competition from a cheaper brand. The annotator criticizes the court's finding of restriction as too abstracted from market realities, the too narrow drawing of the relevant market, the faulty reading of a notification requirement under article 4 (2) Regulation 17, and a too hasty refusal of temporary validity.

Association and External Relations

"Deux ans d'association de la Grèce à la C.E.E.", *Revue du Marché Commun* 1965, No. 77 pp. 59-65 is an effort at drawing a balance for Greece of the results thus far of association, from the point of view of institutional development, progressive realization of the customs union and the harmonization of economic policy. A statistical appreciation of economic changes is however hindered by the incompleteness of available materials. On the other hand, the achievements to date, while not spectacular, do give reason for optimism despite occasional expressions of disappointment in Greece itself. A similar conclusion is somewhat more difficult to arrive at for the African and Madagasque states. The principle reason in the view of the author of "Le drame du sous-développement solutions mondiales ou solutions régionales" at pp. 71-76 of the same journal, is the worsening of the terms of trade against the raw materials exporters, but in favour of industrial exporters. The author, himself a national of one of the signatories of the Yaoundé Convention, reviews the related problems, the position of the under-developed countries at the World Conference for Trade and Development, and their organisation. He favours the solution embodied by the treaty with the E.E.C. A specific problem raised for the associated countries namely, the origin designation rules adopted on February 25, 1964 by the E.E.C. Council, is discussed in *Aussenwirtschaftsdienst* 1965, No. 2 at p. 58. "Warenverkehr zwischen der EWG und der assoziierten überseeïschen Ländern und Gebieten" examines the new regulation, which contemplates expanded trade, although natural oil and oil products are excepted. While on the subject of trade with third countries we ought to mention the suggestive article of *Rolf Sannwald*, "Die europäischen Wirtschafts-gemeinschaft und der Osthandel", in *Europa Archiv* 1965, no. 4, pp. 115-127. A consideration of the economic and political aspects of trade with the formerly "monolithic" Communist Bloc is followed by a statistical review of that trade. The author sees the beginnings of a common E.E.C. commercial policy in this regard.

As for the more specifically legal contributions, we note *Erik Suy's* article in the very first number of the new *Belgische Tijdschrift voor Internationaal Recht*, 1965, no. 1, at pp. 141-147. His remarks on the international and European responsi-

bility of the E.E.C. member States are in the form of a commentary to the well-known plea of the Belgian P. G. Hayoit de Termicourt for the priority of Treaties over posterior laws, primarily as a consequence of the formation of the E.E.C. One of his arguments was that otherwise the national judge would determine the international responsibility of his state in a judgment wherein this priority was not necessarily assured. Suy notes that the procedure for determining international responsibility in the Communities benefits from its obligatory aspects, but would extend Hayoit's argument to cover also classic international treaties. The general powers of the E.E.C. to conclude international treaties and the position of these treaties in the international law of the member states are the subjects of an extensive analysis by *Jaques Megret*, following upon an earlier article of his cited in a previous literature survey (see 2 C.M.L. Rev. 1964-65, p. 463). In "Conclusion, formes et effets des accords internationaux passés par la C.E.E.", *Revue du Marché Commun* 1965, No. 76, pp. 19-28, he describes the procedures of negotiations, etc., which have been modelled primarily on national procedures. He also treats the problem of the European Parliamentary advice on proposed treaties. In the second part of the article, the legal effects of international treates are considered. He places the latter above the legal acts of Community institutions internally, relying on the system of article 189 itself and the direct validity of such treaties within the Community. No treaty can, however, be concluded which conflicts with the E.E.C. Treaty itself. With regard to the member States, they are bound by international treaties of the Community to the same extent as they are bound generally in relation to the Community. Much flexibility characterizes the present situation in practice.