# SURVEY OF LITERATURE

## *General*

The *Journal of Common Market Studies*, No. 3, 1965, is devoted entirely to the relations between Britain and Europe. It contains articles by *R. Mayne* ("Why bother with Europe"), *J. R. Lambert* ("Prospects for the Community"), *J. Pinder* ("The case for economic integration"), *C. Layton* ("Road to co-existence"), *D. Howell* ("New paths for world trade") and *D. Thompson* ("Harmonization of Laws"). This number was discussed in the Editorial Comments of June (3 C.M.L.Rev. 1965-6, pp. 6-7).

The British Institute of International and Comparative Law published two further supplements in its International Law Series. The first supplement dealing with Human Rights will be discussed under the appropriate heading. The second deals with "The Expansion of World Trade: Legal Problems and Techniques", which is the report of a conference held in 1964 at Ditchley Park. The contributors and their papers are as follows: Ernst Wohlfarth, "The European Community and World Trade"; Stanley D. Metzger, "The Prospects for the Kennedy Round"; Dr. C. M. Schmitthoff, "The Commonwealth System of Preferences"; A. Sciolla-Lagrange, "The Preferential Areas Associated with the European Economic Community and in particular the Greek and Turkish Agreements of Association and the Association with the African countries"; J-P. Brunet, "Regional Co-operation between Developing Countries"; and Mark S. Massel, "Non-Tariff-Barriers as an Obstacle to World Trade."

The lecture by *Stanley D. Metzger* has also been published in *Journal of Business Law* 1965, pp. 103-113. Although there is now no hope for a dramatic reduction by 50 per cent across the board, nevertheless negotiations may lead to a very useful reduction of the order of 25 per cent. This would be a "small but forward step" towards the removal of the artificial barriers to world trade.

A report of the meeting of the Committee for international law of the *Union internationale des magistrats*, held on March 6, 1964 at Luxembourg, is given by *F. Dumon* in the *Revue Internationale de Droit Comparé*, 1965, No. 4, pp. 21-52. It deals in the first place with the problem of the application of Community law by the national courts: a survey is given of the existing opinions in the various member countries. A second question discussed during the meeting was the control over the constitutionality of the Treaties and of the law of the three Communities. Especially in Italy and in Germany difficulties arise. In the third place the Committee gave attention to the problems that may be created by the existence of conflicting rules of national law and Community law. The most accepted theory in Germany is that a national statute can amend or abrogate a previous rule of Community law. In a case of conflicting rules a German Court is obliged to refer the question to the Constitutional Court. In France the conflict is decided in favour of Community law as a result of Article 55 of the French constitution. Although in Italy a later statute prevails above a previous rule of a European Community, conflicts can be avoided in many cases by the application of the rule that the legislator is presumed to have acted in conformity with Community law. A conflicting statute may even be declared unconstitutional when it violates the principle of "*pacta sunt servanda*", which is introduced in Italian law by Article 10 of the Constitution. In Luxembourg the priority of international treaties is recognised, and the same is true for the Netherlands to the extent that the treaty is self-executing. In Belgium the question has not yet been answered.

The conclusion of the Committee was that Community law should prevail. Dumon adds to this that the legislator who acts in violation of a treaty without denouncing it acts unlawfully. Rules of international law are not to be assimilated

with national law; they are of a different order. The theory of transformation is incompatible with the system of the European treaties. Shortage of time made it impossible for the Committee to discuss several other problems, such as the application of Articles 85 and 86 E.E.C. by national authorities. The resolution adopted by the meeting may be found at the end of the article.

Int he new journal *Cahiers de droit européen*, 1965, No. 1, pp. 10-46, *Dumon* deals with approximately the same subject-matter as in his earlier mentioned report, but more from the standpoint of national law. He outlines the structure of the Benelux and of the European Communities and investigates whether the member States have been integrated into a federal organisation. He then studies the effect of Community law on the national legal systems and especially on the functioning of national institutions. It becomes clear that the penetration of Community law now has wide-ranging significance.

"La statistique dans le Marché Commun", by *Raymond Dumas*, in *Revue du Marché Commun*, 1965, No. 81, pp. 274-276, reviews the organisation, technical difficulties of comparison, and means of common action with regard to statistical studies in the Common Market and the member States. Although a large amount of good quality basic statistical information is available in each country, differences in terminology and the uses for which the statistics are gathered give rise to difficulties. Article 213 E.E.C. is the only Treaty article dealing even indirectly with this area. However, the various Community institutions have given impulse to studies, and the Office of Statistics has developed into an efficient bureau.

### *Institutional*

*Erich Wirsing* considered in *Revue du Marché Commun*, 1965, pp. 216-225, a number of general aspects of the position of the E.E.C. Commission in the institutional structure of the Community. He paid special attention to the right to submit proposals and to the amendments which had in fact been made in the decision-making process of the Communities. This right of the Commission is an essential part of the policy-making task of every modern executive; it gives the Commission an independent political authority, going beyond that of a mere technical agency. In this respect he points to the completion of Regulation No. 17 on competition, and to the initiatives of the Commission which have lead *inter alia* to the decision to accelerate the pace of integration. The institution of the Agricultural management committees (in his opinion, an application of Article 235 E.E.C. Treaty) is to be considered as an enlargement of the powers of the Commission. It should be added that *Wirsing's* article was published before the crisis of June. Consequently he could not take into account the direct attack which has now been made against the position of the Commission.

### *Human rights*

In the second Supplement of the International Law Series, published by the British Institute of International and Comparative Law, the European Convention on Human Rights forms the subject matter. The report contains contributions by Sir Humphrey Waldock Q.C. on "Human Rights in Contemporary International Law and the Significance of the European Convention"; A.H. Robertson, "The Political Background and Historical Development of the European Convention on Human Rights"; H. Golsong, "The Control Machinery of the European Convention on Human Rights"; J. E. S. Fawcett, "Some Aspects of the Practice of the Commission of Human Rights"; A. B. McNulty, "The European Convention on Human Rights. Its Sanctions and Practice," and Thomas Buergenthal, "The Effect of the European Convention on Human Rights on the Internal Law of Member States".

Special reference to the "United Kingdom practice with regard to the European Convention on human rights" is made by *Lord Shawcross* in the *Revue Belge de droit international*, 1965, pp. 297-305. In his opinion the United Kingdom meets easily the requirements of the Convention of Rome concerning the articles for which some doubt might exist, he points to a number of recent English cases. The Treaty had not been incorporated into English law because the common law already guaranteed compliance with Treaty norms. The United Kingdom has not, however, recognized the individual right of petition provided in Article 25 of the Convention. Here Lord Shawcross says: "justice must not only be done, but it must manifestly appear to be done". He wonders whether the present English government will be willing to reconsider this question.

In *Sociaal-Economische Wetgeving*, 1965, pp. 131-138, *F. M. baron van Asbeck* discusses the European Social Charter that has recently come into force. The Charter has been ratified by the United Kingdom, Norway, Sweden, Ireland, Denmark and the Federal Republic of Germany. Consequently each of these countries has obligated itself in three ways: (a) to consider part I of the Charter as a declaration of intentions, (b) to bind itself to at least five of the seven articles considered to form the heart of the Charter, and (c) to bind itself to five more articles or to a certain number of paragraphs. Van Asbeck enumerates the articles accepted by the various ratifying countries.

*J. J. M. van der Lee* begins with a similar review at *Sociaal Maandblad Arbeid*, 1965, pp. 386-396. He goes on to discuss whether the Netherlands could or should ratify the Charter. In his opinion present Dutch law does not conflict with the obligations which would be accepted upon ratification.

### *Agriculture*

*Th. C. Esselaar* contributed a study on the common agricultural policy of the E.E.C. and the way it is executed in the Netherlands in *Sociaal Economische Wetgeving*, 1965, pp. 213-240. He starts with a summary of the Articles on agriculture in the Rome Treaty. He then describes the basic regulations which have created the market organisations for wine, vegetables and fruits, certain processed goods, beef, grains and rice and dairy products. This sequence also indicates the intensity of Community intervention; intervention is strongest in the last named market. In the second part of his article the measures adopted in the Netherlands for the implementations of the common agricultural policy are discussed in great detail. A large part of *Revue du Marché Commun*, no. 79, 1965, is also devoted to agricultural matters. *G. Gozard* (pp. 176-179) considered the financial implications of the agricultural agreements of December 15, 1964, particularly in the light of Article 207 para. 1 E.E.C. This position stipulates that the Community budget shall be drawn up in the unit of account fixed in accordance with the financial regulations implemented pursuant to Article 209. An anonymous author discussed at pp. 179-187 the European deficit in meat products, and the wine regulation No. 24 was considered by *G. Bréart* at pp. 187-190. The latter paid special attention to Article 4 and the reaction from trade circles. Finally mention should be made of an article signed by *R.F.* on the proposed directives on harmonisation of legislation in the field of seeds.

### *Free movement of workers, Establishment and Services*

*W. van Gerven* has written some interesting comparative notes on the right of establishment in the E.E.C. and in Benelux with special emphasis on the provisions concerning public policy, public security and public health (*Sociaal-Economische Wetgeving*, 1965, pp. 195-213). The Benelux Treaty on this subject provides for rules that are not directly related to the Benelux Economic Union, while the right of establishment in the E.E.C. forms an integral part of the Common Market.

Moreover, because Benelux law is created on the basis of traditional treaties, while in the E.E.C. the special legal character of the Community is much more important, there exist profound differences in the manner in which the subject matter is treated.

In *Droit Social*, 1965, pp. 234-242, *J. Audinet* deals with the problem of persons seeking employment —especially better paid employment—in another country.

This same number contains a discussion by *A. Bonnet* of the social security measures thus far executed in the Community. On January 1, 1959 regulations came into force providing for better protection of migrant workers, by means of harmonisation of the related national statutes. After five years several important amendments have been proposed which aim at a further simplification and closer harmonisation. The author describes the various national regimes and the changes that are caused by the European regulations.

"National Regulation of the movement of workers in the European Community", is the title of an article by *R. Reisner* in which he deals with the immigration of workers in the member States of the Community (*American Journal of Comparative Law*, 1964, pp. 360-385). A survey is given of the various provisions under national law. The immigration of workers from outside the Community is subject to especially close regulation in national law. The law of the country from which the workers have come, as well as that of the receiving country, receives attention. Thereafter a number of bilateral and multilateral treaties on this matter is discussed. Especially devoted to French legislation in the immigration field is the survey by *J. Doublet* in *Droit Social*, 1965, pp. 291-307.

In *Revue du Marché Commun*, 1965, No. 79, pp. 194-198, *E. Heynig* writes on equal pay for male and female workers. The discrimination in wages between the sexes results in the relatively stronger position of the industries that have a large number of female employees. France, that has less female workers than the other member States, feels itself therefore at a disadvantage. In the E.E.C. the end of this discrimination is already projected.

In *Droit Social*, 1965, No. 6, pp. 396-397, *G. Lyon-Caen* annotates a case of the Cour d'Appel in Paris. In the circumstances present in that case, the position of a migrant worker had become in fact worse as a result of Regulations 3 and 4 of the E.E.C.

In the same issue of the *Revue du Marché Commun*, *A. Salmon* discusses the statute enacted in France on December 14, 1964 (pp. 165-169). The Parliament had thereby given the Government the power to issue regulations, subject to the conditions of Article 38 of the Constitution, for the execution of directives of the E.E.C. Council in the areas of freedom of establishment and free performance of services before January 1, 1966. A number of points concerning the concept of "directive" and the conditions under which laws may receive constitutional force are being discussed.

Finally the article on free competition in public tendering by *A. Flamme* (*Revue du Marché Commun*, 1965, No. 81, pp. 277-290) should be mentioned. He discusses the two draft directives on public tenders from the angle of gradual equality of competition. This analysis is preceded by a summary of the history and the aims of the directives. Both the European Parliament and the Economic and Social Committee have requested that a number of modifications be made.

### *Transport*

The Commission proposals adopted by the Council on March 9, 1965, and the other Commission efforts at achieving compromises in the transport field, have been acclaimed by *Rolf Wägenbaur* in *Aussenwirtschatfsdienst*, 1965, Heft 5, pp. 123-125. He describes the directive aimed at unifying licensing procedure for inter-member road transport, while leaving the present bilateralism largely undisturbed. The removal of distortions influencing competition in transport by rail, and internal waterways will proceed according to an agreed-upon schedule, and includes

social measures, taxation and state interventions. The latter two areas will require certain fargoing changes for the Federal Republic. The creation of Community contingents and the harmonisation of bilateral contingents may lead to a considerable liberalisation of inter-member trade. The Dutch veto of a price-margin system for internal carriers, the compromise over weight and volume of vehicles, and the question of treatment of infra-structure costs were briefly alluded to.

*Competition*

Regulation No. 19/65 of the Council has given the power to the Commission to declare that Article 85 para. 1 of the Treaty is not applicable to certain groups of agreements.

*L. P. Suetens* discusses the circumstances which caused the Council to enact the regulation, in *Rechtskundig Weekblad*, 1964-1965, columns 2038-2043, and offers several reflections on its contents. A group exemption can be given only by means of a regulation; the agreements in question must conform with all the conditions of Article 85(3). The Commission must give a description of the groups of agreements that will be covered by the exemption. *Suetens* stresses the importance to the parties of an agreement, of a clear and unambiguous description by the Commission. In his opinion the present avalanche of notifications is the fault of the Community organs themselves. Article 85 para. 3 should have been interpreted as a legal exemption, or else exclusive dealership and licence agreements should have been exempted from notification.

According to *Kirchstein* in *Wirtschaft und Wettbewerb*, 1965, pp. 361-371, the Council was not competent to grant group exemptions. Its task is only to lay down more detailed rules governing the application of Article 85(3). The actual granting of a group exemption is an application *in concreto* of Article 85(3) which belongs exclusively to the competence of the Commission (Article 155). For this reason it cannot be said that the Council has in this regulation delegated powers to the Commission. On the other hand, a special authorization to the Commission was necessary, since neither Article 189 nor Article 155 give it the general competence to make regulations, and Article 85 also contains no special rule to this effect. After this theoretical justification of the solution laid down in the regulation, *Kirchstein* discusses its various rules without going very much into details. But this is done by *Mailänder* in his article on the retrospective effect of group exemptions in *Aussenwirtschaftsdienst*, 1965, No. 7, pp. 161-168. For this reason his contribution will be very useful to the practising lawyer. He gives attention to the following problems: the system of Regulation 19/65 and especially the relation to individual exemptions; the private law consequences of retrospective effect for parties to an agreement and for outsiders; and the possible conflicts of competence between national courts and the E.E.C. Commission. Many of the familiar problems relating to the interpretation of Regulation 17 will come up again, particularly as to the circumstances requiring the national courts to postpone a decision pending an opinion by the Commission.

In "Frankreich: Absoluter Gebietsschutz für Alleinvertriebsverträge durch die Gerichte?", *Aussenwirtschaftsdienst*, 1965, No. 5, pp. 130-131, *Kurt Markett* discusses a decision of July 9, 1964 of the Tribunal de Commerce de la Seine. Allowing damages against a parallel importer, the Court had followed the prevalent line of French case law. The validity of the exclusive-dealership agreement was upheld under French law, and its provisional validity as an agreement notified in time not yet adjudicated upon by the Commission was upheld under Community law. The commentator observes that by this decision simple exclusive arrangements are furnished with absolute territorial protection which are already condemned by the European Commission in the Grundig/Consten case. Unfortunate also was the full enforcement against outsiders of this "provisionally valid" agreement, which would

probably not be exempted. The case also provides difficulties for any proposed group exemption of simple exclusive agreements.

*Arved Deringer* writes in the Foreign Antitrust Section of the *New York Bar Review* 1965 (pp. 105-124) on "Problems of Distribution within the Common Market". The author complains that the E.E.C. Commission shows an uncomplimentary disregard of legal literature in the formulation of its policy; its "case-law" therefore requires special attention. To this end Deringer contributes some "raw guide-lines". With regard to the *Grundig-Consten* case, he takes the view that the Commission will allow an exclusive dealership for a particular territory only when such an arrangement is required for either the provision of a difficult technical service or the introduction of new products.

On the question of resale price maintenance, the French and Dutch opposition to the practice under consideration make it unlikely that it can be maintained in Germany: it is impossible to police a prohibition on re-export of German goods to Germany. However, Deringer thinks that no prediction can be made as to whether the Commission will grant exemptions in respect of resale price maintenance contracts. He also regards it as not impossible that Article 85 be applied to various mergers, which might result in a practice similar to that under the U.S. antitrust rules.

In the *Columbia Law Review*, April 1965, Professor *Carl H. Fulda* writes on "The First Antitrust Decisions of the Commission of the European Economic Community" (pp. 625-645). This article presents a critical analysis of the early decisions of the Commission and a comparison with American rules. The Grosfillex decision would have been the same under the Sherman Act had Grosfillex been a firm in the U.S. In the Dutch building contractors decision (DECA), the Commission said they had "no actual knowledge" of any uncompetitive effects inside the Community, whereas under American law there would have been an enquiry into this. In the Grundig case the inhibition of the GINT trademark would have been the same under the U.S. Trade-Mark Act. Whether the Tile Cartel, even as revised, would be exempted under U.S. law is open to question. On all these points the author emphasizes that case-law is badly needed.

An article of *Walter Hadding* in *Wirtschaft und Wettbewerb*, 1965, No. 5, pp. 371-383, deals with the well-known problem of the civil consequences of the notification of cartels on the basis of Regulation 17. After a clear exposition of the difficulties, he attempts his own contribution to a satisfactory resolution thereof. Postponement of a decision by the national court until the Commission has decided upon a possible exemption has the great disadvantage that the parties directly concerned will simply have to wait until then. This objection becomes increasingly serious, in proportion to the length of the period of uncertainty pending the decision of the Commission. This solution must then be rejected in most cases. Although Regulation 17 does not give explicit rules on the civil consequences of notification, there are, according to Hadding, elements supporting a grant of provisional validity in Article 6 (possibility of retrospective effect) and in Article 15 (no fine if notified in time). That provisional validity is the best solution is demonstrated by an evaluation of all interests concerned. In an action between the parties to the agreement, the fact that the plaintiff has cooperated in making the agreement must be decisive. And in an action against a third party to prevent his undermining a cartel (duly filed with the Commission), the possibility that a whole sales organisation may be destroyed because of a perhaps merely temporary invalidity must be given greater weight than the consequences of an exclusion from the trade for the outsider. In any case it would be easier to estimate the damages of the third party if the cartel turns out to be invalid. It seems to us that Hadding gives undue weight to existing interests in relation to the possible consequences of, for example, a boycott.

At *Rechtskundig Weekblad*, 1964-65, No. 42, col. 2097-2118 can be found a contribution by *Dr. I. Samkalden* on Article 86 of the Treaty. That text has been some-

what revised and appears now under the co-authorship of *Samkalden* and *Druker* in this issue at pp. 158-183.

"Relevanter Markt, Marktbeherrschung und Missbrauch in § 22 GWB und Art. 86 EWGV", by *Ingo Schmidt*, appearing at *Wirtschaft und Wettbewerb*, 1965, pp. 453-494, is another careful systematic analysis of this difficult material. Although primarily an economist's paper, with numerous graphs, formulae, and models, it is written with clarity and an awareness of the primary concern of the lawyer. Schmidt demonstrates the necessity for delimiting the relevant product market by means of the various aspects of the criterion of substitutability (functional replacability, price cross-elasticities, and subjectively viewed demand-supply relationships). Market dominance relates, in his view, to the absence of "workable competition", which can be determined by cumulative application of the "market structure" and "market conduct" tests. These require in turn investigation of the relationship of the various terms of exchange: price, rebates, payment terms, quality, service, etc. Market dominance need not be expressed by abusive exploitation, since either self-restraint or countervailing power may play a role. Abuses are to be made out by reference to the situation of workable competition, in accord with the concept of "Als-ob-Wettbewerb", although the difficulties of deriving a "comparative market" must not be underestimated. Half the paper is given over to detailed analysis of potential abuses occurring in connection with offer and demand at either higher or lower prices than "normal".

Article 86 was in issue before the Tribunal de Commerce de la Seine in the case *Fédération nationale des Cinémas français (F.N.C.F.)* v. *Office de Radio- diffusion-Télévision française (O-R.T.F.)*, published in *Jurisclasseur Périodique*, Jur, 14208 with an annotation by *Lyon-Caen*. The F.N.C.F. complained that the O-R.T.F. had abused its economic power, but this complaint was dismissed. The Tribunal said that no violation of the French price-regulation of 1945 was proved, and that it did not feel itself obliged, as a lower court, to ask for a preliminary ruling on Article 86 of the E.E.C. Treaty. For the rest it noted that no commerce between the member States was affected so that Article 86 did not apply. *Lyon Caen* is justified in saying that the Tribunal did not consider the question seriously enough, especially the treatment of a television monopoly under Articles 86 and 90 of the Treaty raises difficult questions.

In the *University of Pennsylvania Law Review* for March 1965 (pp. 633-667) *Richard M. Buxbaum* contributes an article on "Restrictions Inherent in the Patent Monopoly: a Comparative Critique". Particularly important for the interpretation of the Rome Treaty, is the extent to which the exploitation of restrictions in the legal patent monopoly is affected by anti-trust legislation. The author regards the attempt of the Council in Regulation No. 17 and in its "Announcements" to exclude "inherent patent restrictions" from the reach of E.E.C. antitrust law as being erroneous and useless. He investigates closely the idea of the "inherent restriction" and rejects it as a misconception, which is in danger of being carried into the substantive law. It is moreover a concept which is not upheld in American law. In every case there must be a detailed economic analysis of the actual situation in order to determine whether or not there has been a misuse of the patent. The author suggests that the same investigations will have to be made by the E.E.C. Commission and a "rule of reason" should be established in respect of the restraints in question.

Reconciliation of the tensions between freedom of contract and freedom of competition characterizes the development of the modern law of competition, observes *A. de Caluwé* at one point in "Essai d'une théorie du droit de la concurrence", *Revue de droit intellectuel*, 1965, pp. 7-21. In this contribution to contemporary legal philosophy, the author pleads for treatment of all aspects of the various "laws on competition" (industrial property, patents, unfair competition, anti-trust) in an integrated system.

The position of government enterprises in the Community is outlined at *Aussenwirtschaftsdienst*, 1965, No. 5, pp. 121-123, by *Klaus-Dieter Huth*, in "Offentliche Wirtschaft und EWG-Vertrag". His thesis on the same subject, "Die Sonderstellung der öffentlichen Hand in den Europäischen Gemeinschaften", has been reviewed in this issue of C.M.L.Rev. at pp. 267 ff. After a concise discussion of a number of articles here concerned (37, 48(4), 52ff., 85 ff., 92 ff., 222, 103 ff.), Huth concludes that the Treaty aims rather at harmonization and equalization, than at elimination, of state-directed activities. Private and public enterprises are treated fundamentally alike, while a final decision as to the permissible measure of state intervention in the E.E.C. economy is postponed.

*Werner Grussendorf* has written on the same subject in *Wirtschaft und Wettbewerb*, 1965, No. 5, pp. 383-388. He starts with a definition of a public enterprise broad enough to cover also private companies of which the government owns the majority of the shares. The author fears that the formal equalization of Article 90 enterprises with private companies may be endangered by modern efforts toward economic development, which results in the growing influence of the government in private industry.

Last year *J. Vandamme* lectured at Louvain on the competence of the Commission to acquire information concerning cartels. This lecture is now published in *Rechtskundig Weekblad*, 1964-1965, col. 1629-1636. There is a difference between an inquiry for a special case and an investigation into the practices of a whole branch of industry. Information may be asked both from the member States and from enterprises, but only if a violation of Articles 85 or 86 is presumed to exist and if the information is "necessary" (Article 11 of Regulation no. 17). For the meaning of "necessary" one may find an indication in the case 31/59 Brescia v. High Authority (April 4, 1960). Vandamme surveys the other articles of Regulation 17 on the obtaining of information and their implications.

The draft regulation recently presented by the Commission "dealing with protection against the practices of dumping, export premiums, or subventions, utilized by countries not belonging to the E.E.C.", is summarized and briefly compared to the German procedure in "Gemeinschaftsregelung für antidumping Massnahmen in der EWG", *Aussenwirtschaftsdienst*, 1965, Heft 8, pp. 195-196. The draft regulation meets the desires of certain industrial circles for strong anti-dumping protection; in contrast to the German provision for retrospective application of special tariff rates, the draft provides for immediate application of provisional measures. The draft was expected, however, to give rise to serious discussion in the Council.

The two draft directives relating to liberalization of governmental contracts awards and harmonization of procedures for letting public works were discussed primarily from the point of view of equalization of conditions of competition by *M. A. Flamme* in "La Libération de la concurrence dans les marchés publics au sein de la C.E.E.", *Revue du Marché Commun*, 1965, No. 81, pp. 277-290. A summary of the formative history and reasoning behind the directives is followed by a separate analysis of each. The successive "liberalization" by means of quotas and subquotas provided in the first directive as an escape clause for transitional difficulties caused by allowing foreign contractors to tender for public works, has been criticized by the Economic and Social Committee and the European Parliament, and will have to be revised. Inclusion within the directive's field of operation, of concessions for public works (under both private and public law) and railway construction, has been urged. The second directive coordinating procedures was necessary in order to eliminate national variances which could result in factual discrimination. The extent of coordination—for example, whether to include also the means open for redressing violations of award procedures—has been discussed, as well as the objects: publication of invitations for tender, criteria of selection of responsible firms and for award of contracts (including the conditions for application of the *gré à gré*

or "unacceptable bid" procedure). The Consultative Committee for public works created by directive will play an important policing role.

*Harmonisation of Laws*

In *Recueil Dalloz*, Chron. 1963, p. 273, *R. Lecourt* and *R. M. Chevallier* had already drawn the balance with regard to the progress made in the field of harmonisation of laws in the E.E.C. Now, one and a half year later, they have done the same (*Recueil Dalloz*, 1965, Chron. XXXIV, pp. 147-152). They noted that little more has since been achieved. Progress is possible only when there is a real "pression des nécessités", in which circumstances the numerous arguments made in behalf of the excellence of one's own laws can be surmounted.

European company law was the subject of an article by *C. A. E. Uniken Venema* in *Naamloze Vennootschap*, 1965, pp. 55-62. The author discusses in a critical way the proposal of the Commission of February 21, 1964 for a directive based on Article 54 (3) (g) of the Treaty. The purpose of the directive is to align the guarantees accorded in the six countries for the protection of shareholders and creditors. Another directive concerning the capital of corporations is already in preparation. *Uniken Venema* questions whether intervention of the E.E.C. in the company law of the member States can indeed be based on Article 54 para (3) (g) of the Treaty. This article may be used only in the context of abolition of restrictions on the freedom of establishment and, moreover, only in circumstances that are nearly as serious as the case of distorsion alluded to in Article 101. Its function is to bring about equilavence of guarantees, but not uniformity. The proposed directive contains so many details that it seems to exceed the competence of the Community.

In an exploration of the current situation in the pharmaceutical industry, "Problèmes et possibilités de l'industrie pharmaceutique dans le Marché Commun", *Revue du Marché Commun*, 1965, No. 81, pp. 291-295, *C. Mosseri-Marlio* of Mead-Johnson Laboratories (Benelux) notes that development of new pharmaceutical products always entails certain risks. New Community measures must eliminate, however, overcautious national legislations which impede introduction of successful products from country to country. In addition, such measures ought to allow for comparatively rapid recovery of research and marketing expenses, and for increased concentration and specialization in research. The directive already taken in this field (O.G. 369/65) is reviewed by *Pierre Duprat* in the same journal at pp. 296-306, under the title "La Réglementation des spécialités pharmaceutiques dans le Marché Commun". After discussing applicable treaty dispositions and national legslation, he notes that the directive has been limited to products for human treatment, excluding veterinary preparations. The harmonized conditions (in particular the criterion of therapeutic effect) for patenting, applied with flexibility by the competent authorities, will safeguard the general interest as well as protect the serious producers. The requirements that the decision to refuse, suspend, or withdraw patent authorization must be accompanied by specific grounds, and that any decision must be taken within a fixed time satisfies the needs of producers. The provisions regarding labeling, while not essential from the point of view of public health, are indispensable from the point of view of free circulation of the products. The directive, important as it is, is, however, not sufficient to create a common market in pharmaceuticals from the perspective of either free circulation or undistorted competition. The proposal for a second directive, presented February 24, 1964 (supplement to *Bulletin* of the E.E.C. No. 4/1964) outlined, in accord with the first aim, a system of identical controls and authorization procedures. Differing price regulations and social security aspects are the main barriers to achieving the second aim.

*Association*

In the *University of Pittsburgh Law Review* for March 1965 Professor *David M. Cohen* writes on "The Association of Third Countries with the European Economic Community pursuant to Article 238" (pp. 521-549). The author examines the provisions of the Association Agreements with Greece and Turkey and comes to the conclusion that association differs from accession to membership in that it is not limited to European states, it need not be for an unlimited duration and it does not involve so many rights and obligations. It differs on the other hand from an ordinary commercial agreement because it involves a higher degree of participation in the structure and methods of the Community, and usually includes the eventual establishment of a customs union or free trade area.

*Case law of the Court of Justice of the European Communities and of National Courts*

Article 177 of the E.E.C. Treaty has an important place in the legal structure of the Community. But still very much discussed is what the exact role of the preliminary ruling ought to be. *W. Alexander* writes in *Cahiers de droit Européen*, No. 1, pp. 47-58 on recent applications of Article 177. First, he surveys three recent decisions of the Court and three new requests of national courts for a preliminary ruling. In the case *Albatros* v. *Sopeco* (case 20/64, Rec. X/3, 2 C.M.L.Rev. 1964-5, pp. 441-445) the Court speaks of the complex rules of Chapter II. In this reference he reads a reference to the case *Société des Pétroles Shell-Berre* (See 3 C.M.L.Rev. 1965-6, pp. 100-107) decided by the French *Conseil d'Etat* on June 19, 1964. This administrative court held, in contrast to the European Court, that the articles in question were "*claires*" and refused to use the procedure of Article 177. The other two cases concern Regulation no. 3 (O.G. 561/58) of the Council. The second part of the article deals with a number of cases in which the national courts refused to ask for a preliminary ruling: decisions of the French *Cour de Cassation* of February 19, 1964 (2 C.M.L.Rev. 1964-5, pp. 448-49) and of October 22, 1964 (Nicolas et Société Brandt Frères, 2 C.M.L.Rev. 1964-5, p. 449, of the Dutch *Hoge Raad* (Supreme Court) of April 10, 1964 (2 C.M.L.Rev. 1964-5, pp. 100-101) and the case before the *Conseil d'Etat*, mentioned above.

In a commentary on the Albatros-case (*Jurisclasseur Périodique*, April 28, 1965, D. 1907), *Jeantet* discusses at length the competence of the Court in a case submitted to it on the basis of Article 177. He perceives an implicit rejection of the theory of the *acte clair* in the words: "... that this (national) court obliged or not according to the Treaty—can avail itself of the procedure of Article 177 in order to obtain a uniform interpretation for the whole Community of the complicated articles of Chapter II. ..." Jeantet indicates his approval of this rejection. It should be added, however, that the wording of the Court's ruling is far from supporting fully the standpoint which Jeantet upholds. As far as the main questions of the case are concerned, he declares that the decision shows a cautious moderation. However, it may be questioned whether it was necessary for the Court to give such a limited scope to its own competence.

*Jean Amphoux* annotated the same case in *Cahiers de Droit Européen*, pp. 59-71. He notes that the Court reiterates almost literally the considerations concerning its own competence in the case 6/64, *Costa* v. *E.N.E.L.* (2 C.M.L.Rev. 1964-5, pp. 197-213 with annotation Sk.). In his opinion the view of the Court that it may not look to the facts in the principal proceedings creates the danger that a preliminary ruling may be asked which has no relation with the principal procedure. In such a case the Court should be able to reject the request. The Court provided only the most limited answer possible to the questions posed; but this answer should nonetheless enable the Court in Rome to render judgment in the case at hand.

The application of Article 177 in summary proceedings *(kort geding)* was discussed

in *Ars Aequi*, May 1965, pp. 198-203 by *A. Kosto* and in June by *J. L. Schultsz* (pp. 228-231). In the same number *P. J. G. Kapteyn* has annotated the judgment of the Court in the joint cases 90 and 91/63 (2 C.M.L.Rev. 1964-5, pp. 340-344 with annotation Sk.). The *exceptio non adimpleti contractus*, rejected by the Court is given much attention. The decision is new evidence that the Court does not consider the Treaty as a classical international agreement.

The Costa and Albatros cases have lead *Hans Würdinger* to go into the problems of the commercial monopolies under Article 37, especially with regard to the French petroleum industry (in *Wirtschaft und Wettbewerb*, 1965, no. 4). He rejects the opinion of *Wohlfarth* (in: *Kommentar zum E.W.G.-Vertrag*) that the Article provided a definition of a monopoly with a commercial character. As is shown also by the Costa case, this notion is only the starting-point of Article 37; its contents must be derived also from other elements. The most characteristic element of such a monopoly is its discrimination against foreign goods. An example may be found in the French system, which is organised to protect the national products against import from other countries. *Würdinger* indicates what measures, in his opinion, have to be taken to comply with the Treaty.

In an annotation under the case 38/64, Getreide-Import Gesellschaft, S. a.r.l. *v.* Commission (3 C.M.L.Rev. 1965-6, pp. 90-91) the editors of *Aussenwirtschaftsdienst des Betriebsberaters* (No. 7, 1965, p. 173) discuss the insufficient protection of the individual against decisions of the Commission. It is very difficult to have a decision annulled by the Court; compensation of damages under Article 215 par. 2, is possible, however, only when a decision is annulled. The editors propose to award damages also in cases in which the illegality of a decision has been established by a preliminary ruling of the Court.

*M. R. Mok* and *H. Johannes* discuss a series of problems raised by the inclusion of an arbitration clause in a cartel agreement in "Schiedsgerichtsbarkeit und EWG-Vertrag", *Aussenwirtschaftsdienst*, 1965, No. 8, pp. 181-184. In the light of the Dutch arbitration judgement of July 22, 1964 (*Arbitrale Rechtspraak* 1964, p. 240 (No. 524); French translation at *Revue de l'Arbitrage* 1964, p. 28), the authors examine whether Art. 177 is applicable to the arbitration procedure; to what extent arbitration may be allowed to determine civil law consequences of nullity under Art. 85(2)) in place of the civil jurisdiction and without the usual accompanying publicity; and under what conditions the presence of the arbitration clause itself already represents a restraint on competition. The arbitration court considered the cartel in question void; it was a mutual exclusivedealings agreement between Dutch importers, dealers, and producers which prohibited import into Holland from the rest of the E.E.C. except by way of the cartel members. Although an agreement between nationals of one State, it affected trade between the States and should therefore have been notified to the Commission. (It was also void under Dutch law.) With this conclusion the authors were in accord. The arbitration court was therefore incompetent, since the arbitration clause was also necessarily void. The authors also approved this result, though noting other views held outside Holland on the "Kompetenz-Kompetenz" of arbiters. The arbitration court had further held that it was not a "national judicial instance" competent to refer to the European Court under Article 177; here the authors, noting the differences in the official texts and the controversy in the literature, argued that the arbitration court should have referred the very question of its position for decision by the Court.

At *Revue critique de droit international privé*, 1965, No. 1, pp. 154-161, *M. Waelbroeck* has annotated a case decided by the Court of Appeal of Brussels on June 25, 1964 (Cement Manufacturers) and mentioned in earlier Literature Surveys, in connection with comments by *Rigaux* (2 C.M.L.Rev. 1964-5, p. 363) and *Del Marmol* (3 C.M.L.Rev. 1965-6, p. 124). The Brussels court had overruled the lower court decision to give full effect to a cartel with indemnity clause, which at most had provisional validity under Article 85 and Regulation 17. Waelbroeck points out

the dangers of unrestricted application of "provisional validity", argues for suspension of judgment pending a Commission decision, and urges submission to the Court by way of Art. 177 for further interpretation of the ambiguous *Bosch*-case. Although somewhat critical of the finding of "affect on trade" between the member States, he shares the other views of the Brussels court, noting that the national court may still decide immediately matters susceptible for later redetermination.

In the same number of the *Revue critique de droit international privé* at pp. 163-165, *E. Mezger* briefly reviews the *Nicolas and Brandt* case of October 22, 1964, also the subject of commentary cited earlier in this rubric. He approves the disposition of the case of the Cour de Cassation as solely a matter of French law rather than Community law, not requiring a reference to the European Court.