SURVEY OF LITERATURE

I. *General and Institutional*

The *International and Comparative Law Quarterly* for July 1965 contains the address by *Walter Hallstein,* President of the E.E.C. Commission, in Londen on "The E.E.C. Commission: A New Factor in International Life" (pp. 727-741). It gives a magisterial survey of the staus of the Commission in regard to both the Six themselves and non-member countries. The unique quality of the Treaty is that the powers for the elaboration of its articles are conferred upon the institutions of the Community and not the member States themselves. So greatly is the Commission involved in the preparation of the acts of the Community (where its right of initiative is of vital importance) that it has been described as "the seventh partner at the Council table" and is the greatest factor in keeping the Community moving. The control over the Commission is wisely conferred upon the European Parliament which, having no national groups, is a Community Institution *par excellence* and is "often the Commission's best ally in the quest for integration". In foreign affairs the Commission becomes the agent of the Community. The President of the Commission receives the credentials of the missions accredited to the Community and maintains current relations with them. It conducts negotiations on behalf of the Community with non-member countries and international organisations and thus exercises great influence with the Council. Here the Commission bears new responsibilities: "the external relations of an economic association of 180 million people reflect desiderata vastly different in extent and even in kind from those of each of its constituent countries". Hallstein delivered his address before the crisis of June; the developments after that month will show to what extent the Commission can stand up against attack from one of the member States.

The crisis is discussed from a juridical point of view by *G. Nicolaysen* in *Neue Juristische Wochenschrift,* 1965, No. 36, pp. 1653-1658. The sincere cooperation of all national governments is a prerequisite for the functioning of the Community, and Nicolaysen notes that, although the Council had exceeded the term fixed in Article 7 of Regulation No. 25, the French reaction was out of proportion. However, it should still be possible to reach an agreement on the financing of the common agricultural policy, and in fact it is only on this point that further progress must be made before the expiration of the transitional period. No dead-line exists for the two other proposals of the Commission (concerning own resources of the Community and the increase of the powers of the European Parliament) and according to Nicolaysen these could be better postponed for a while. As is known the new proposals of the Commission deal only with the financing of the agricultural policy (see 3 C.M.L.Rev. 1965-6, p. 249).

In connection with the (old) proposal of the Commission to extend the budgetary powers of the Parliament *M.J. Kuiper* has written an interesting article on parliamentary influence in the E.E.C. in *Ars Aequi,* 1964-65, No. 10, pp. 245-265. Kuiper points to a number of factors that render the recommendations of the European Parliament rather ineffective in most cases. Especially the fact that the deliberations of the Council are not public is a great draw-back, since consequently it is never known whether changes in the original Commission proposals are the result of a unanimous vote of the Council, or have been made by the Commission itself.

In the Editorial Comments (pp. 285 of this issue) we have already paid ample attention to the congress of the Union internationale des avocats, held last September. The excellent reports presented to this congress are of the outmost

importance for the study of the two subjects discussed: the preliminary procedure of Article 177 E.E.C. Treaty, and the legal protection of private persons in the judicial system of the Treaties. The general report on the first subject was prepared by *Ernest Arendt;* it gives an almost exhaustive survey of the questions that may arise in connection with the preliminary procedure. This report, and the national reports are published in *Sociaal Economische Wetgeving,* 1965, Nos. 7-8, pp. 385-513; the authors of the national reports are *H. Paetow* for Germany, *J. Mertens de Wilmars* for Belgium, *A. Astolfi* for Italy, *E. Arendt* and *A. Georges* for Luxembourg and *J.C. Schultsz* for the Netherlands. The same issue of *Sociaal Economische Wetgeving* contains also a note by *Dennis Thompson* on reference for a preliminary decision in English law (pp. 514-515) and an article by *A.P. Funke* on the legal history of Article 177 (pp. 516-523). The following number of the same periodical includes the report on the second subject (the legal protection of private persons in the Communities) by *N. Catalano,* who first summarizes the national reports, and then offers a remarkable interpretation of Article 173 of the E.E.C. Treaty. For a discussion of Catalano's point of view see the Editorial Comments at pages 287-288.

"Grundfragen des europäisches Gemeinschaftsrechts" (Basic questions of European Community law) is the ponderous title of a contribution by *H. Furler* in *Neue Juristische Wochenschrift,* 1965, No. 31, pp. 1401-1409. Community law in his opinion consists of general rules; he does not therefore analyse or refer to individual decisions. And even directives, although of great importance, have, he says, no law-making character. Among other things Furler discusses the constitutionality of the German statute approving the E.E.C. Treaty: the validity of this statute need not be doubted, since Article 24 of the German Constitution can be broadly enough construed. Moreover, the proposition that the division of governmental powers required by Article 20 of the Constitution has been neglected in the Treaty, is not correct: the Community is not a state, but just a starting-point for further development.

The revocation of decisions under Community law is studied in another issue of *Neue Juristische Wochenschrift,* 1965, No. 36, pp. 1648-1650, by *W. Däubler.* Since the treaties do not give rules for this subject-matter, one has to resort to the general legal principles of the member States. It appears from the national legal systems that the principles of legality and of legal security are the decisive factors in this question. Accordingly a distinction must be drawn between decisions that favour and decisions that burden the individuals. Unlawful decisions with the latter effect must be withdrawn; but where they have a favourable result then the solution depends on the good or bad faith of the person involved. As far as lawful decisions are concerned, the Court of Justice has ruled that revocation of such a decision is not permitted if it has created subjective rights. Däubler would prefer to use the distinction between a favourable and a burdensome result also in cases involving a lawful decision.

An important and very comprehensive survey of the international law practice of the Federal Republic of Germany in 1963 is given by *Michael Bothe* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 1965, pp. 223-351. At pages 310-320 questions relating to the European Communities are discussed: among others, the compatibility of the Franco-German treaty of January 22, 1963 with the European Communities, and the control of the national parliaments over the E.E.C. budget. Hopefully more studies of this type will be made.

American interest in the Common Market is demonstrated by the *Boston College Industrial and Commercial Law Review* for Spring 1965, which is devoted to a symposium on "American Business and the Common Market". Among the contributors, *Sarah Montgomery* writes on "The Potential Economic Effects of the E.E.C." (pp. 425-432) and applies a test elaborated by Bela Belassa to the growing Community. By this test the potential growth will depend on the economic size of

the union, transport costs within the area as compared with the rest of the world and the extent to which the economies within the union are competitive or complementary. Her view is that in these terms the Community scores quite high, provided that it remains internally competitive and succeeds in lowering its external tariff in the Kennedy round. The main contents of the symposium are devoted to methods of operation in the Community countries, with particular reference to distribution contracts, the establishment of branches and subsidiaries, and the creation of joint ventures. There is considerable material on the legal and practical aspects of companies in the member States. *Robert B. Fraser* contributes a substantial article on "Foreign Licensing — United States Tax Aspects" (pp. 509-532), dealing particularly with the controlled foreign company. *James B. Gambrell* writtes on "Patents and Antitrust: an integrated approach in the E.E.C." (pp. 541-560). He reviews the provisions of the Patent Convention and the incidence of the rules of competition on patent licences. *Alison L. Scafuti* writes on "United States Antitrust Laws in Relation to American Business operating in the Common Market" (pp. 561-568) and examines the effect of the U.S. Antitrust Laws on the European subsidiaries organised by U.S. businessmen. He concludes that, in the absence of restraint by the U.S. authorities where extraterritoriality is concerned, the only fair solution is that a multi-national convention be concluded to limit the extraterritorial effect of antitrust laws. There are also contributions by *Herbert Burstein* on "Arbitration of International Commercial Disputes" (pp. 569-578), dealing with the facilities available and the effect of the U.S. Arbitration Act, and by *Norman H. Birnkrant* (pp. 579-589) on "Relief and Remedies of International Litigation", which gives some practical advice for the American who wishes to litigate abroad or to enforce a foreign judgment in the United States.

A new approach to promote private arbitration in international commercial matters is the European Convention on International Commercial Arbitration of April 21, 1961. *Ernst Mezger* writes on this subject in *Rabels Zeitschrift,* 1965, No. 2, pp. 231-302. The convention, which has already been ratified by Germany, Austria and a number of East European countries, differs basically from previous agreements in this area. It does so in particular by creating a special category of arbitral awards, which are not subject exclusively to the binding provisions of the convention or to the stipulations of the parties. The Convention seeks to ensure that arbitration is not unduly hampered by objections directed against either the validity of the agreement to arbitrate or the underlying commercial transactions. A special objective of the Convention has been to facilitate East-West trade. According to Mezger, the implementation of the Convention — which is not always drafted in the most fortunate manner — will give rise to many questions in the national legal systems. This is in particular the case with Article XI, which deals with a problem already a subject of the previous Geneva and New York agreements: simplification of the recognition and enforcement of foreign arbitral awards.

The *International and Comparative Law Quarterly* for October 1965 contains the address by *Frank Figgures,* the former Secretary-General of E.F.T.A., on "Legal Aspects of the European Free Trade Association" (pp. 1079-1088). He is at pains to emphasise that E.F.T.A. is an experiment in integration, in the creation of a single market, and not a commercial agreement. The attempt in this direction is strictly limited, he said, and the approach of the E.F.T.A. countries is essentially a simple one. The first reason for this is that it reflects a certain style in their public life, and the E.F.T.A. countries "are content with their capacity to solve problems when they arise tomorrow ... (rather) than work out a theoretically perfect solution in advance". Mr. Figgures here presents a dangerous philosophy to justify the continuance of intergovernmental organisations. This may reflect British government thinking, but it shows a distinct tendency towards Gaullism. Common solutions are to be found only by means of a procedure which is laid down in advance. Mr. Figgures also says, however, and this is more encour-

aging, that the second reason for simplicity is that E.F.T.A. was only intended as a temporary body to lead to a wider European unity. Should E.F.T.A. be compelled to remain independent, Mr. Figgures acknowledges that it will probably require a Court of Justice and provisions for the harmonisation of laws in three categories: (i) national regulatory measures relating to safety and other standards, particularly for foodstuffs; (ii) alignment of systems of indirect taxation; and (iii) monopolies and restrictive trade practices. This shows that as soon as tariffs and quotas are removed, the non-tariff barriers become important. The real question is whether an intergovernmental organisation is adequate to deal with them.

II. *Council of Europe, Human rights*

The second issue of *Cahiers de droit européen* is devoted for an important part to the Council of Europe and the influence it has had till now. *H. Golsong* analyses to what extent the Council differs from an international organisation of the classical type (pp. 140-147). He draws special attention to the particular way treaties are concluded among the member States. This issue also countains the text of an address delivered by *J. Velu* on the European Convention on human rights (pp. 99-121). Velu goes primarily into the political aspects of the Convention. He points to several reasons why the intentions of its authors have been realized only partially. Important factors are that ratification of the Convention has never been declared a prerequisite for membership of the Council of Europe, and that the right of individuals to complain is not generally accepted. Although, as a result, the influence of the convention is not as great as it could have been, it has nevertheless, to a certain extent, created a European legal order. Consequently this new European law should prevail over national law; the reasoning of the Court of Justice of the European Communities in the *Tariff Commission* cases and in the *Costa-ENEL* case ought also to apply here. According to Velu the case law of the Commission on Human Rights provides a starting point for his position. *F. Ermacore,* a member of this Commission, has written an article on human rights in international law in *Oesterreichische Juristenzeitung,* 1965, No. 14/15, pp. 375-381. He also makes some critical remarks on the present situation in Austria.

The *International and Comparative Law Quarterly,* 1965, pp. 646-653 contains a note by *A.H. Robertson* on "The Legal Programme of the Council of Europe". The information given refers to recent developments; a bibliography of legal literature on the Council of Europe (with the exception of literature on the Convention on human rights) is included.

M.-A. Pérot-Morel writes in *Jurisclasseur Périodique,* 1965, No. 16, 1905 on the implications for French law of the third Convention for the harmonization of patent law, concluded by the member States of the Council of Europe on November 27, 1963.

III. *Agriculture*

The practice with regard to the milk and dairy products sub-sector in the E.E.C. Agricultural system is examined by *Georg Jung* in *Aussenwirtschaftsdienst,* 1965, No. 12, pp. 270-274. The structure of the market organization has a number of transitional aspects already familiar to those conversant with the other Community market organisations, *inter alia:* a Community target price, with national target prices as well; gradual abolition of state subsidies to producers, partly automatic, partly pursuant to annual Council decisions; removal of some, and consolidation and replacement of other protective measures, with necessary increases in threshold prices and levies. The interdependence of Community and national measures is amply demonstrated; the steps taken toward approximation of national target and

threshold prices and the interventions required during the second market year are also documented.

III. *Free Movement of Persons, Services and Capital*

The right of establishment is the subject of an article by *W. van Gerven* in *Cahiers de droit européen,* 1965, No. 2, pp. 125-139. The same author has dealt with this subject in a somewhat different and more comprehensive way in this issue of the *Common Market Law Review,* pp. 344-362.

In the *American Journal of Comparative Law* for Summer 1964 *Ralph Reisner* writes on "National Regulation of the Movement of Workers in the European Community" (pp. 360-384). This deals specifically with the various national provisions in the member States applying to the entry and settlement of workers from *outside* the Community.

There are no actual numerical quotas imposed by the recipient countries, but the right of entry is in fact influenced by the state of the labour market. Criteria applied in actual administration are financial status, health, character and sometimes marital status and age. The right to stay will also depend on the continuance of a residence permit, and a work permit is also required. The system has been considerably ameliorated by bi-lateral agreements, *e.g.,* the German-Austrian Agreement of 1951, which provided that Austrians then resident in Germany did not require a work permit. There is also the O.E.E.C. Convention, which provides for cooperation between the member countries, and the I.L.O. Convention Concerning Migration for Employment, which attempts to provide social benefits for migrant workers. The most far-reaching of all is the Benelux Convention of 1960, which provides for real free movement of workers for Benelux nationals within the area. The only reservation made is that it can be ordered that at least 50 per cent of the employees of any enterprise shall be nationals.

IV. *Transport*

Until now the E.E.C. has not succeeded in adopting a common policy on transport; it is still rather difficult to reconcile the various standpoints. *Bruno Minoletti* has studied in some detail the pending proposals of the Commission (*Les problèmes de l'Europe,* 1965, pp. 7-19). The draft regulation to form a Community quota system purports to replace gradually the national quotas; this will enable transport enterprises of all member States to take part in international transport irrespective of their nationality. It seems, however, that the Council is willing to adopt a Community quota system only for an experimental period of four years, and that it wants to maintain and to expand the bilateral quotas. The introduction of a system of rate brackets, the subject of another draft regulation, is strongly opposed by the Netherlands. As a compromise it is willing to agree with rate brackets for transportation by road, but not for shipping on the Rhine. The Commission, however, does not want to make any exceptions. Several other draft regulations and directives of the Commission are also discussed. An important matter in dispute is transport by sea and by air: the Commission, the European Parliament and the Dutch government are of the opinion that the general transport provisions of the Treaty do apply; the other member States, on the contrary, maintain that a unanimous vote of the Council is necessary to make these provisions applicable, in accordance with Article 84, para. 2.

The interrelationship of subsidized transport fare schedules, regional development policy and the rules of competition is the subject of a lengthy study by *Rolf Wägenbaur* in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht,* 1965, No. 3, pp. 180-216. In the introduction, the central purpose of E.E.C. transport policy is seen as the removal of measures which falsify the conditions under which

competition takes place; at the same time the E.E.C. rules of competition (especially Art. 92) must be taken to apply in principle to the transport field itself, whatever special exception pursuant to Article 75 E.E.C. may be later made. This is also the thrust of Article 80 E.E.C. Discussed are: provisions connected with Article 80; the areas falling under Articles 80 and 92, respectively; the reach of the Article 80 prohibition on support measures; and the procedure to be followed by the Commission under Article 80, para. 2. Each of the criteria named in the last provision is investigated; and Wägenbaur concludes that the preference is definitely to be given to direct forms of assistance improving the basic structures of the region involved, over the less obvious distortions of freight rate structures. The measures adopted by the Federal Republic, France and Italy are enumerated with an eye to the standards the Commission will use to test requests to authorize support measures. In a last section, the position of exceptional "competitive" freight rates in the E.E.C. is analysed, as well as the role of "as-if-rates" *("als-ob-Tarife")* with regard to potential competitors. The entire article benefits from numerous references to the situation under the E.C.S.C.

V. *Competition*

Developments in the field of competition have not been much affected by the crisis in the Communities. On the contrary, a growing number of Commission decisions is now being published, and they provide more substance for commentaries, which may become less conjectural than in the past.

Especially worthy of consideration is the address of *H. von der Groeben,* Chief of the E.E.C. Commission Competition Group, delivered to the European Parliament on June 16, 1965. We alluded to it briefly in the Editorial Comments of the previous issue of the Common Market Law Review (Vol. 3, No. 2). In addition to the English language edition circulated by the Communities, *Wirtschaft und Wettbewerb,* 1965, No. 9, pp. 691-700, has reprinted the text in full in German. Beside the outline of the Commission's policy with regard to mergers, it should be noted that the speech also contained an excellent concise record of Community progress, as of mid-1965, toward removal of competition distortions. Not content with surveying the extensive remaining problems which each successive phase of integration seems to bring with it, von der Groeben also defined in concrete terms, the measures and policies contemplated and in preparation at the Commission.

The well-known Grundig-Consten decision (2. C.M.L.Rev. 1964-5, p. 352), now being appealed to the European Court, did not concern only the exclusive distributorship agreement between the parties, but also the subsidiary agreement on the trademark GINT. The consequences of the decision for the latter agreement are investigated by *J. Heiseke* in *Neue Juristische Wochenschrift,* 1965, No. 31, pp. 1409-1413. The decision forbids Consten to use the trademark in order to prevent "parallel imports" of Grundig products into France. Heiseke objects to this part of the decision. Article 85 of the Treaty deals with agreements, but not with private rights based on national legislation. Since the trademark is registered in France, the rights it conveys are to be governed by French law only. The Commission has said that the subsidiary agreement is in itself incompatible with Article 85. This is not correct, however: although the trademark may provide absolute territorial protection, this does not result from the agreement, but from the present situation of six national legal systems existing alongside each other. Heiseke concludes that the decision on the GINT trademark reaches too far.

An analogous problem arises in the field of patent law. The patentee has the right to control the bringing into circulation of the products concerned. But, if he has sold his products, he has no further control over them. However, if in another country a parallel patent exists, the owner of that patent again has the right to control the sale of the product in that country. In this manner an abso-

lute territorial protection may be created. In the opinion of *N. Koch* and *F. Froschmaier,* writing in *Gewerblicher Rechtsschutz und Urheberrecht,* 1965, No. 3, pp. 121-127, this is incompatible with Article 85 E.E.C. They propose a solution according to which the protection of a patent would be exhausted in all the member States for every object sold in one of them. In the same periodical, No. 6, pp. 302-304, *J. Monnet* has critized this proposition. In this opinion the Treaty has not changed the rights of a patentee as regulated by the national legal systems. Moreover, the proposed solution would create great difficulties, since in every country one would have to make a distinction between products imported from a member State (this import would not infringe patent rights) and products imported from outside the Common Market (the import of these goods would still infringe patent rights). In practice this would be impossible. Monnet thinks that the problem could be better solved by the creation of some sort of European patent.

C. Tessin writes in *Aussenwirtschaftsdienst des Betriebsberaters,* 1965, No. 11, pp. 241-243 on Article 15 para. 6 of Regulation No. 17. This paragraph says that persons who have notified an agreement to the Commission may no longer be exempted from fines for the period after a Commission communication to the effect that the notified agreement violates Article 85 para. 1 and does not qualify for an exemption under the third paragraph of that article. Tessin takes the view that this communication does not have any effect on the provisional validity of the agreement: the parties are still bound by it. The only purpose of Article 15 para. 6 is to cancel the protection against fines, by means of the communication. Tessin furthermore notes that the communication cannot be appealed since it has no binding force; only the decision to impose fines can be brought before the Court in Luxembourg.

In the *International and Comparative Law Quarterly* for October 1965, pp. 1375-1382, *Alan Campbell,* in a note on "The Commission of the E.E.C. and Restrictive Trading Agreements", offers a summary of the Commission's decisions, including Grundig-Consten, and the effect of the group exemption regulation. Campbell also notes that the legal committee of the Council of Europe has recommended a convention between E.F.T.A. and the Community on the extra-territorial effect of anti-trust law.

The growing recent interest in the application of Article 86 E.E.C., evidenced earlier this year by the remarks of *Samkalden* in *Rechtskundig Weekblad 1965,* No. 42, columns 2097-2118 and *Samkalden* and *Druker* in the previous issue of *Common Market Law Review,* received additional impetus at the spring meeting of the Netherlands Association for European Law in the Hague. The two papers presented and discussed on that occasion, and a third dealing with problems raised by the possible overlap of Articles 85 and 86, have been published in *Sociaal-Economische Wetgeving* 1965, No. 6. The first paper, "Enkele aantekeningen bij Artikel 86 van het E.E.G.-Verdrag" by *J.J.A. Ellis,* at pp. 317-334, stressed the limits on application of the E.E.C. competition rules, which the author presumes to derive from the Treaty itself as well as its drafting history. His thesis that these rules are only of a subsidiary nature, to assist the unification of the single market, and have no independent significance, will be familiar to readers of Ellis' earlier contributions. His argumentation here is no more convincing than before, and his excessive reliance on ambiguous texts prepared during the formative period (which reliance is suspect in any case, in view of the general international law rules relating to use of such sources for treaty interpretation) also does little to inspire confidence in his approach. The observations of *J. Vandamme* (Louvain) at pp. 334-348 come more to grips with the substantive aspects of Article 86. He reviews first a number of definitions of dominant position derived from economic theory, national legislation and the E.C.S.C. Treaty, and the concept of relevant market. In connection with the latter, he notes that recent developments in American

case law show increasing concern rather with structural criteria and overall economic power. Certain techniques for the attaining of a dominant position are considered, including merger, exchange of shares, erection of subsidiaries, and organization of holding companies. With regard to the concept of abuse, Vandamme prefers to focus on conduct itself, rather than on its effects or results. *B. H. ter Kuile,* at pp. 348-360, discusses what forms of economic concentration fall under each of the Articles 85 and 86 respectively, and whether both articles can be applied simultaneously to the same concentration. His approach is first to investigate the reach of Article 85, with regard to examples of wholly — or partly — owned subsidiaries, joint ventures, and interlocking ownership. He next distinguishes between "internal competition" (between the concentrating partners) and "external competition" (between them and outsiders) (compare the analysis of *Torley Duwel,* at *Nederlands Juristenblad* 1965, pp. 129-139, reviewed at 3 C.M.L.Rev. 1965-6, p. 116). "Relevant competition" is the term he introduces to indicate that form of competition which is considered most important on the market concerned. Thus, Article 85(1) would not apply to an agreement between a group of small producers, previously in the shadow of several giant firms, but now able to form a unit more able to compete. His analysis with regard to exclusive dealership contracts leads in the direction of *Snijders* in *De Naamloze Vennootschap* 1965, pp. 157-161, 172-179 (see 3 C.M.L.Rev. 1965-6, p. 117). In the little space allocated to consideration of Article 86, as such, Ter Kuile underlines its independent role, namely, with regard to dominant positions possessed by a single enterprise, and the correction of abuses committed by cartels exempted under Article 85(3).

"Les régles de concurrence du Marché Commun et la Propriété Intellectuelle" by *François Hepp* in *Archiv für Urheber- Film- Funk- und Theaterrecht,* 1964, No. 1/2/3/4, pp. 21-29 (German text, pp. 29-35) reopens an earlier controversy much cited in these pages (See, *e.g.,* 2 C.M.L.Rev. 1964-5, pp. 117-118). The main problem dealt with is whether film producers or distributors granting exclusive projection rights in foreign countries must first register their agreements with the E.E.C. Commission, under Regulation No. 27 E.E.C. (and No. 17). He argues that films are in the same position as literary and artistic works, in the sense that they are unique intellectual products and not merely commercial goods, the objects of competitive exchange. The presumed exceptions of Art. 36(1) E.E.C. favouring the former should thus here also apply. For so long as these exclusive agreements contain no wider restrictions than inherent in the arrangement, they do not therefore fall under the rules of competition and thus need not be notified. Finally, he notes that Articles 222 and 234 and Article 37 para. 5 all argue that the previous system must continue undisturbed. It will be remembered that the Director-General of the Commission Division on Competition, *VerLoren van Themaat,* 1 C.M.L. Rev. 1964-5, pp. 428-430, took a much more cautious view, arguing that application of Articles 85 ff. could not be doubted in principle, while the extent of such application and its necessity in specific cases should be objects of further study.

For those not already familiar with the fundamental aspects of American antitrust policy, the comparative survey of *Lazar Focsaneau,* entitled "Le droit de la concurrence de la C.E.E. et le droit anti-trust des états-unis" and appearing in *Revue du Marché Commun* 1965 (No. 82), pp. 342-349, may be useful. The main sections of the Sherman, Clayton, and Robinson-Patman Acts (and their amendments) pass in review. The author correctly notes that the case law developed under Article 2 of the Sherman Act (monopolies) cannot, because of the substantial difference in approach, shed much light on the reach of Article 86 E.E.C. Less correct, however, is his conclusion, in connection with the possibility of civil actions, that, although the sanction of nullity is not provided by the American legislation, "there is no doubt that agreements or decisions declared illegal by these laws are deprived of their legal effect, according to the general principles

of Anglo-American law". Further, even this survey might have included mention of the important American legislation with regard to resale price maintenance, and a more precise analysis of the application of the "rule of reason".

VI. *Harmonisation of Laws*

The French proposal for a European company is outlined by the French Minister of Justice, *J. Foyer,* in the *Revue du Marché Commun,* 1965, No. 81, pp. 268-273. This new type of company would be regulated entirely by national law, but it would be a uniform national law in all member States. In as much as the uniform law does not provide the answer to certain questions, it will be supplemented in each country by general legal rules. The French minister expects that in this way the European company can be best integrated into the existing legal systems. Foyer also discusses several concrete problems that may arise in practice, *e.g.,* the question of the seat of the company.

Continuing interest in the harmonization of the various systems of civil procedure in Europe is demonstrated by a lengthy commentary on a book previously reviewed in this journal by I.E. Druker (2 C.M.L.Rev. 1964-5, No. 4, pp. 470-471). The book is "Auf dem Wege zu einem europäischen Prozessrecht" by *Heinrich Nagel;* the commentary is by *Franz Matscher,* and appears at pp. 194-197 of the Austrian periodical *Juristische Blätter,* No. 7/8, for 1965. Generally praising Nagel's study as a useful survey, he does, however, not share the view that civil procedure has merely, in relation to substantive law, a secondary or subordinate quality. Nor does he agree that certain jurisdictional provisions, especially in personal and family law, are discriminatory merely because they are based upon the nationality of the parties. Further he thinks the problems related to the obtaining of proof abroad (foreign witness, etc.) are, methodologically seen, out of place in Nagel's discussion of discrimination, as these do *not* turn on the nationality of the parties. Direct communication between courts, he notes, is not desirable, unless between geographic and cultural neighbour states, as otherwise there will be no savings in time over the usual diplomatic or consular channels. With regard to the recognition of foreign judgments, he emphasizes a major reason for delay (possibility of appeal), and notes that the problem of execution must be treated separately. Nagel's optimism with regard to a prospective Treaty of the Six on recognition and execution of foreign judgments he thinks perhaps unwarranted, especially in the area of imposed limits on jurisdiction (*compétence - zuständigkeit).* Uniformity in this area is not necessary, and seeking it will cause delays; coordination is sufficient and greatly useful by itself.

Hans Arnold has studied in *Aussenwirtschaftsdienst,* 1965, No. 15, pp. 321-325 the draft convention on recognition and execution of foreign judgments, which has appeared as Commission Document No. 14, 371/IV/64, accompanied by an extensive commentary in Doc. No. 2449/IV/65. In contrast to *Matscher,* Arnold fully subscribes to the desirability of a uniform treatment of the foreign judgments problem, which will "restore the free mobility of legal claims in a broad way and thereby guarantee the necessary legal protection, within the Common Market". Summarizing the contents of the draft, Arnold points especially to those provisions relating to judicial competence and personal jurisdiction which deviate from former domestic or Treaty regulation. For clarification, he has included extensive references to the relevant texts in a number of lengthy footnotes. He concludes that the draft contains substantial novelties vis-à-vis the classic system of recognition, with the result that the situation for the Community as a whole will approximate in many regards that of a single domestic jurisdiction. Finally, again in opposition to Matscher, he thinks a definitive convention will soon be completed.

VII. *Association*

In *International Organisation* for Spring 1965 *Werner Feld* writes on "The Association Agreements of the European Communities" (pp. 223-249). This article presents an analysis of the agreement between the E.C.S.C. and the United Kingdom, and the agreements entered into with the E.E.C. and Greece, Turkey and the African States. He makes the point that so far no association has been entered into by Euratom. In respect of the Greek and Turkish agreements he quotes Pescatore's observation that the institutional structure established by the agreements permits the associated States to participate in the attainment of the objectives of the Community. On the other hand, he indicates the disappointment of the Greeks in the growth of their exports to the Community in spite of the fact that the Community tariffs have been reduced by 50 per cent. The Greeks also apparently resent the fact that they are excluded from the decision-making process of the Community's organs, *e.g.*, in the formulation of agriculture policy. Feld reaches the conclusion that the short-term gains in these agreements are less important than the long-range political and economic advantages.

VIII. *Case Law of the Court of Justice of the European Communities and of National Courts*

In the *Revue du Marché Commun* of July/August 1965 a new section has been opened, dealing with the case law of the European Court of Justice. The editors of the section, *Dupuy, Rideau* and *Torelli* give summaries of the most important cases, followed by short annotations. In the first contribution, they discuss case 1/64, *Glucoseries Réunies* (3 C.M.L.Rev. 1965-6, pp. 231-232), case 6/64, *Costa* v. *ENEL* (2 C.M.L.Rev. 1964-5, pp. 197-220) and joint cases 90 and 91/63, *E.E.C. Commission* v. *Belgium and Luxembourg* (2 C.M.L.Rev. 1964-5, pp. 340-348). In his remarks on the *Costa case, Rideau* points out that the Court, in order to ascertain whether an article of the Treaty is self-executing, has taken into account not only the manner in which the obligation is formulated (*i.e.* is the obligation defined completely, or is a further elaboration necessary?), but also the character of the relation, of which the obligation forms a part. Thus, the Court declares that the Articles 93 and 102 are binding upon the member States *in their quality* as States; consequently individuals cannot derive any rights from these articles. Their alleged violation can be the subject of a complaint by the Commission only. The commentary on the joint cases 90 and 91/63 notes that the Court has newly confirmed that the E.E.C. Treaty is a "treaty-constitution". This means that one of the member States is not free to violate an obligation even when one of the other States has not met its obligations. It is an interesting point that this principle is contrary to the system of Article 55 of the French constitution, which says that a treaty prevails over national law, except where the other party does not apply the treaty.

The joint cases 90 and 91/63 are also annotated by *Kapteyn* in *Ars Aequi*, 1964-65, No. 9, pp. 243-246. He, too, is of the opinion that the Treaty, which has created a new legal order, has at the same time explicitly provided for procedures to deal with violations, so that the use of other means to react to presumed violations cannot be permitted.

Ehle tries to ascertain the correct interpretation of Articles 12 and 95 of the Treaty in *Aussenwirtschaftsdienst*, 1965, No. 13, pp. 281-284. Reason for this is the preliminary decision of the court in the case 10/65, *Deutschmann* (3 C.M.L.Rev. 1965-6, pp. 232-233). The Court ruled that the first paragraph of Article 95 does not apply to a levy imposed at the occasion of the issuance of import licences. Unlike Articles 13 and 17 it does not pertain to duties levied exclusively on imported products, but only to those that are imposed on products of both national and foreign origin. Ehle draws attention to the implicit decision of the Court that Article

95 is self-executing: otherwise the Court would not have answered the questions certified to it. In the meantime the *Finanzgericht Saarland* has asked for a preliminary ruling on the precise question whether or not Article 95 para 1 is self-executing.

Gleiss and *Hootz* have added their observations on the recent Belgian "*Cement-Convention*" case (No. 35, Case law of National Courts, 3 C.M.L.Rev. 1965-6, pp. 245-246), in *Aussenwirtschaftsdienst,* 1965, No. 15, pp. 336-338. The authors note first that the Brussels Court of Appeal omitted mention of the date of notification of the agreements in question, which was crucial to disposition of the case for the period at issue. Further, the decision is seen to be contrary to the trend of other national judgments which have generally enforced to a certain extent duly notified agreements, as being provisionally valid. Also controversial is the point that the appellate court did not rely, for its decision to suspend, on the initiation of a proceeding by the Commission; it apparently did not consider itself affected by Article 9(3) of Regulation No. 17, because it was not an "authority" in the sense of that provision. Finally, the refusal to enforce the agreement is seen to deprive "provisional validity" of its meaning. The defendant can always be protected by a later repayment, but failure to enforce a contested agreement can lead to irreparable harm.

According to *Rigaux* the cement convention case has been the only one before a Belgian Court in which Community law was decisive. He comes to this conclusion in a general article on the application of Community law by Belgian judges in *Annales de Droit,* 1965, No. 3, pp. 277-292. Rigaux considers correct the opinion of the Brussels court that national courts are not "authorities of the member States" in the meaning of Article 9 of Regulation No. 17; he objects, however, to the position of the court that a communication from the Commission, saying that it has initiated a proceeding, ends the competence of the Belgian authorities. In several other cases the parties pleaded the applicability of Article 85, although the agreements involved did not have any effect on trade among the member States. The president of an Antwerp court has even applied Articles 85 and 86 without indicating in what way interstate trade was affected.

In a judgment of July 7, 1965, annotated in *Aussenwirtschaftsdienst,* 1965, No. 13, pp. 299-300 by *Ditges* the *Finanzgericht Düsseldorf* held unlike the *Finanzgericht Rheinland-Pfalz* (see 1 C.M.L.Rev. 1963-4, pp. 463-465) that the German statute approving the E.E.C. Treaty was constitutional. The Court upheld the appeal of an importer against a duty imposed on poultry, on the ground that the German regulation underlying the duty unlawfully used "customs-value" as rate basis: The *Finanzgericht* deemed this inconsistent with the free-at-frontier-price provided by E.E.C. Regulations Nos. 22 and 109. In a decision of January 26, 1965, reported in *Aussenwirtschaftsdienst,* 1965, No. 13, p. 300 the same court upheld an appeal against a decision of the German customs authorities. These had refused to apply the internal German tariff on cocoa-beans from Ivory Coast, which came by way of Amsterdam and had been stored in that harbour for eight weeks. Although a direct transport is a condition for the application of the internal tariff, Article 29 of the E.E.C. Customs rules says that transit through another member State and transshipment in such a state is not to be considered an interruption of the transport. Since no time period constituting such interruption has been fixed by the Treaty, the decision of the German customs must be considered incorrect.

In an article, appearing at *Aussenwirtschaftsdienst,* 1965, No. 12, pp. 267-270, *Ernst Cohn* reacts to the views taken by *Mok* and *Johannes* with regard to the already well-known Netherlands arbitration case of July 22, 1964 (*Arbitrale Rechtspraak* 1964, p. 240, No. 524). For a capsule summary of their article, appearing in *Aussenwirtschaftsdienst* 1965, pp. 181-184, see the previous number of Common Market Law Review at pp. 262. With regard to referral under Article 177 by

an arbitrator, Cohn notes that, while the negative conclusion of most German writers accords with German practice, both Belgian and French law tend to view arbitration as a legal proceeding, open also to appeal. Textual interpretations being insufficient, the purpose of Article 177 must then be looked to, and that appears to be legal *uniformity* rather than centralization of procedure. In this light, considering the lesser authority of arbitral decisions and the possibility of a flood of arbitral referrals, Cohn would exclude the arbiter from Article 177. The possibility of a cartel escaping from the Treaty rules by means of an arbitration clause can always be countered by a suit based on violation of public order. With regard to the question of the effect of nullity of the main contract on the arbitration clause, and the duty of arbitrators to investigate their own compentence, the author also rejects the conclusions of Mok and Johannes, as being based on the irrelevant fear of evasion of Treaty rules and a disregard of the role and benefits of arbitration especially also in international cartel matters.

In *Rutgers Law Review,* Spring 1965, *Heinz R. Hink* writes on "Governmental Liability for Risk under French and German Law" (pp. 472-488). This article concludes a series of three on governmental tort liability and is important in view of the effect of trends in German and French law in influencing the jurisprudence of the Court of Justice. The present topic concerns the liability of the administration in the absence of "fault". This liability, which the author calls "liability for risk" is tantamount to strict liability. As a general rule German law does not acknowledge liability without fault, but there are statutory exceptions in respect of hazardous undertakings, such as the operation of a railway or airline, a gas works or an electric power plant. This has now been extended to motor vehicles. The only defences are *force majeure* or contributory negligence. These rules apply equally to the State and to private owners.

In French law, on the other hand, the liability of the French administrative authorities exists generally even without fault and goes beyond hazardous undertakings. It is the basis of a far-reaching general rule that anyone suffering damage by administrative action is entitled to compensation, although this must still be regarded as a proposition of some novelty.