SURVEY OF LITERATURE

General

A useful realistic study of the effect of the European Parliament on Community decision-making is contained in an article by *O. Renard-Payen*, in *Revue Trimestrielle de Droit Européen*, No. 4, pp. 526-552. Reviewed first are the questions for which consultation of the Parliament is obligatory and the situations in which the Parliament has been consulted where the obligation did not exist. There follows an analysis of the conditions upon which consultation is to take place: the necessity for prior information; the limitation to an existing proposal of the Commission. The limits on the influence of a Parliamentary opinion are examined, in a last section, from the point of view of new content in a final decision added by the Council and in relation to the changes in a proposal made by the Commission itself, after the Parliamentary opinion has been brought out. The dilemma of the Commission, which is caught between Council and Parliament, is pointed out. The Parliament has tried to extend its influence by obtaining more information on Commission positions; and by seeking to introduce a second round of consultation with the Council, when Parliamentary recommendations are not followed. The refusal to submit an opinion in a case of obligatory consultation has not been exploited as a means of Parliamentary pressure, and in his opinion promises less than the technique of the negative advice. In any case, not the lack of precision of the Treaty text, but the political realities, are responsible for the weakness of the European Parliament at this time.

In *International Organization* for Winter 1965 *Leon N. Lindberg* writes on "Decision Making and Integration in the European Community" (pp. 56—80). The writer has conducted an extensive research into the mechanics of the agricultural policy of the Community, which provides a unique example of Community-national cooperation. He comes to the conclusion (before June, 1965) that there is a presumption that the point of no-return in Community integration has been reached, but gives a warning that agricultural progress may well accentuate the tension that exists in the Community on foreign policy. He considers furthermore that the pressures towards integration may not be so great in other fields. There will however be a spillover from agriculture to general commercial policies. His main deduction however is an optimistic one, that while the Community system is what he calls a "crisis system", involving deadlines, ultimatums, threats and package deals, the evergrowing dependence of the Six on each other (as the recent crisis has shown) is very great indeed.

The Report of the Proceedings of the American Society of International Law at its 59th annual meeting contains papers on the Development of International Law by European Organisations. The contributors were *Stuart A. Scheingold* who dealt with the Court of Justice, *Peter Hay* on the European Communities, and *A. H. Robertson* on the contribution of the Council of Europe.

Agriculture

A problem which has long concerned a number of commentators, whether from the point of view of budgetary and institutional implications or from the point of view of the common agricultural policy (see previous sections of this Survey), is the financing of the Community agriculture policy. The subject is sytematically and carefully treated by *J. R. Vergès,* in *Revue Trimestrielle de Droit Européen,* 1965, No. 2, pp. 181-197 and No. 3, 321-322. After a review of the mechanism of the Fund for agriculture established by Regulation No. 25 of 1962, including

the background to its adoption and the problems subsequently arising, Vergès discusses the implications of the Commission proposals of March 1965. He suggests that the Commission went too far, too fast, in anticipating the acceptability of a complete conversion to Community resources of both agriculture levies and common customs revenues. The loss of these revenues to the national budgets implies a willingness to sacrifice on behalf of the Community by the importing States. Finally, he notes the logic of an extension of Parliamentary budget powers, once the Community has its own resources, and suggests the implications of such a development for the structure of the Community. In the Addendum, written after the crisis of June, 1965 was under way, the author observes that the French Government might well have ceded on the question of extension of Parliamentary powers, if France could have got her way on the financing of the fund for the next period.

The Movement of Persons, Services and Capital

A general introduction into the problems of the right of establishment and the free supply of services is offered by *Yvon Loussouarn* in *Revue Trimestrielle de Droit Européen,* No. 2, 1965, pp. 169-181. The dominant principle of Community Law in this field is the principle of non-discrimination: every member State has to treat foreigners in the same way as its own nationals. The author points to the advantages of this system above a system based on reciprocity. Reciprocity would mean that a member State has to treat nationals of another country in the same way as its own nationals are treated in that country. This would necessitate difficult studies in comparative law in order to decide whether legislative provisions in two countries can be considered as equivalent. The system adopted avoids this problem. On the other hand, it does not in itself result in equal treatment of foreigners in all member States and consequently coordination of legislation is necessary as a complement to the non-discrimination principle. *Michel Renault* describes in *Juris-classeur périodique*, Doctr. 1977, February 16, 1966, the present situation with regard to the same subject. Especially interesting is his discussion of the different methods used in the member States to transform the Community directives into national law. In France, Belgium and Italy measures have been enacted (*"mesures préalables"*) enabling the government to execute directives by decree (*décret*) (the French law, however, expired on January 1, 1966). General restrictions based on nationality do not exist in Italy and in the Netherlands. In the other Common Market Countries various forms of *cartes de commerçant* are required of foreigners. In Germany, however, the requirement of a prior administrative licence for foreigners for the admission to a profession, has now been abandoned. A survey is also included of the most important existing national impediments to a freedom of establishment.

In *Cahiers de Droit Européen* 1966, No. 1, pp. 55—72 *H. Desmedt* provides an extensive review of the directives of the Council on the treatment of foreigners: Directive 64/220/EEC of February 25, 1964 for the removal of restrictions on travel and residence by nationals of member States within the Community, and Directive 64/221/EEC of the same date for the coordination of the special measures governing the entry and residence of foreign nationals, in cases where such measures are warranted on grounds of public policy, public safety or public health (for both directives see 2 C.M.L.Rev. 1964-5, pp. 105-106). The purpose of the two directives is to prevent the right of establishment remaining a dead letter because foreign nationals are not allowed to enter or reside freely in the six countries. Dermedt mentions the implementing measures that are taken in the member States. Special attention is paid to the question whether a directive can contain provisions that are directly applicable. In his opinion the fact that directives are addressed to member States is no impediment for direct applicability.

André G. Delion has undertaken some research on public enterprise in the European Common Market, and has arrived at some interesting conclusions (*Revue du Marché Commun*, February 1966, pp. 67-85). First, many public enterprises were created in the past, more because of circumstances and necessity than because of political doctrine. Damage wrought by the first world war, the dislocations of the great international depression of the thirties and the desire to promote economic and social development start often as the cradle of public enterprise. The author admits, however, the influence of political doctrines in the period 1933-1948, when Germany, Italy and France had a large share of politically-oriented establishments of public enterprise. In recent times, the author says, public enterprise tends to become a complex industrial grouping, which is more and more difficult to delimit and to define. However, some indications of its importance in the various countries are given. These public industrial groupings have a crucial role to play in the development of a policy of balanced economic growth, especially in order to fill gaps left by private enterprise, in regionally balanced growth and in counteracting the influence of the trade cycle. Equally, public enterprise can be of importance in maintaining competition or the correction of dominant positions in the private sector, and may be the sole alternative to an existing or emanating private monopoly. The public sector has, however, to behave as a rational economic agent and this applies especially to the formation of prices and investment decisions. Rational prices express scarcity and scarcity structures and act as signals of the optimal utilisation of production factors. Competitive rationality requires marginal pricing and investment decisions based on the marginal revenue principle. However, for the public sector, there are often overriding difficulties which prevent the application of economic rationality. The way out of this problem, is, according to the author, coordination and even programming on a European scale. In his conclusion, M. Delion traces several broad guiding lines for the future behaviour of public enterprises in a Common Market context.

In the first issue of the *Revue Trimestrielle de Droit Européen* (1965 pp. 1-10), *Colliard* also discusses the place and role of public enterprise in the common market. He does this under the double aspect of public enterprise as an element of the common market and as an instrument of the common economic policy. According to the text of the Rome Treaty, public enterprise is not more than tolerated, for the dispositions of the Treaty regarding this sector of economic activity are scarce, vague and exceptional. In the course of the last few years, especially after the nationalisation of electricity in Italy and the decision of the European Court of Justice in July 1964, however, the position of public enterprise is seen to be less weak than was initially thought and development of this sector is considered possible under certain conditions, the author says. Thus nationalisation is not contrary to the Treaty and if public enterprise conforms to the general principles its existence is (legally) assured.

The other aspect—public enterprise as an instrument of economic policy—is stressed in connection with the medium term planning policy, decided upon by the Council of Ministers in April 1964, and the recommendation addressed to the Governments of member countries to limit their expenditure. Here public enterprise—in view of its character and functions—is considered to be very important in realizing the harmonious and balanced expansion which is one of the main goals of the Common Market.

Finally the author offers some suggestions in order to achieve a better coordination between public enterprise of the various countries and to inaugurate among them the beginnings of a European capital market. Also, national public enterprises could well found jointly, European public enterprises, such as is e.g. envisaged by Art. 130 in the context of the financial operations of the European Investment Bank.

The title "Antitrust Problems of the American Exporter vis-a-vis the European Common Market" does not really cover the contribution by *H. P. Crawford* in *Tulane Law Review*, 1965, No. 2, pp. 228-252. A cursory, rather superficial survey is made of the import of articles 85-86 E.E.C., in which the author also describes the "surprisingly liberal escape provision" (!) of Article 85 (3). This is followed by an equally cursory comparative review of the competition law of the four states possessing some: surely the most recent changes in the French law, relating to dominant positions, could have been mentioned (Finance Law No. 63-628 of July 2, 1963) in a 1965 publication. Further, although the author bewails the lack of case law issuing from the European Court, it apparently was not deemed important to examine the Commission decision in Grundig-Consten, of September, 1964. Finally, more than half the article is devoted to nothing more than a survey of American(!) anti-trust law as it bears on foreign commerce.

Harmonisation of Laws

Harmonisation of technical provisions is extremely complicated as is shown by *Nicolaas Bel* in the *Revue du Marché Commun*, 1966, No. 87, pp. 26-33. As the direct trade barriers similar to tariffs and quotas disappear gradually, the divergency in administrative and technical provisions becomes more perceptible. The Commission has now drawn up a programme for harmonisation with a priority scheme based on the importance for the intra-community trade, both qualitative and quantitative represented by certain national measures. National experts have closely assisted the Commission at this task. The author goes into some of the most important problems of harmonisation: the necessity of very detailed rules to achieve the abolishment of barriers of this kind, the question whether the procedure of Article 100 (unanimity in the Council after advice by the European Parliament and the Economic and Social Committee) is not too cumbrous, and the problem of mutual recognition of national technical controls.

Commercial Policy

One of the main problems facing the exporter who wishes, for example, to sell equipment to a foreign buyer, and his foreign sub-contractor, who acts as intermediary, is the delay in payment which especially accompanies foreign transactions. In reality, the exporter is thereby called upon to provide credit to the foreign buyer and the involvement of the foreign sub-contractor is an attempt to spread the risks of the transaction. However, the technique resorted to by the majority of exports is that of credit-insurance, or the obtaining of guarantees, possibly from public bodies. The sub-contractor is here also involved, by way of a joint insurance plan (*"l'assurance conjointe"*); or, indirectly, when the competent national instances enter agreements, on a basis of reciprocity which automatically cover the sub-contractor as well (*"l'incorporation automatique"*). This is the background against which E.E.C. Council Decision No. 65/312 of June 15, 1965 was taken, and it is sketched by *M. Betbeder*, in his contribution "Garanties et Financements à l'exportation, problèmes relatifs aux sous-tractances", *Revue du Marché Commun* No. 87, 1965, pp. 9-25. He analyses the decision, paying special attention to the rigorous definition of sub-contract, the regime of "automatic incorporation" established therein, and the other techniques. The effect of the former regime is to create a preference on behalf of intracommunity exchanges. This preference stems not so much from the higher maxima permitted for intracommunity contracts, but rather from the basic principles of the system which operate in favor of such exchanges. He concludes that the decision nonetheless provides a reasonable balance between the implications of Community solidarity and the desire for external trade relations.

The advocate general *Roemer* has lectured recently on the appeal for inaction. The text of this important speech, that includes a general survey of the case law of the Court in Luxembourg, is published in *Sociaal-Economische Wetgeving*, 1966, No. 1, pp. 1-15. The appeal for inaction as regulated in Article 35 of the E.C.S.C. Treaty is to be considered as a special instance of an appeal for annulment. But this cannot be said of the E.E.C. Treaty, where the appeal is not directed towards the annulment of a fictitious negative decision but towards the establishment of a violation of the Treaty. Most important is the question of who is qualified to institute such an action. In the Coal and Steel Community this depends on the decision that has been asked. Article 175 of the Treaty of Rome, which is more restrictive, says that any person may submit a complaint to the effect that a Community institution has failed to address to him an act other than a recommendation or an opinion. According to Roemer such an act needs not to be a decision, but may also be an act which has binding force only to a limited extent (e.g. an information by the Commission pursuant to Article 15 paragraph 6 of Regulation No. 17). The requirement that the act should have been directed to the appellant is to be interpreted broadly: the real interests are decisive.

In the *Tulane Law Review* for December 1965, *Jerry L. Mashaw* writes on "Federal Issues in and about the Jurisdiction of the Court of Justice of the European Communities". (pp. 21-56). The author deals specifically with the federal aspect of the Luxembourg Court with particular reference to the central government/regional government, and the regional government/citizen relationships. He analyses the provisions of the Treaty in respect of the powers of the Community against the member States, and has evalued the decisions of the Court of Justice under Article 177. He emphasises the unique quality of the Community system as distinct from other systems, which requires a degree of cooperation between the Community and the member States which is altogether novel. He mentions the problem of the interpretation of the laws to be harmonised when they are subject to six separate national jurisdictions. He is however impressed with the Court's own conception of the new legal order and its flexibility of approach.

A. Pépy has devoted a second article to the preliminary procedure of Article 177 of the Rome Treaty in *Cahiers de droit européen* 1966, No. 1, pp. 21-39 (for the first article see the previous section of this survey). Here he deals especially with the role of the national courts in this procedure. He first discusses what is meant by "court or tribunal" in the second and third paragraph of the Article. He then considers what courts are under an obligation to refer a question to the Luxembourg Court. In his opinion every court is obliged to refer if its decision in a certain case cannot be appealed ("concrete" theory); he draws an argument for this proposition from the *Costa* v *Enel* case. The author also discusses the *"acte clair"* theory, which he rejects.

In the joint cases 106 and 107/63, *Toepfer* v. *E.E.C. Commission* (3 C.M.L.Rev. 1965-6, pp. 233-236, annotation Peters) the Court has for the first time admitted an appeal against a decision directed to a member State. The Court held that the decision was of direct concern to the apellants, basing itself on Article 22 of Regulation No. 19 stating that the decision "shall be effective immediately". *Fromont* doubts in a note on this case in *Recueil Dalloz*, January 26, 1966, Jur. p. 57-59 whether this interpretation by the Court of Regulation No. 19 is correct. According to him the words "shall be effective immediately" are used to indicate that the member State has to execute the decision at once, but they do not mean that the State has no freedom at all to decide in what manner the decision will be executed.

Peter Ulmer has written an annotation to the case 45/64, *E.E.C. Commission* v. *Italy* (3 C.M.L.Rev. 1965-6, pp. 367-368) in *Aussenwirtschaftsdienst*, 1966, No.

1, pp. 17-20. He agrees with the decision of the Court and points to the recognition by the Court that the member States are, within the limits of Article 96, free to regulate independently the way in which they grant the drawback. This would mean that the German Ausgleichsteuer is compatible with the Treaty.

Euratom

In the *Stanford Law Review* for November 1965 Professor *Stephen Gorove* writes on "The First Multinational Atomic Inspection and Control System at Work: Euratom's Experience." (pp. 160—186). The author described the purpose and scope of safety control, with a description of the distinguishing features of Euratom's control as compared with I.A.E.A. and E.N.E.A. He also analyses the allocation of authority and regular control procedures under the Euratom Treaty, dealing with data collection, verification and sanctions. In his conclusions the writer underlines the fact that Euratom only applies to the peaceful use of atomic energy, but its system does at least have this advantage that it would be almost impossible for any member State to commence using atomic energy for military purposes without being detected. He considers that the power to send inspectors into the national establishments has been used with tact and discretion. He has no doubt that Euratom is the most comprehensive security and control system to date and provides a healthy balance between direct administration over the member States and permitting atomic research and industrial development to flourish as freely as possible from international bureaucracy.