SURVEY OF LITERATURE

General and Institutional

Sociaal-Economische Wetgeving, October 1966, published three interesting reports presented to the Dutch Association for European law on the acts of representatives of the governments of member States taken within the Council of Ministers of the European Communities.

Bebr's report is written in English (pp. 529-545). In his opinion the acts of the representatives have the legal character of international agreements concluded by the member States, but at the same time they pay special attention to the Community factors in the acts and to the way they are executed in the six countries.

Schermers (pp. 545-579) also takes the view that the decisions of the representatives are comparable with other international agreements. He divides them into five groups and investigates for each of these groups (1) whether the Commission may institute an action against the member States if the decision violates Community law; (2) whether an appeal may be lodged against a violation of the decision by a Community organ; (3) whether a preliminary question may be asked concerning the decision.

The report by *Pescatore* in French (pp. 579-586) deals with the legal character of the decisions taken by the representatives.

D. Tallon writes in *Cahiers de droit européen* 1966, No. 6, pp. 571-580 on "Le droit communautaire; Réalités et illusions". He pleads for a sense of reality: the imperfections that exist on the Community level and on the national level (reserved attitude of governments and judiciaries) should not be kept in the dark. Tallon criticizes the legal information provided by Community services. Abundant information is given on future developments and studies, while exact documentation on the existing Community law is lacking.

In *Europa Archiv* 1966, No. 22, pp. 811-822, *K. Neunreither* contributes on the process of decision making in the European Parliament. More than in the national parliaments the decisions are taken in the Commissions. This may be the reason for the great attention that is paid to technical questions, which has caused a loss of interest of the general public in the acts of the European Parliament. The author mentions the questions of the members as important contributions of the Parliament as well as the initiatives it has taken on several occasions (*e.g.* at the association of African states).

Linthorst Homan, a member of the High Authority of the E.C.S.C. has analyzed the difference between the intergovernmental and the supranational method of international cooperation (*Internationale Spectator* 1967, pp. 27-51). From a practical point of view the new supranational method has proved successful in the E.E.C. and in Euratom, but not in the E.C.S.C. Especially in the E.E.C. the efforts of the Commission have resulted in an accelerated attainment of the aims of the Community. In legal terms it is hard to make a sharp distinction between supranational and intergovernmental. From a political point of view supranationality would include a responsibility of the executive to a Community institution. This is the European Parliament, which has in fact an important influence on the executives that are now unable to succumb to the temptation of easy compromises.

The possible entrance of the United Kingdom into the E.E.C. is discussed by *Breitenstein* in *Europa Archiv* 1966, No. 24, pp. 875-885. According to the author only two of the five provisos formulated by Gaitskell in 1962 are still relevant: the agricultural policy and the relations with the Commonwealth. But both these problems can be resolved by an adequate transitional period. Three new problems have arisen for the British government: a tactical one (how to avert a new refusal) a political one (what will be Britain's role in Europe and in the world) and a monetary one.

Van Benthem van den Bergh writes in *Common Market* (December 1966, pp. 246-248) that the most important question is now what conditions France will pose for

British membership. He advises the probable condition of a political union. *Waterman* disagrees with this preposition in the same periodical (pp. 249-251); he expects that the French president will ask for concessions in the nuclear field.

Europa Archiv 1966, No. 24 includes an article by *Willmann* on the importance of continuing economic integration (pp. 865-874). He points to the important results that have been reached in 1966 in spite of the political differences of opinion.

Council of Europe, Human Rights

On February 9, 1967 the European Court of Human Rights ruled on a preliminary question in the Belgian language cases and declared itself competent to hear the case. *E. Suy* has commented on this ruling in *Rechtskundig Weekblad*, 1967, No. 26, pp. 1257-1264.

Interesting is a judgment of a Belgian court in Brussels (*Journal des Tribunaux*, No. 4551, pp. 685-687) in which an article of the language-statute is held invalid because it violates the Convention on the Protection of Human Rights. *I. de Weerdt* writes on the judgment in *Rechtskundig Weekblad* 1967, No. 23, pp. 1119-1126. He says that the Convention is violated, but thinks it important that a Belgian court has accepted the theory that international conventions supersede national statutes.

Competition

Catalano pays ample attention to the three decisions of the Luxembourg Court on exclusive dealing agreements (Grundig-Consten, L.T.M. *v.* M.B.U. and Italy *v.* Council) in *Cahiers de droit européen* 1967, No. 1, pp. 20-48. He criticizes the Court for not taking into account that the exclusive dealer is a real associate of the manufacturer. He is only willing to take the risks inherent in an exclusive dealing agreement if he will be sure that third parties will not benefit from his efforts. But if an absolute territorial protection is held unlawful this assurance cannot be given. Consequently, small and medium-size firms will be hampered in their access to the markets of other member States. Large companies will still be able to employ agents; in fact this kind of relationship should also be held unlawful. Furthermore the author disagrees with the Court on the interpretation of Article 85 para. 3. He also points to the differences between French and Italian case law on the relationship between unlawful competition and parallel imports.

Wolfgang Harms deals in *Europarecht* 1966, No. 3, pp. 230-272, with intra-enterprise conspiracy, *i.e.* the problem of agreements and concerted actions between legally independent but economically connected enterprises. The Court of Justice has not yet rendered a judgment on this point, but in a number of scrap-iron cases it has dealt with delivery-contracts between enterprises of one concern as contracts between independent enterprises. This could lead the Court to follow the American intra-enterprise-conspiracy theory as it is developed by the U.S. Supreme Court. The American law on this subject is discussed at length; the very formal theory adhered to by the Supreme Court (but apparently not always by the lower courts) should not be adopted in the Common Market. The disadvantages have proved to be too substantial in the U.S.A.

G. Labeau deals with the economic aspects of competition law in *Revue du marché commun* 1966, No. 96, pp. 809-818. In the economic system prevailing in the Community the principle of competition is accepted. But the way this principle is applied in practice may differ according to the extent of macro-economic guidance one wishes to accept. France and Germany differ from each other in this respect. The author continues with a discussion of the competition policy in the Community and its methods. The Commission is opposed to cartels, favours concentrations and is vigilant when nationalized enterprises or state-monopolies are concerned.

The same periodical, 1966, No. 97, pp. 862-870, includes a contribution by *Lazar*

Foscaneanu on the meaning of the words "the object or effect of which is" in Article 85 of the Treaty (to prevent, restrict or distort competition). Generally the word "object" is held to refer to the intention of the parties and the word "effect" to consequences of the agreement. The author discusses the practice of the Commission and the Case law of the Court which are in conformity with this interpretation. In his opinion the word "effect" should be interpreted in such a way that only consequences that could be foreseen at the time the agreement was concluded are taken into account.

W. L. Snijders studies the words "which may affect trade between member States" of Article 85 in *Naamloze Vennootschap*, November 1966. Within the Common Market two principles should be observed: the principle of freedom, i.e. the trade between member States should not be impeded by tariffs, quota and like measures, and the principle of equality, i.e. national regulations should not result in unequal conditions for economic activities. Agreements between enterprises should not affect the trade between the member States by contravening these principles.

J. van Damme continues his long contribution on the Articles 35 and 86 in *Cahiers de droit européen* 1966, No. 6, pp. 602-634. Questions of procedure are discussed in this instalment. Much attention is paid to the power of the Commission to investigate individual cases and also branches of trade. The last instalment of the article is published in the same periodical, 1967, No. 1, pp. 49-80. Here the cooperation between the member States and the Community authorities and the protection of the rights of private parties are discussed. The author deals also with the sole agency agreements and licensing agreements.

The term "undertaking" in Article 85 is the subject of a contribution by *Irène Torley Duwel* in *Revue trimestrielle de droit européen* 1966, No. 3, pp. 400-408bis. She makes a comparative study of the law in the U.S.A., Britain, Germany and the Netherlands and concludes that the interpretation of the term depends on the interpretation of the whole article.

Lucy Willemetz writes in *Cahiers de droit européen* 1966, No. 6, pp. 583-601 on Article 86 of the Treaty and starts with a discussion on the meaning of undertaking. It is not quite clear what is meant by the terms "dominant position", "to exploit in an improper way" and "substantial part of the common market" in Article 86. But antitrust law is not an end in itself, it is one of the means to reach the goals of the Treaty which should be used in a flexible way.

The legal Committee of the Council of Europe has made a study of the extra-territorial effect of antitrust law (Report Grailly of January 25, 1966, Doc. 2035). This report is discussed by *Hans Wiebringhaus* in *Revue du marché commun* 1966, No. 95, pp. 755-765. The report establishes that many European States give inadequate extra-territorial effect to their legislation. It is suggested that agreements should be judged according to the law of the country where they are executed.

W. Dörinkel contributes in *Aussenwirtschaftsdienst* 1966, No. 21, pp. 422-425 on the power of the Commission to collect information and investigate cartel cases. The Commission may not ask for information if it is not reasonably convinced that the rules on competition are violated. In the author's opinion information may be refused on the basis of general principles of law if this would make oneself or relatives guilty of a crime.

B. Baardman wrote a critical review of the draft regulation on group exemptions as it was published in the summer of 1966 (*Sociaal-Economische Wetgeving* 1966, No. 11/12, pp. 587-594). The final text of the regulation (see the Legislation section of this issue. pp. 77-91) has followed to a large extent the suggestions by Baardman and others.

Association

François Luchaire has written an interesting article on the association with Nigeria in *Revue trimestrielle de droit européen* 1966, pp. 593-610. The agreement is compared with

the Yaoundé agreement concluded with 18 African States. While these States are left free to establish regional organisations, Nigeria is bound to grant the advantages that it grants to any other State, also to the member States of the E.E.C. But the author doubts whether the E.E.C. countries will impede regional cooperation between Nigeria and other States in this way. Also other differences between the association agreements are discussed.

Hans Joachim Mayer-Mauritius writes in *Europa Archiv*, Vol. 20, 1966, pp. 741-748 on the Swiss attitude towards the E.E.C. Since an association agreement would impose on Switzerland almost the same obligations as membership, but would not grant the same rights, the author proposes a non-preferential commercial treaty. Such a treaty would not raise the suspicion of the general public in Switzerland that membership would be the ultimate goal.

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

B. Baardman has written a note to the three cases on Article 85 that were decided last summer (Grundig-Consten, L.T.M. *v.* M.B.U., Italian Government, 4 C.M.L.Rev. 1966-67, pp. 197-220) in *Cahiers de droit européen* 1966, No. 6, pp. 669-689. According to the author the court has given a satisfactory answer to a number of questions: whether vertical agreements are covered by Article 85, the importance of the intra-brand and inter-brand competition, the question of partial invalidity, the relationship between trademark law and competition law, and the application of Article 85 para. 3 on groups of agreements. But an important defect of the judgment is that it does not indicate what agreements are prohibited by Article 85 para. 1.

The first Lütticke case (No. 48/65, Lütticke *v.* E.E.C. Commission 4 C.M.L.Rev. 1966-67, pp. 78-80) is annotated by *N. Catalano* in *Revue trimestrielle de droit européen* 1966, pp. 371-382. Catalano does not agree with the Court that the appeal for annulment was inadmissable against a letter of the Commission's Director-General for competition stating that it would not introduce an Article 169 procedure against Germany. In his opinion the Commission is bound to introduce such a procedure if it notices a violation of the Treaty. The judgment rendered by the court harms the protection of the legal interests of private persons.

The second Lütticke case (No. 57/65, Lütticke *v.* Hauptzollamt Saarlouis, 4 C.M.L.-Rev. 1966-67, pp. 327-330) is commented upon by *M. Waelbroeck* in *Cahiers de droit européen* 1967, No. 2, pp. 184-194. In declaring Article 95 self-executing the Court went even further than in the Van Gend en Loos and Costa *v.* ENEL cases, and granted the national courts greater powers than they have had traditionally. The Court also held that the provision obliging the member States to abolish discriminatory measures before a certain date creates individual rights for the citizens. This is an important ruling that may apply also to obligations contained in directives or regulations.

E. J. Cohn writes in *Aussenwirtschaftsdienst* 1966, No. 21, pp. 431-433 on the case No. 61/65, Widow Vaassen-Göbbels *v.* Beambtenfonds (4 C.M.L.Rev. 1966-67, pp. 440-441). The Court decided that the Arbitral Tribunal of the Fund was a court within the meaning of Article 177. The reasoning of the Court leads Cohn to the conclusion that arbitration will not normally be considered as a court within the meaning of that Article: the characteristics of the Arbitral Tribunal of the Fund emphasized by the Court are absent in most other cases.

The yearly survey of the case law of the Court by *L. J. Brinkhorst* published in *Bestuurswetenschappen* 1966, pp. 387-407, deals this time with a great number of important decisions *e.g.* the three recent judgments on competition law. The author stresses the significance of the second Lütticke case (4 C.M.L.Rev. 1966-7, pp. 327-330) which may lead to declaring self-executing a number of Treaty provisions that contain a transitional period, *e.g.* Article 119. The ruling on the motivation of Community decisions in the Schwarze case (3 C.M.L.Rev. 1965-6, pp. 363-366) is seen as a slight modification of the previous case law.

The Costa *v.* Enel procedure is continued by a judgment of a Milanese court (Conciliatore) on May 4, 1966. *Luigi Ferrari Bravo* criticizes this judgment in *Cahiers de droit européen* 1967, No. 2, pp. 200-228, because it does not apply the rulings of the Luxembourg court in a proper way.

S. A. Kuipers writes in the same periodical, 1967, No. 1, pp. 86-93 on two judgments of the Supreme Court of the Netherlands of December 22, 1965, and February 11, 1966 (4 C.M.L.Rev. 1966-7, pp. 444-446), wherein the "acte clair" theory is applied.

Philippe Cahier contributes in *Cahiers de droit européen* 1967, No. 2, pp. 123-162 on the procedure against member States of the three European Communities for violation of the Treaty. Proceedings may be instituted by a member State directly (Article 39 E.C.S.C.) or after the Commission has been consulted (Articles 170 E.E.C., 142 Euratom); they may also be instituted by Community organs. In the Coal and Steel Community the High Authority may take note of a violation in a reasoned decision, which can be appealed before the Court. In the two other Communities the Commission issues a reasoned opinion; if the member State does not comply with it the Commission may bring the matter before the Court. The author pays attention to the formal requirements of the decisions of the High Authority and the reasoned opinions of the two other executives, to the way the member State concerned must be heard and to the proceedings before the Court of Justice.

The *Journal of Common Market Studies* 1966, vol. V, pp. 113-139 includes a contribution by *Berrios Martinez* on Article 177. The author makes a distinction between preliminary rulings on the interpretation of Community law and on the validity of Community acts. In the latter case a different decision by the Court on the same question is impossible. Martinez favours the supplementary protection the Article provides for individuals but regrets that member States may avail themselves also of this remedy, thus evading the term set by Article 173 (3). He rejects the "acte clair" theory.

Euratom

The term "joint enterprise" used in Chapter V of the Euratom Treaty has been discussed recently in two periodicals. *R. Berger* writes in *Aussenwirtschaftsdienst* 1966, No. 23/24, pp. 468-473 that the articles of Chapter V do not provide a complete regulation for joint enterprises. So it is not clear whether the Commission may intervene in the policy of such an enterprise. The word "joint" should be interpreted as "intended to serve the ends of the Treaty". The author notes the interesting fact that the decision of the Council constituting a joint enterprise (Article 49 para. (1) Euratom Treaty) has no addressee.

J. Gourier characterizes the joint enterprise in a different way in *Revue trimestrielle de droit européen* 1966, No. 3, pp. 382-393. In his opinion a joint enterprise has the following features: it is an international enterprise in which various governments take part; it is established by an international agreement; it serves an international aim and it has the benefit of certain privileges.