EDITORIAL COMMENTS

The Editors wish to draw the attention of the readers of this journal to several changes in the editorial staff.

Mr. Dennis Thompson has been appointed legal adviser to E.F.T.A., consequently he will not be able to continue his responsibility as an editor of the Common Market Law Review. We are grateful for his contribution to the editorship from the very beginning; his participation was indispensable to lend to our journal an international perspective.

We are pleased to announce that Mr. K. R. Simmonds, director of the British Institute of International and Comparative Law, will succeed Mr. Thompson as the British editor. A close cooperation between the British Institute and the Europa Instituut of Leyden University in the preparation of the journal will thus be possible.

We also welcome Professor H. H. Maas, the new director of the Europa Instituut in Leyden, as an editor. Prof. L. J. Brinkhorst, although he has left the Europa Instituut to join the faculty of Groningen University, will continue to serve as an editor.

In the last month of 1967 and the first of 1968 Community life has been dominated by the problems arising from the requests for membership presented by the United Kingdom, Norway, Denmark and Ireland. At this moment—the end of February—a solution is still far from sight. This is not a surprise: anybody could have foreseen that long discussions were ahead. What, however, is astonishing is the fact that even the member States most convinced of the necessity of a positive answer to these requests and at the same time completely aware of the unwillingness of France to cooperate had not prepared any alternative solution as an answer to the French refusal to enter into negotiations. Apparently they tried hard to force France's hand in order to clear up the situation, but as the moment came, they seemed to be unprepared on what to do. Should not the Benelux memorandum have been ready before the 19th of December? Should not Mr. Brandt immediately have put the question to Mr. Couve de Murville what the misty French idea of arrangements as an interim solution awaiting better times really contained? One can hardly believe that the Five—if it is allowed to consider them as a real unit—did all that was possible to make it difficult for France. It is likely that after the Council's meeting in November the French Minister of Foreign Affairs returned to Paris quite convinced that his opponents were not prepared to fight, and right he was, at least at that moment.

Now, three proposals are in discussion: the Benelux memorandum, the German indications for what should be a comprehensive trade agreement and the ideas of Mr. Fanfani. One can conclude that all governments agree

in pursuing the normal execution of the Community treaties. However, there seems not to exist an unanimous opinion on what that means. In the meantime, the Netherlands and Italy have refused further cooperation in the so-called Maréchal working party which was charged, during a Council session at the end of October, to report before 1 March 1968 to the Council on problems of scientific and technological research, including the presently existing cooperation in other organisations in particular, and the means of inducing other European States to cooperate in the fields of data processing and telecommunications, development of new means of transport, metallurgy and others. As the Dutch in Luxembourg pleaded vigorously and successfully for a report to the Council instead of to the representatives of the member States, they were apparently aware of the fact that any policy in the field of technology can hardly be disassociated from other elements of economic and industrial policy including a European company statute, a European patent, fiscal harmonisation and State aid. It is not clear why some of these latter features should be eligible for no more than consultations with the Four, as the Benelux memorandum suggests, while technology should be considered as an independent subject that has nothing to do with the Treaties of Rome. Those consultations should, according to the Benelux memorandum, be organised along the same lines as provided for in the agreement regarding the relations between the U.K. and the E.C.S.C. In that agreement the greater part of the consultations takes place within a Council of Association comprised of, at most, four representatives of the High Authority and four of the British government. The late Special Council of Ministers played in fact only a very modest part. The Benelux memorandum has not indicated which of these two consultation formulae should be applied.

In the second part of the Benelux countries' memorandum, the other member States as well as third European countries are invited to participate in the consultations that will be intensified between themselves on subjects of a political nature. It is on this point that Mr. Fanfani hooks in with his suggestion of convening a conference of Ministers of Foreign Affairs of the Six and the applicant States in order to fix ways and means for a stronger cooperation with a view to the economic and political unification of Europe. This suggestion could tend to extend the regular W.E.U. sessions from seven to ten participants.

One may doubt whether any of these proposals could provide real progress and be of real advantage. Consultations on the ministerial level have seldom proved to be useful for the management of current problems. If one really wishes to draw the applicants into the development of important community problems, consultations should be organised in Brussels between the permanent representations and missions with as little formality and as fast as possible. As for Mr. Fanfani's suggestions, it seems hardly possible that either France or Germany will be cooperative in that direction. In fact, it is Germany that occupies a key position in the whole situation. The Paris

meeting of the German Chancellor and the French President will not have fortified the illusions of those who hope for a weakening of the Paris-Bonn axis.

What can a waiting Britain do under such circumstances? We cannot but subscribe to the opinion that it should "develop domestic and international policies which will facilitate entry when the necessary period has elapsed and the applications can be renewed ... and consolidate the Four's political commitment which its Government has made to Europe".

The problems on the road towards further political and economic integration seem in no way to affect the development of Community law as a separate and distinct European legal order. Its influence and effect on the national laws of the member States in its day-to-day application is ever growing. Important judgments recently rendered by the Court of Justice of the European Communities and the German Constitutional Court *(Bundesverfassungsgericht)* respectively, in which the relationship of Community law to national law was discussed, bear witness to this fact. Both courts reached very similar results. In the Neumann-case the validity of certain E.E.C. agricultural regulations had been contested before the Federal Court of Finance in Germany. In order to be able to decide upon this allegation the German Court referred for a preliminary ruling to the Court in Luxembourg, the question, *inter alia*, whether the E.E.C. Treaty had empowered the Community institutions to institute a levy system directly applicable in the member States. The Court of Justice gave a positive answer to this question, strongly affirming the special character of the Community agricultural system and its uniform applicability in all member States.[1] The language of the Court deserves to be cited: "... this system has the same binding force in all member States as part of the legal order of the Community which they have set up and which has been integrated into their legal system by operation of the Treaty". Thus, more succinctly than ever before, the Court emphasizes that it is only the *Treaty* and not national law which determines the ranking and validity of Community law within the national legal system. It seems that the German Constitutional Court is also beginning to accept this doctrine. It may be recalled that in Germany in particular the constitutionality of the E.E.C. Treaty has given rise to serious doubts (especially before the Finanzgericht Rheinland-Pfaltz).[2] Even though the Bundesverfassungsgericht in a decision of July 5, 1967 had declared an appeal on this account inadmissible, it did not do so in absolutely unequivocal terms. More recently, however, there are signs that the highest German Court does accept the special character of Community law as determinative for its relationship to German law. In a decision of October 18, 1967, it

1. Case no. 17/67, judgment of December 13, 1967.
2. November 14, 1963, 2 C.M.L.Rev. 1963-64, p. 463.

refused to admit a plea that certain E.E.C. regulations were unconstitutional, since they had not respected certain fundamental rights laid down in the German Constitution. The Constitutional Court spoke of "a more and more integrating Community of a special nature" to whom sovereign rights had been transferred in the sense of Article 24 of the Basic Law. A new public authority was then created, whose acts neither have to be approved ("ratified") by the States, nor can be annulled by them. Consequently its legal provisions "form a special legal order whose rules are neither international law nor national law", against which a constitutional appeal cannot be allowed. Hence the argument that the authorities of the E.E.C. could only have come into being by the co-operation of the German State was considered irrelevant to the question whether Community acts were "acts of a German public authority" and therefore subject to constitutional control. The Court finally noted that it did not (yet) rule upon the conformity of Community law with the fundamental legal rights of the Basic Law in cases brought before it in an indirect way. The answer to this would depend on a decision as to whether the German Republic could have entirely freed the Community from the obligation of respect for the fundamental legal order when it transferred it powers pursuant to Article 24. Although the case was then limited to the holding that constitutional appeals against E.E.C. regulations cannot be brought directly before the Constitutional Court, it does seem to go a long way in admitting the independence and autonomy of the Community legal order vis-à-vis national law. The reasoning of the Constitutional Court excludes the application of the traditional transformation theory at least for the insertion of Community law. Seen in this context it is a hopeful step on the road towards a uniform recognition of the supremacy of Community law throughout the member States.

The existence of six different national systems of company law makes it difficult for companies in the member States to derive maximum benefit from the Common Market. Legal commentators have already paid ample attention to this question, but till now no practical results have been reached. Recently, however, the first important steps were taken. On February 29, 1968, the member States signed a convention on the mutual recognition of companies, based on Article 220 of the Treaty. As a result of the convention, companies of one of the member States will be automatically recognised by the other member States and will be entitled to conclude contracts, to institute actions, etc., in these states. It is to be regretted that the new convention does not grant any competence to the Court of Justice; the governments only declare that they will examine the question whether this should be done by a further agreement.

The joint declaration by the Five that negotiations should be opened as soon as possible with all states that have applied for membership of the E.E.C., in order to prepare for their adherence to this convention, is noteworthy.

Agreement has also been reached on the text of the first Directive on company law. It provides for rules on the publication of various data, *inter alia* the charter of the company and its balance sheets and profit-and-loss statements. The Directive does not specify what data must be included, thus leaving important matters to a future Directive on this subject. The Directive does include rather precise rules to safeguard the interests of persons contracting with a company; clauses in the charter limiting the power of directiors to represent the company cannot be invoked against such persons. The Directive will cause substantial modifications of national legislation in some of the member States.