SURVEY OF LITERATURE

General and Institutional

Prof. *Hallstein*, former President of the E.E.C. Commission, has given his views on the future of the Communities now that 10 years have passed since the Treaties of Rome were signed (*Europa Archiv*, 22d year, No. 6, pp. 195-207). He favours the maintenance of the institutional set-up and criticizes certain tendencies which might jeopardize the functioning and the political balance of the Communities. Hallstein discusses several objectives which the Communities have to achieve during the remaining years of the transitional period and considers that a political union can be reached by around 1980.

The decennial celebration of the signing of the Treaties has coincided with the publication of issue *No. 100 of the Revue du Marché Commun* (March 1967). Among many important articles, one finds an interesting contribution by *E. Noël and H. Etienne* on decentralisation and delegation of powers in the Common Market. Although the scope of Community activities and their incidence within the member States is steadily increasing, the institutional structures created by the Treaties of Rome have remained essentially untouched. The authors discuss the necessity of delegation of competences and find that the Commission has not made the widest use possible of the techniques available to it. The use of the "written procedure" permits it to avoid the inconveniences of the compulsory collegiate decision-making. The Council should entrust the Commission with more tasks; new formulae have to be explored in view of the elaboration of common policies in fields where Community institutions lack exclusive powers.

In the same issue of the *Revue du Marché Commun* (March 1967, pp. 213-220), *C. Constantinides Megret* comments on the problems of delegation with respect to the powers of national authorities to implement community norms. In most of the member States the Parliaments are unwilling to abandon their sovereign powers in this respect for the benefit of the national executive bodies. In many instances, however, Parliaments are not as appropriate for this task as are Executives. The author argues that the movement towards more powers of national Executives emphasizes the need to reinforce the position of the European Parliament and to create a new institutional balance at the Community level.

In *Revue du Marché Commun*, No. 99, February 1967, pp. 69-76, *J. Reid* gives a survey of the activities of the European Parliament in 1966.

The existence of a technological gap between the countries of Western Europe and the United States of America does not worry every author on this subject to the same extent. *E. G. Moline* thinks that the Europeans do not lag behind in so far as scientific research and inventions are concerned (*Europa Archiv*, No. 12, pp. 427-445). But the gap does exist in the field of "innovations", *i.e.*, the practical application of new findings. The author analyzes the European and American attitudes in this respect and concludes that Europe will be able to narrow this gap provided that the development of the European integration does not stagnate.

In issue No. 16, pp. 593-600, of the same periodical an attempt is made by *K. H. Standke* to define the notion of "technological gap." He points to the different meanings attributed to this idea by Americans and Europeans and, by means of statistics, presents the gap in realistic proportion.

Pierre Mercier has published the second half of his article on the E.E.C. Draft Convention on Reciprocal Recognition and Execution of Judicial Decisions (*Cahiers de droit européen*, 1967, No. 5, pp. 513-531). The proposed Convention primarily concerns the Community countries; however, the way in which it can affect the position of nationals of third States has brought forth strong opposition from Anglo-American quarters within the framework of the Hague Conference on Private International Law.

To meet some of the complaints of these countries, an additional Protocol has been drawn up and is open to ratification by any State which is a party to the Convention. The author considers the Convention as a remarkable achievement of the E.E.C. countries and as a step forward towards an international code on civil procedure.

In the context of the confrontation between the system of the decentralized market economy and the construction of a common juridical order within the E.E.C., economic law has come to play an increasingly important and pervasive role. *A. Jacquemin* in *Revue du Marché Commun*, Sept. 1967, pp. 439-445, points out that the elaboration of this field has been left largely in the hands of jurists. He recommends more active participation by European economists, and advocates a new approach which begins with a consideration of economic realities from which the need for constraining law is then ascertained.

The American Journal of Comparative Law, Vol. XV, Nos. 1 and 2, 1966-67, pp. 204-229, contains a contribution by *Ulrich Drobnig* on Conflicts of Law and its relevance to European integration. The author sketches the current role of conflicts law, which is fundamentally "to relate the legal relations of a Community with restricted purposes and powers to the full-fledged legal systems of the member States," and projects the probable future role of conflicts law in the development of a united Europe.

What can European industrial circles expect from a European-type Company? Prof. *F. Ottel* describes in *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen*, Vol. 10, No. 6, pp. 127-134, the major problems which must be solved in this connection. The author advocates that the *lex brevis esto* rule be borne in mind with respect to the results of Community legislation in this field. The author expresses doubts concerning the observance of this rule.

A contribution by *R. Morera* and *F. Argan* covers the subject of the preliminary Draft Convention on European Patent Law (*Cahiers de droit européen*, 1967, No. 5, pp. 491-512). This Draft Convention has led to considerable criticism. A sore point is the possibility of giving third States the right to adhere. The authors conclude that exclusion of third States and, especially, of the United States would not be altogether unwarranted; this would imply a continued existence of parallel national legislations in this province.

Agriculture

Cahiers de droit européen, 1967, No. 3, pp. 247-289, includes a contribution by *Michel Melchior* on the general structure of the agricultural organisations. He deals at length with the various elements of these market organisations: price and intervention policy, rules on intra-community trade and on trade with third countries, and with escape clauses in the regulations.

These escape clauses are the subject of an article by *Claus-Dieter Ehlermann* in *Europarecht*, 1966, No. 4, pp. 305-334. The clauses provide for a number of conditions that must be met before a member State or the Commission may take or approve safeguard measures. Often it is said that they are permitted "if the market is, as a result of imports, seriously disturbed or threatened with serious disturbance in such a way that the aims mentioned in Article 39 of the Treaty are endangered." According to the author a danger for the aims of Article 39 is conceivable only for the aims mentioned under (b), ensuring of a fair standard of living, and (c), stabilisation of markets, since the other aims cannot be affected by large imports. The analysis of the practice of the Commission is particularly interesting. Ehlermann concludes that the interpretation of the conditions has become stricter, thus leaving few cases wherein safeguard measures are still permitted.

Dietrich Ehle contributes his views in *Aussenwirtschaftsdienst*, 1967, No. 2, pp. 47-52, on Regulation No. 159/66/EEC of October 25, 1966 providing for supplementary provisions for the market organisations for fruit and vegetables (see 4 C.M.L.Rev.

1966-67, p. 461). He disagrees with the provisions on the establishment of growers' associations which have as their objective the concentration of supply and the regulation of producers' prices. In Ehle's view, the task of the associations is not sharply enough defined. Moreover, the growers are put in an advantageous position vis-à-vis the dealers in agricultural products by the possibility of subsidizing the associations; this would not be in accordance with Community law and with the constitutional law of the member States.

The *Revue trimestrielle de droit européen*, 1967, No. 1, pp. 30-61, contains a comprehensive survey by *J. R. Vergès* of the financing of the agricultural policy of the Community for the period from July 1, 1965 till the end of the transitional period (Council's decision of May 11, 1966). It is noticed that the Council has tried to limit the expenditures of the Agricultural Fund to some extent, *e.g.*, by fixing a maximum for the intervention costs in the fruit and vegetable market and by fixing maximum quantities of sugar for which the common price will be guaranteed. The system of financing will result in the heaviest burden being laid upon the countries that import agricultural products from outside the E.E.C. This is in accordance with the agricultural policy which gives preference to products raised within the Community.

Annales du Marché Commun, 1967, No. 1, pp. 15-18, pays attention to the "orientation" section of the Agricultural Fund. The task of this section and the way in which the available sum is divided are discussed.

H. B. Krohn provides a survey of the financial activity of the Agricultural Fund in *Revue du Marché Commun*, 1966, No. 97, pp. 839-842.

A common policy on fishery does not yet exist within the E.E.C. *R. Simmonet* explains in *Revue du Marché Commun*, 1967, No. 101, pp. 241-249, what measures such a policy should imply. Fishermen from all members States should be free to enter the territorial seas of the other member States; the entrance by fishermen from third countries should be regulated on Community level. The author notices that the Commission has made proposals to the Council on this subject and on some related questions.

Jean Sadrin provides a short survey of the French State Monopoly of tabacco in *Revue du Marché Commun*, April 1967, No. 101, pp. 250-252. He also discusses what changes would be necessary to come to a common policy for tobacco.

Free Movement of Persons; Right of Establishment

R. H. Lauwaars has written a good overall picture of Dutch measures implementing Community law in the field of free movement of workers. (*Sociaal Maandblad Arbeid*, 1967, No. 5, pp. 309-322; 1967, No. 6, pp. 388-402). The principles governing free movement of workers have been laid down in Council Regulation No. 38/64 and in several Directives. The author discusses the Dutch elaboration of the Community norms and finds that the equal treatment of nationals and non-nationals has been realized in a loyal and efficient manner. He points to the restrictions which the Dutch government has been obliged to make with respect to the workers' right to bring his family to Holland with him. The new Dutch Law on Foreigners takes full account of the changes Community law has brought about with respect to the treatment of foreigners.

The engagement in and the exercise of non-wage-earning activities in the member States have to be realized by Directives issued under Article 57 providing for mutual recognition of diplomas, certificates and other qualifications. *De Crayencourt* in *Revue du Marché Commun*, Jan. 1967, No. 98, pp. 24-37, points to the second paragraph of Article 57 as establishing a prerequisite for the reciprocal recognition of professional qualifications and notes that training and education requirements in the member States must be more or less equivalent. The Community can play an important role in this field and thus contribute to the creation of an educational system of high quality which leaves room for rational specialization and regional diversity. The article ends with a survey of the present state of affairs with regard to the medical, legal and technical professions.

The German author, *H. Niessen*, has commented on the incorrect implementation which the Federal Republic has given to Council Directives on the right of establishment (*Aussenwirtschaftsdienst*, 1967, No. 1, pp. 12-15). When a person wants to engage in non-wage-earning activities in one of the member States, the requirements of this State with respect to reliability, professional skill and solidarity are met by the presentation of certain documents which the person's home country has delivered to him. The author criticizes the fact that German legislation has not been adapted to this rule, although officials have been instructed by internal administrative measures to apply the Directives.

A highly interesting study of the transnational labour flow within the European Community and its relation to the development of a political Community has been written by *Helen S. Feldstein* in *Journal of Common Market Studies*, September 1967, pp. 24-55. The author discusses the development of E.E.C. policy regarding free movement of workers and interprets the major trends in intra-community migration up to 1965. A thoughtful analysis of the complex interrelationship between transnational labour mobility and political integration is offered, together with an evaluation of the past and present situation.

Competition

Some commentaries on the Grundig Consten judgment of the Court of Justice (4 C.M.L.Rev. 1966-67, pp. 209-220) should still be mentioned in this survey.

M. Bohlig wrote a systematic note in *Gewerblicher Rechtsschutz und Urheberrecht*, 1966, No. 11, pp. 585-586. In his opinion, no conclusions should be drawn from the part of the judgment relating to the trademark Gint for the right to patents and other industrial property rights.

The Court's ruling on the Gint trademark was also the subject of an address delivered by *H. Schumacher* and published in *Wirtschaft und Wettbewerb*, 1967, pp. 3-11. He concludes from the decision that the E.E.C. Treaty does not affect the acquisition of a right to a trademark in one of the member States, but that it may affect the enforcement of that right. The Court has made clear that the prevention of all parallel imports by means of a trademark is not permitted. Attention is paid to the question whether the principle of territoriality is an essential part of the right to a trademark, which would include that this right is essentially affected if that principle is no longer respected in the separate member States of the Community. This question is answered in the negative. The territoriality of the trademark is only the logical consequence of the limited application of national legislation; consequently, the division of the Common Market by means of trademarks is to be considered an abuse that is forbidden by Articles 85 and 86 of the Treaty.

The Grundig case, as well as the two other cartel judgments pronounced at about the same time (*L.T.M. v. M.B.U.* and *Italian Government v. E.E.C. Council*, 4 C.M.L.Rev. 1966-67, pp. 197-202) are discussed by *Jean Schapiro* in *Journal du Droit International*, 1967, No. 2, pp. 323-356. He disagrees with the ruling that, if the object of an agreement is to restrict competition, the consequences are no longer relevant. Also he is of the opinion that vertical agreements are not covered by Article 85.

As to the last mentioned question, *F. Koenigs* endorses the decision of the Court in the case, *Italy v. E.E.C. Council* in *Europarecht*, 1966, No. 4, pp. 343-347. The objections made in business circles that large integrated firms are thus favoured over smaller firms that must make use of sole agency agreements should not be over-estimated in view of the possibility of group-exemptions.

The Grundig case was a reason for *F. Kirschstein* to make a comparative study of the way the E.E.C. Treaty and the German antitrust legislation is enforced (*Aussenwirtschaftsdienst*, 1967, No. 6, pp. 209-216). According to Community law agreements in restraint of trade are prohibited, other than in Germany. This prohibition is enforced with a number of sanctions which may be imposed by the Commission (*e.g.* fines, penal sums). Actions taken in execution of illegal agreements are not prohibited as such, but may themselves constitute a practice forbidden by the Treaty.

Spormann writes on Regulation No. 67/67 (group exemption for bilateral exclusive agency agreements) in *Aussenwirtschaftsdienst* 1967, No. 5, pp. 175-179. Since the author commented on the draft regulation in the same periodical, he now pays most attention to the differences between the draft and the final text.

A short note on the same regulation by *A. Deringer* is published in *Aussenwirtschaftsdienst*, 1967, No. 6, pp. 226-227.

Article 3 of Regulation No. 67/67 says that the regulation does not apply if the contracting parties impede third parties from buying the products concerned elsewhere, especially if they do this by means of industrial property rights. This rule is criticized by J. Barents in *Nederlands Juristenblad*, 1967, pp. 667-672. He deems the provision a contradiction of the Commission's communication of December 24, 1962, where it said that a number of agreements on patents are not covered by Article 85, para. 1 of the Treaty. If that is correct, the exemption of the regulation cannot be made dependent on the absence of an agreement on patents, which agreement is not even prohibited by Article 85, para. 1.

J. Robert writes in *Juris Classeur Périodique* of October 18, 1967, No. 15233, on a judgment of the Court of Appeal of Paris of February 22, 1967 *(Laffort v. Société Laboratoires Sarbach)*. The physician Laffort, owner of a trademark for certain pharmaceutical products, granted an exclusive licence to Société Laboratoire Sarbach to produce and sell these products. A dispute on royalties between the parties was laid before arbiters. Shortly afterwards, the producer filed a complaint with the Commission, alleging that the agreement constituted a violation of Articles 85 and 86. The arbiters considered this complaint as the introduction of a procedure by the Commission in the meaning of Article 9, para. 3 of Regulation No. 17; consequently they declared themselves incompetent to decide whether the agreement violated the E.E.C. Treaty. On appeal, the Court of Appeal held that a procedure is introduced in the meaning of Article 9, para. 3, only if the Commission has manifested clearly that it has done so, *e.g.*, by giving notice to national authorities or to the parties concerned. Since this was not done the Court deemed itself competent to deal with the issue; it decided that no such violation was present. Robert disagrees with the decision of the arbiters: they are never national authorities in the sense of Regulation No. 17 (see also Robert's opinion on this point in 4 C.M.L.Rev. 1966-67, pp. 365-371, at p. 367). If they find that an agreement violates the E.E.C. Treaty, they must declare the agreement illegal, and consequently themselves incompetent to decide on the dispute. The author approves the judgment of the Court of Appeal. The claim based on Article 85 was an action to retard the decision; it was rightly dismissed.

K. Markert compares the judgment of the Brussels Court of Appeal of June 25, 1964 (cement case) with the German case law on the question whether judges are to be considered as national authorities (*Wirtschaft und Wettbewerb*, 1967, No. 1, pp. 51-53). He pleads for the reference of this question to the Luxembourg Court.

F. Rigaux annotates the decision of the Court of Appeal of Liège of June 8, 1966 (*Schott v. Remacle*, reported in the Case law section of this issue by G. Schrans) in *Cahiers de droit européen*, 1967, No. 3, pp. 328-332. The writer says that the Court should have indicated more clearly why it held the E.E.C. rules on competition not applicable in this case.

Social Policy

Institutional problems raised by the drawing up of a social welfare policy at the Community level is the subject of an article by *E. Heynig*, published in *Revue du Marché Commun*, No. 100, pp. 198-213. Responsibility for social welfare policy has been reserved for the member States, but the Commission is charged, pursuant to Article 118, with encouraging the closest possible cooperation between the States. The author discusses the distribution of powers between the Community institutions in this field and examines the concrete action taken by the Commission and the Council. The links between social policy and the general policy of the member States seem to indicate that agreements should be concluded by representatives of the member States assembled within the Council. The author suggests different lines of action and stresses the need for consultations with all interested groups.

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

In *Sociaal Economische Wetgeving*, 1967, No. 2, pp. 96-99, the Dutch Professor, *P. J. G. Kapteyn*, has commented on the Court's Judgment of December 1, 1965 in Case No. 45/64 *(Commission vs. Italian Republic)*. The Court has decided that Italy violated Article 96 of the Treaty by not excluding from drawback of internal charges expenses which exporters incurred with respect to registration fees, stamp-duties and mortgages. The author limits himself to a discussion of problems connected with the procedure of Article 169. He concludes that the Court is unwilling to restrict the applicability of this Article more than strictly necessary.

The Court's decision in Cases No. 52/65 and 55/65 is commented upon by *J. Frowein* in *Cahiers de droit européen*, 1967, No. 3, pp. 301-308. An important question in these cases was the definition of charges having an effect equivalent to customs duties. According to the author, the Court leaves open the possibility that a member State may ask payment in compensation for certain services it renders to its nationals. But the granting of import licences cannot be considered in this context a service for which one must pay. Thus, the results are equal to that of a customs duty on importation. The second issue of the dispute was the German complaint that the principle of equality had not been observed by the Commission issuing Directives under Article 13 (2), addressed exclusively to the Federal Republic. The Court upheld the Directives under attack and pointed out that a member State can invoke Article 175 whenever this principle has been violated.

Several authors have paid attention to the Court's judgment in the so-called *Kampffmeyer* case of July 14, 1967 (Consolidated Cases 5, 7 and 13-24/66; C.M.L.Rev. 1967-8, pp. 208-211). In the *Juristische Wochenschrift* of September 14, 1967, pp. 1722-1726, *Klaus Bunte* has written a casenote, while in *Aussenwirtschaftsdienst*, 1967, No. 8, pp. 311-312, the decision has merely been printed. This judgment constitutes a sequel to the *Toepfer* decision (See, C.M.L.Rev. 1965-6, pp. 233-243) in which the Court annulled the Commission decision of October 1963, which allowed Germany to maintain in force safeguard measures concerning the importation of cereals. The Court of Justice in this case admits the principle of Community liability under Article 215 (2) and makes a distinction between categories of injured parties, according to how the importers have behaved after the Commission decided to uphold the German safeguarding levy. The author reviews the Court's findings with respect to the assessment of damages on the basis of real and demonstrable losses suffered by the injured parties and goes into the Court's jurisprudence with regard to official fault (see Article 40, E.C.S.C.).

The Judgment of July 5, 1967 of the German Bundesverfassungsgericht, ruling upon a request filed by the Financial Court of Rheinland-Pfalz on November 14, 1963, has been published in both *Aussenwirtschaftsdienst*, 1967, No. 9, pp. 364-366, and in *Neue Juristische Wochenschrift*, September 1967, pp. 1707-1710. The Financial Court had requested the Constitutional Court to give its opinion on the relationship between the German Law on Compensatory Turnover Taxes and Article 18 of Regulation No. 19. Another question, which apparently has bothered the Constitutional Court a great deal, was whether the Statute of Ratification, in connection with the powers which the Council of Ministers can exercise pursuant to Article 189, was not incompatible with the German Constitution. The Statute forbids in Articles 20 and 129 (3) the granting of legislative powers to executive bodies. The Court held that the request was inadmissible, since Article 18 of Regulation No. 19 was irrelevant to the outcome of the dispute. The meaning of Articles 95 *et seq.* would be decisive for the legality of the German law. However, the Court went into the question of whether the unconstitutionality of Article 1 of the Statute of Ratification in so far as Article 189 E.E.C. is concerned, would not entail the nullity in Germany of the whole E.E.C. Treaty. It found that although the importance of Article 189 is paramount in the context of the Treaty, its unconsistutionality and the nullity of acts taken in pursuance of it would not affect the rest of the Treaty and would not deprive Article 95 of its self-executing character.

The Bundesfinanzhof has dealt with similar questions. It seems that it has reached another conclusion than the Constitutional Court in the case mentioned above. It considers that unconstitutional ratification of the central provisions of Article 189 could only result in making the Treaty null and void in its entirety. This decision of April 25, 1967, has been published in *Europarecht*, 1967, No. pp. 239-245, and very summarily in *Neue Juristische Wochenschrift*, September 14, 1967, p. 1722.

A contribution (*Europarecht*, 1967, pp. 245-247, and *Neue Juristische Wochenschrift*, September 14, 1967, p. 1727) has been made on the Judgment of February 10, 1967 of the French Conseil d'Etat, in which Article 91 (1) was considered as a non-self-executing provision. *Nicolaysen*, in a casenote, points to two other recent judgments in which the Conseil refrained from referring a case to the Court of Justice for preliminary ruling. In all three cases it restricted the scope of Article 177 by applying the theory of the "acte clair". The Commission, requested to give its opinion, replied that it did not hold the opinion that Article 177 was violated by this restrictive application; however, it admitted that the formation of Community law would have benefited from requests for preliminary rulings in the cases referred to. (See, for the answer of the Commission to the question of the Dutch M.P. Westenterp, in the European Parliament, O.G. No. 270 of November 8, 1967, pp. 2 *et seq.*)

An interesting judgment of the French Cour de Cassation, made on January 5, 1967, has been published in *Recueil Dalloz*, July 12, 1967, pp. 465-467. The Court had to deal with the question of whether certain fabrics imported from Germany and originating in Yugoslavia had become an E.E.C. product by subsequent manufacturing in France. The importer urged the Court to request a preliminary decision, by application of Article 177 on the meaning of the Commission Decision of June 28, 1960. As the internal administrative decree regulating the application of this decision in France was sufficiently clear, the Court refused to refer the case to the Community Court.

In *Europarecht*, 1967, No. 1, pp. 55-72, *Peter Weides* comments in a casenote on the Court's decisions in the Cases No. 37/64 and No. 39/64 of July 13, 1965. Both cases concern appeals for annulment of assessments for the scrap equalization. Weides analyses the meaning and content of the decisions enabling the High Authority to impose the taxes on enterprises. Exceptions of illegality invoked against these decisions were rejected by the Court. Further, the author discusses the Court's decision that the principle of equal treatment of enterprises and absence of discrimination prevails over particular rights of interested individuals. In the particular case, the plaintiffs had claimed that the decision on which the assessments were based should be considered null and void, since it allowed the assessment of levies with a retroactive effect.

In *Monatschrift für Deutsches Recht*, 1967, No. 6, a judgment of the Oberverwaltungsgericht Hamburg has been reported dealing with the notion of public security and public order in domestic law as found in the Treaty of Friendship between Italy and Germany and in the European Treaty of Establishment.

An interesting case concerning a referral for preliminary ruling made by the French Cour de Cassation on the interpretation of Article 28(*b*) and (f) of Regulation No. 3 has been reported in *Recueil Dalloz*, October 4, 1967. The French Court in conformity with the submission of its Advocate General Goffart, has now turned to the Court of Justice for the first time with a request under Article 177.