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Economic Law of the Member States of the European Communities in an Economic and Monetary Union

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Economic Law of the Member States of the European Communities in an Economic and Monetary Union

An interim report with provisional conclusions and recommendations, based on reports or interim reports on the economic law of Belgium, Germany, France, Italy, the Netherlands and the United Kingdom

by

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Foreword

This interim report is based on final reports relating to Germany, France, Italy and the Netherlands and interim reports relating to Belgium and the United Kingdom. In due course it will have to be revised on the strength of further material on the economic law of the Member States of the enlarged Community. The first four reports were concluded in mid 1971. Since then the tendency noted in the interim report towards increasing convergence of the economic law of the Member States has been continuing. Thus in France the role of five-year plans and 'dirigiste' measures has been further reduced, whereas in Germany the arsenal of possibilities of intervention has been extended precisely in the direction of the Comunity average.

As a rule the national reports are cited with the name of the author and the subdivision followed. To prevent confusion only the Dutch report is cited as 'Dutch report'.

In view of its different character, the following report has been given a somewhat different lay-out from the national reports. The aim of this report is to examine the place of the economic law of the Member States in an economic and monetary union. In connection with this, an explanation is first given of the aim and method of the study in Chapter I. Chapter II is mainly based on the first part of the national reports. Chapter III follows on the subdivision of the second part of the national reports. As two sections have first been included on the overall objectives of economic policy and the overall institutional aspects, the numbering of the following sections moves up two numbers in respect of that of the national reports. In addition to a summary of national law, each section contains conclusions with regard to harmonization or coordination. After a summary of the preceding chapters, Chapter IV contains the principal recommendations arising from the study. The recommendations in the report are of a minimal nature, as they relate in fact to only the first two stages of the economic and monetary union. This is connected with the fact that the relevant Council resolutions have established that amendments will have to be made to the Treaty of Rome, but not which amendments. Consequently, the recommendations must be based not only on the existing national law but also on the existing text of the Treaty. The latter text makes it for instance possible to harmonize the powers of the central banks as a minimum condition for effective coordination, but not to establish a European central bank with its own powers. This instance at the same time makes it clear that the report can contribute to insight into the points on which, to avoid superfluous work, a quick decision is desirable on the choice between harmonization of national law and further extension of Community law.

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CHAPTER I

Introduction

1. Purpose of the study

Means and end of the European Economic Community

Under Article 2 of the Treaty of Rome the Community has the task of promoting the harmonious development of economic activities throughout the Community, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to the Community. In the Treaty itself and in various other documents this task is elaborated. Of these other documents, special mention should be made of the various medium-term economic policy programmes and the resolutions of March 1971 and March 1972 concerning the realization of an economic and monetary union.

Likewise under Article 2 of the Treaty of Rome, the Community should perform its task by establishing a common market and by progressively approximating the economic policies of the Member States. Both means have an influence on the economic law of the Member States, and in the present report the legal aspects of this influence will be examined.

The principal economic aspects of the above influence have already been analysed before in a report by Professor J. Zijlstra with the assistance of Professor B. Goudzwaard entitled 'Economic policy and problems of competition in the EEC and the Member States' (EEC studies, competition series No 2, Brussels 1966, cited hereafter as the Zijlstra report). The present study forms a legal complement to that report. As will appear, however, it deals with a somewhat more extensive subject-matter.

The establishment of a common market

In brief, the establishment of a common market means creating effective competition in which establishment, production, financing and transactions in goods and services can take place where the economic conditions are the most favourable, without regulations of private or public law distorting the free play of the market to any great extent (cf. Zijlstra report, p. 39). Means of achieving a common market within the whole territory of the European Communities include the customs union, the free movement of persons, services and capital and the rules on competition (Articles 85—94) of the Treaty. Like the common policies for agriculture and transport, the means mentioned are largely characterized from the legal point of view by the existence or the creation of lasting, legally binding standards of Community law.

However, experience has shown that the lasting binding standards of the Treaty with regard to the establishment of a common market must be supplemented by numerous — also lasting — measures of coordination or harmonization of national law.

Neither the liberalization obligations arising directly out of the Treaty nor the directives and regulations for implementation of those obligations proved adequate to arrive at the establishment of a common market. As examples of necessary supplementation by harmonization of legislation mention may be made from current harmonization practice of the coordination, harmonization or unification of customs legislation (Articles 27, 100 and 235), company law (Article 54,3g), the legislation regarding the taking up and pursuit of activities as self-employed persons (Article 57, paragraph 2), large areas of tax legislation (Articles 99 and 100), the legislation on public order covered by Article 36 which causes the so-called technical and administrative obstacles to trade (Articles 43 and 100), and

the regulation of supply and demand in the field of public procurement (Articles 57, 66 and 100). Part of this legislation does not come under economic law within the meaning given to the latter by this report. To that extent this legislation will be dealt with briefly, if at all. Considerations of expediency have also played a part here. The Commission is already very well documented in these fields of law and in them has moreover already largely laid down the objectives sought by harmonization. However, economic law in the narrower sense still displays a more or less strong cohesion. Moreover, it forms the legal basis of economic policy, which displays a clear unity above all in some Member states. Economic law in the narrower sense has been fully examined in the national reports forming the basis of this report on account of that cohesion of its constituent elements.

In this report the questions examined first of all are those concerned with the usually lasting harmonization of Member States' economic law which relate to the establishment of the common market. In particular the matters arise here which have not yet found a solution in Community legislation. This aspect of the study is therefore particularly concerned with the extent to which the existence side by side of usually differing systems of national economic law leads to obstacles to or distortion of competition in intra-EEC trade. However, the nature of this study will allow of only broad conclusions on this point with regard to the possibility, the utility, the legal basis and the legal methods of coordination or harmonization of the economic law of the Member States. The conclusions will be even broader concerning those parts of national economic law that have to be harmonized in the framework of common agricultural policy and common transport policy, or under the ECSC Treaty or the Euratom Treaty. Here too it is mainly a question in principle of working out lasting regulations required for the establishment of a common market in these sectors.

The establishment of a common market is thus mainly brought about by means of lasting binding standards which have either already been elaborated in the Treaties or are being brought about by regulations or directives for implementation of the Treaties. The lasting obligations that have been laid down in the Treaties themselves for this purpose, or at least find a clear and specific basis in them, must be supplemented by likewise lasting coordination or harmonization of national law.

The need for coordination of economic policy

With respect to the economic law of the Member States, the lasting Community standards mentioned above have two consequences. They have the legal consequence that standards of national economic law at variance with Community regulations may no longer be applied or must be abolished or adapted. Instances might be customs duties and quantitative import restrictions or measures having equivalent effect in intra-Community trade, discriminatory provisions regarding establishment, certain agreements between firms and so on. This report does not further consider these consequences. However, no less important than the legal consequence are the economic consequences that creation of a common market has for the economic law of the Member States. The Zijlstra report summarizes these consequences on p. 41 by stating that the economic and geographical enlargement of the market and the greater mobility of the factors of production 'will create an economic situation in which the national economies will display a considerably greater degree of openness and vulnerability than at present and in which in principle any national artificial intervention in the operation of the market will be reduced in effectiveness, irrespective of whether this intervention is of private origin — for instance by cartels — or of public origin (i.e. by the national authorities)'. According to the further explanation of this statement (Zijlstra report, pp. 41—46), it relates both to overall short-term and medium-term economic policy and to the direct control of for instance wages, prices, interest on capital, investments, competition, etc. The need for the second means mentioned in Article 2 of the EEC Treaty, the coordination of the economic policy of the Member States and thus of the approximation of national economic law, arises above all from the decreasing effectiveness of purely national action. To attain the objectives set, an effecitve coordination or common policy at Community level or, to put it another way, an economic and monetary union must compensate the decreasing effectiveness of national economic policy. The legal implications of the necessity to supplement the common market by an economic and monetary union will be examined in this report in connection with the problem of the coordination or harmonization of the economic law of the Member States. It will become evident in this context that the method of lasting, legally binding standards which play such a predominent part in the establishment of the common market can only be used to a very limited extent in the coordination of economic policy. The latter will often call for short-term decisions which are also only in force for a very limited period of time. As a result, on often highly important points of policy, problems of institutional efficiency will arise similar to those on relatively secondary points of policy that had to be solved in the past in the day-to-day implementation of the common agricultural policy. In this context the German concepts 'Dauerordnung' and 'Prozesslenkung' should be

compared. While the 'Dauerordnung' from the first phase of the EEC will definitely have to be maintained and further developed, in the new phase of the economic and monetary union it will also have to be supplemented by 'Prozesslenkung'.

Summary

In sum this report therefore deals with the problem of the extent to which, for the establishment of a common market and the realization of an economic and monetary union, harmonization of the economic law of the Member States is necessary, and how this harmonization can be achieved.

2. Defining the subject of study

This report deals with the place of the economic law of the Member States of the European Communities in an economic and monetary union. The economic and monetary union presupposes the completion of the common market (cf. the Resolution of the Council and of the representatives of the governments of the Member States of 22 March 1971, Official Journal 1971, C 28).
The report is of the nature of an interim report and draws provisional conclusions from the reports on the economic law of Germany (by Professor H. F. Zacher), of France (by Professor M. Fromont), of Italy (by Professor G. Sacchi Morsiani) and of the Netherlands (by Professor P. Verloren van Themaat and Mr L. A. Geelhoel).
At the same time it was already possible also to take into account interim reports on Belgium by Professor G. Schrans and on the United Kingdom by Professor T. C. Daintith. The compilation of an interim report was considered desirable to stimulate the discussion on the national reports already completed. Upon completion of all national reports a final report or a supplementation of the interim report can be drawn up. This will also be able to take into account the discussion stimulated by the interim report.

The basic concept for the whole study is that of economic law. It was generally agreed between the rapporteurs that economic law should mean in all reports the whole body of legal regulations promulgated to serve economic policy. At the same time attention has been devoted to legal regulations which may not be important to national economic policy but which, through the differences between them, are of particular significance to the economic policy of the Community. Instances are certain areas of tax legislation and the legislation containing standards that products must comply with in connection with the protection of the health of human beings, plants and animals. However, only brief attention is paid to aspects of law on which there is already extensive documentation and which are not of direct importance to national economic policy.

3. Method of investigation

To render the systems of economic law of the Member States comparable, it was necessary to arrive at a common systematic classification of this field of law.

The point of departure for the classification was formed by the above mentioned Zijlstra report and in particular the planning typology contained in that report (pp. 32—35). For this typology classifies the instruments of economic policy according to the — also legally relevant — degree of commitment and the degree of differentiation by sectors or enterprises. However, a number of distinctions which at the time of compilation of the Zijlstra report seemed meaningful from the viewpoint of economic policy proved difficult to maintain from a legal point of view or had been overtaken by events since 1964. Moreover, from the angle of comparative law it proved useful to work out more precisely further subdivisions. In addition, the purpose of the present investigation made it necessary also to examine the mandatory regulations of national economic law insofar as they are not directly connected with the general objectives of national economic policy or with general short-term or medium-term planning.

As mentioned above, in this process, in view of the objectives of the economic policy of the European Communities, attention was also paid to a number of fields of law which, viewed nationally, do not belong to economic law as defined above, or with regard to which this is open to dispute.

On the strength of the above considerations the rapporteurs ultimately accepted a subdivision of economic law into the following five main groups:

First group: the legal organization of economic forecasting (Zijlstra type I)

Otherwise than might be thought at first sight, pure forecasting without setting specific tasks is quite definitely an instrument of economic policy. Thus private firms will make allowance for such forecasts regarding the general economic development when making their own plans. Moreover, forecasts will always start from certain — perhaps alternative — assumptions regarding the official policy to be followed. The varying views of the

different governments on the organization of such forecasts and their influence on this show that the governments already regard forcasts as an instrument of economic policy.

Second group: indicative short- and medium-term planning, supplemented by overall and indirect instruments for attainment of the objectives set
(Zijlstra types II and III)

This group includes the five-year plans in Belgium, France and Italy and budgetary policy, general taxation policy and monetary policy in all Member States. The legal standards of this group are not binding on private enterprise, but they are on the authorities in many cases. Sometimes, notably in Italy and to a less extent in France, they are also binding on public enterprises. Their influence on the behaviour of private business is characteristically indirect.

Especially in countries where medium-term economic policy is highly developed, short-term economic policy is regarded as a method of adjusting the development of the economy to bring it in line with the current aims of medium-term policy. Consequently short- and medium-term economic policy are considered as being interrelated in this part of the reports. To some extent too both forms use the same legal instruments.

Third group: measures of assistance
(Zijlstra types IV and V)

On account of the purpose of the study stated under I. 1, aids are interpreted here in the same broad sense as in Article 92 of the Treaty of Rome. From a viewpoint of national law it did not prove feasible in an analysis of the economic law of the Member States to adopt the distinction that Zijlstra makes between unconditional and conditional aids. In Community supervision of national aids this distinction plays a clearer role.

It emerges from the national reports that the description of national aid policy is simpler in countries where this instrument is applied systematically and in clear connection with medium-term economic policy (Belgium, France and Italy) than in countries where there is no clear and systematic aid policy.

Fourth group: programme contracts
(dealt with in the Zijlstra report as a part of his planning type V)

While legally speaking conditional aids cannot always be clearly distinguished from unconditional aids, programme contracts between the authorities and business do form an obvious separate category. The part of business concerned undertakes by such contracts to implement a given programme (e.g. with regard to investments, exports, wage or price policy). As a *quid pro quo* from the authorities programme contracts sometimes provide for aids to the firms concerned, and sometimes grant relief or exemption from mandatory regulations. In elaborated form they exist above all in France and — clearly on the French model — in Belgium. However, in embryonic form they also exist in other Member States. In principle not only firms or groups of firms but also organizations of employers and employees can be partners in such programme contracts. The *quid pro quo* on the part of the authorities may further in principle relate not only to the instruments of groups 3 and 5 but also to those of groups 1 and 2. For the distinctive feature of this group of measures lies in their quasi-contractual nature. The contracting partners — the authorities and business — are within the limits of what is legally permitted free in their choice of objectives and implementary instruments.

Fifth group: mandatory regulations
(Extension of Zijlstra type VI to all mandatory regulations of economic law, even if they are not bound up with a plan)

In this category mandatory institutional provisions are also dealt with, for instance with regard to professional organization. The following are dealt with as measures of substantive law: mandatory measures implementing short-term economic policy, regulations for situations of crisis and shortage, regulations on foreign economic relations, general regulations of structural policy such as cartel legislation, quantitative and qualitative regulations with regard to access to a market (including investment control and establishment control from the point of view of physical planning or environmental protection), regulations concerning separate aspects of market behaviour and regulations of public order.

Certainly, the last subdivision is not a part of national economic law. But, as mentioned above, these regulations may be of great importance to the economic law of the European Communities.

Sixth group: sectoral legislation
(Zijlstra type VI A)

This group specially envisages sectors like agriculture and transport, where all the organizational measures are clearly interrelated and the sectoral policy context of the measures weighs more heavily than the general policy of furthering competition or the general planning or other objectives of the Member State not specifically related to the

sector. However, in some national reports measures are also dealt with in this group which, because the objectives are general rather than sectoral, affect the sectoral behaviour on only a few points, for the rest giving free play to the general market and planning mechanism.

Seventh and eighth group: enforcement of the law and legal protection

In a comparative study undertaken with a view to the harmonization of national law, some attention must of course be paid in conclusion to the regulation of enforcement of the law (administrative, criminal and other sanctions) and of legal protection. For harmonization of economic law is pointless if the harmonized law cannot be enforced everywhere with equal effectiveness. In addition, a harmonized regulation of the judicial interpretation of harmonized law may sometimes be of decisive importance. It finally emerges from the regulation on legal protection to what extent economic law in the various Member States is regarded as a separate field of law.

4. Utility of the analysis scheme to Community policy

The analysis scheme thus derived from the Zijlstra report also proves to be effective from the point of view of the harmonization or coordination of the economic law of the Member States which is being sought. In Community law there are examples of all the groups of economic policy instruments referred to in the analysis scheme. But in particular the instruments of coordination of Member States' economic law at the disposal of the Communities display a differentiation which in general fits in well with the analysis scheme. The investigation in this respect is mainly confined to the EEC Treaty. In the other Community treaties a number of instruments of coordination are more highly developed.

4.1. *FIRST AND SECOND GROUP*

Forecasts and indicative planning in the medium-term, like overall and indirect interventions, can be coordinated in this connection on the basis of Articles 105 and 145 of the Treaty of Rome and the organizational powers of the Commission and the Council.

Short-term economic policy can be coordinated by the application of Article 103 and sometimes by the application of Article 100, of the EEC Treaty (e.g. in the fiscal field).

Insofar as *public enterprises* are used as instruments of economic policy, Article 90 of the EEC Treaty, in conjunction with Article 105, presents an effective instrument of coordination.

Public contracts can be coordinated by applying Articles 30, 57/66 and 100 and by public orders coordinated by the Community or placed with business. A serious gap in powers of coordination exists only under Article 107 with regard to the exchange rate policy of the Member States.

4.2. *THIRD GROUP*

Aids can be effectively coordinated with medium-term economic policy by application of Articles 92 and 93 of the EEC Treaty and Community financial incentives of varying kinds (Investment Bank, Social Fund, Agricultural Fund and other funds still to be created, and also special incentives under the ECSC and Euratom Treaties.

4.3. *FOURTH GROUP*

Insofar as national programme contracts are tied to measures of assistance, they can likewise be coordinated under Articles 92 and 93 of the EEC Treaty, and in other cases perhaps under Articles 30, 90, 101 or 105. Finally, programme contracts at Community level are possible to the extent to which the Community can offer the prospect of a financial or other quid pro quo.

4.4. *FIFTH AND SIXTH GROUP*

Notwithstanding the common policies for agriculture, transport, coal and steel, nuclear energy and foreign trade, mandatory regulations can be coordinated or harmonized under Articles 57, 66, 99—103, 220, 224 and 235 of the EEC Treaty and international conventions for agreements on fields not mentioned in Article 220.

4.5. *SEVENTH AND EIGHTH GROUP:* Article 100 or international conventions

From this broad comparison of the analysis scheme with the coordinative instruments of the Community treaties, two important conclusions can be drawn. In the first place, it becomes more or less

apparent how the coordinative instruments in the Community treaties and notably in the EEC Treaty tie in with the differentiation of instruments of national economic policy forming the basis of the reports. Secondly, a serious gap in the powers of the Community exists only with regard to some aspects of monetary policy, notably exchange rate policy. However, these encouraging conclusions are of a rather formal nature. In particular with regard to the first and second group of measures great institutional problems of organization, decision-making ability and effectiveness will occur. These are problems of the transition from the method of lasting binding standards to an effective 'Prozesslenkung' that were already mentioned in the first section of of this chapter. However, problems will also arise in the field of harmonization of mandatory national standards of economic law which in the past did not yet come clearly to the fore. This is the problem of outline laws forming the foundation of mandatory measures relating for instance to short-term economic policy. It has to be examined here to what extent coordination of the application of the outline laws is more important than harmonization of the outline laws themselves. Insofar as the application has to take place at short notice and results in measures of limited duration, similar institutional questions again arise as with regard to the day-to-day adjustment of economic processes in general. The problem becomes even more complicated to the extent that the national measures in question are at variance with mandatory regulations of primary or secondary Community law or to the extent that harmonization is likewise required for completion of the common market. Mandatory regulations of short-term economic policy may enter into conflict with free intra-EEC trade where competition is undistorted. Coordination by the Community of Member States' short-term economic policy will have to obviate such conflicts.

The problem thus defined already played a part in the taking of Community measures for intra-EEC trade in agricultural produce after the last French devaluation and the German and Dutch revaluations. For reasons of short-term economic policy measures were temporarily taken in application of Article 103 of the EEC Treaty which were at variance with the principles of free movement of goods. But it is not certain that all Member States already fully recognized the fundamental and more general significance of the problem at that time.

5. Lay-out of the report

As the first part of each national report already contains a summary of the system of economic law concerned, for these summaries per country reference may be made to the national reports.

However, in the second chapter of this report a number of broad conclusions in the field of comparative law are drawn from the national summaries. It will be indicated in a manner similar to that on pp. 36 and 37 of the Zijlstra report, but then from the legal point of view, what relevant differences of emphasis exist between the Member States in objectives, subjects regulated and use of the various instruments of the analysis scheme. In this broad comparison the economic law of each Member State is therefore regarded as a unit, whether or not explicitly expressed as such. The concepts 'economische orde' and 'Wirkschaftsverfassung' or 'constitution économique' also come up for discussion here. A number of general conclusions for the coordination or harmonization of the economic law of the Member States will be linked to the broad comparison.
In the third and largest chapter the objectives of economic policy and the institutional mechanism for achieving those ends will first be discussed. Then the various subjects of the uniform analysis scheme will be examined in the same order as in the national reports. In the case of all the subjects dealt with, the most important ways in which national systems correspond and differ are discussed first.

Then it is indicated to what extent coordination, harmonization or unification of the national regulations is necessary and how this can be achieved under the European Community treaties.

The fourth chapter will summarize the principal conclusions which may be drawn from the study.

CHAPTER II

The main characteristics of the national systems of economic law examined

1. The unity of each system of economic law

From the various national reports or interim reports, it clearly emerges that each national system of economic law displays unity, or at least cohesion. This must not be disregarded in the Community's coordinative activities in various fields of economic law. The cohesion has sometimes been worked out thoroughly in accordance with a rational plan (France, and to a less considerable extent in Belgium and Italy too). Sometimes little system can be discovered in the economic law of a country at first sight (Germany, the Netherlands, the United Kingdom). But in that case too a comparative study quite definitely reveals that there are a number of general characteristics of the national system of economic law concerned that distinguish this system from the economic law of other countries. As was said in the previous chapter, the present chapter will indicate the principal relevant differences in emphasis in a similar way to that on pp. 36 and 37 of the Zijlstra report, but from the legal point of view.

2. The historical strata in the national systems of economic law

Between the national systems of economic law there are more differences in emphasis than essential differences. Even before the Community treaties came into being the economic law of the countries investigated displayed greater points of similarity than of difference. A more extensive investigation from the viewpoint of legal history than appears from most reports would show that economic law in all the countries concerned came into being above all in the critical prewar years, with often striking parallels — to the very date of their introduction — in the organizational measures then taken per branch of industry.

The historical experience of the inflation period during the 1920's in Germany, the historical stratum of the legal measures taken to deal with the crisis in all the countries investigated, some aspects of the historical stratum of the subsequent interventionist legislation and above all the period of recovery and expansion in the first two postwar decades clearly set their stamp on the economic law now in force in all the countries investigated.

Notably in the reports relating to France and the Netherlands, attention is explicitly devoted to these historical strata of current economic law. So important an instrument of Italian economic policy as the state holding companies and also major elements of current Belgian economic law date from the critical prewar period. On the other hand, important elements of German economic law — notably the emphasis on price stability, the market economy and the idea of the constitutional state — were not so much derived from economic law of the Twenties and Thirties as reactions to it. Elements of reactions to previous periods — this time structurally connected with the two-party system and thus periodically returning — may, according to the British interim report, also be noted in the economic law of the United Kingdom.

3. The influence of the European Communities

After the European Community treaties had been concluded the tendency towards convergence of the systems of economic law of the Member States clearly grew.
In part this is a direct political, legal or economic consequence of the Community treaties. In the introductory chapter it has already been pointed out that the liberalization of the interstate economic relations of the Member States considerably weakened the effectiveness of national measures of

economic policy, even where these were not from a strictly legal point of view inconsistent with Community law. The liberalization of interstate trade thus compelled a certain degree of liberalization of economic policy and thus of economic law in the most 'dirigiste' countries. On the other hand, in the countries relying more on the market mechanism it came increasingly to be seen that the operation of the market mechanism had to be adjusted at least by a number of overall and indirect measures, but also by a number of specific indirect or even very directly acting measures. Presumably all Member States, with only a few minor reservations, can now accept what the Zijlstra report (p. 17) quotes in summarized form from the orientation report for the French Fifth Plan. According to this quotation which is by way of summary 'market and plan are both necessary side by side. The market has the task (on condition that sufficient information is present and that monopoloid elements are absent) of adjusting supply and demand to one another. The plan has the task "of putting forward, beyond the powers and limits of the market, a common view of economic development explaining individual behaviour". For the market has by nature the restriction that it cannot reflect the future needs and developments: consequently, the present market situation is not an adequate guide for decisions by firms'.

The idea that 'market' and 'plan' perform complementary tasks and are both necessary is also, as already remarked, contained in Article 2 of the EEC Treaty. As emerges from the successive programmes for medium-term economic policy, the term 'coordination' used in the article mentioned does not, after all, exclude the concept 'plan', but includes it. The fact that in the EEC the term 'programme' was introduced instead of 'plan' was connected with associations that the concept 'plan' aroused, notably in Germany, with the concepts 'dirigisme' and 'planned economy'. The Zijlstra report (pp. 34—37), the above mentioned French orientation report for the Fifth Plan and the legal terminology employed in the Netherlands all make it clear, however, that planning need in now way be bound up with centralization of all or the major economic decisions.

4. Decisive factors in the degree of convergence or divergence of systems of economic law

The degree of convergence and divergence of the systems of economic law of the Member States of the EEC is ultimately connected above all with the degree of community of fundamental cultural and political values in the Member States and with the degree of comparability of their economic structure. Values like personal freedom and democracy cannot be realized without radical decentralization of the power of decision, in the economic field too. Values like equality and solidarity with economically weaker groups cannot be attained any more than the economic 'magic square' of Article 104 of the EEC Treaty without a certain degree of coordination of the decentralized decisions and without certain legal guarantees of equal treatment. The exact degree of coordination of economic decisions required depends, according to a remarkable proposition by Farjat (*Droit économique,* Presses universitaires de France 1971, pp. 238 and 265 et seq.), directly on the degree of concentration of business. This proposition needs further empirical verification. However, it is an established fact that the structural development phase of an economy, which finds partial expression in the Western countries in the degree of concentration, is of great influence on the development of economic law, in addition to the cyclical phases and the dependence on foreign trade. The ultimate explanation of the increasing convergence that may be noted in the development of the economic law of the Member States must therefore presumably be sought in the large degree of community of fundamental cultural and political values in the Member States, the increasing comparability of their enonomic structure and the interdependence reinforced by the establishment of a common market.

The national reports forming the basis of this report and the three medium-term economic programmes published so far notably display a radical convergence with respect to the subjects regulated by economic law and to the objectives pursued. The economically or legally relevant differences in emphasis relate above all to the methods with which certain objectives are pursued or, to put it the other way round, the manner of using instruments of economic policy which, in themselves, are often available in all Member States. Incidentally, applicable to all national reports and to every study of comparative law is the warning pronounced in the French report: 'It is evident that the range of instruments of economic law gives only an inexact picture of economic policy'.

5. Economic law in Germany

According to the Zijlstra report, in 1964 'soziale Marktwirtschaft' still prevailed to so great an extent in Germany that only with regard to direct government action did a certain type of planning occur, the report's planning type II (op. cit., p. 36). This can certainly not be maintained since the

enactment of the Law to Promote Stability and Growth of the Economy in 1967. On the contrary, it emerges from the German report that economic law in the Federal Republic now relates to all six main groups and most of the subgroups of instruments laid down in the comparative scheme and that to a certain extent one may even speak of a 'planning euphoria' (Zacher, Nos 22 and 44). And yet in Germany the main emphasis still falls clearly on promotion of the proper functioning of the market economy. Legally speaking, this is reflected inter alia in the highly independent and powerful position of the Bundeskartellamt, and also in the opposition still regularly put up in the recent past to 'dirigiste' measures in for instance the fields of foreign payments, capital and commercial transactions and domestic wages and prices. In the third place mention may be made in this connection of the absence of generally valid legal principles for the measures of assistance that are now widely applied in the Federal Republic too and the lack of development of the instrument of programme contracts. Finally, the nature of German economic policy which is still little directed towards planning is evidenced by the absence of a systematic summary of the in themselves numerous mandatory intervention regulations and their consistent employment for the realization of certain objectives defined by a plan. It is further characteristic that sectoral economic policy is unevenly developed and the fairly extensive public sector of the economy is neither regarded nor used as an instrument of economic policy. The planning now applied is in other words mainly of the nature of Globalsteuerung, or overall control (second main group) and, unlike the situation in France, does not aim at introducing rational cohesion into the numerous individual measures or in the decisions of the firms. As long as the individual measures taken by the authorities and the decisions of the firms do not lead to a major upset of the market mechanism, the effect of these measures and decisions can be coordinated by the market. To sum up, the economic law of the Federal Republic is now economically characterized by the fact that the demand side is broadly and systematically influenced by overall control, especially in the interest of the stability of the economy (Zacher No 14), while the supply side is mainly coordinated by the market. The market economy itself is also regarded as a central value of the economic order (Zacher No 21). However, the effect of competition is corrected by numerous though as a rule not very drastic official measures of above all intervention groups 3 and 5 from the common analysis scheme (Zacher No 4).

From a *legal point of view* the following elements must be added above all to the characterization of German economic law.

(a) THE DIVISION OF COMPETENCE BETWEEN BUND AND LÄNDER

Although the greater part of economic legislation has been enacted at Bund level, in view of the federal nature of the Republic the economic law of the Länder may not be overlooked (Zacher No 4).

(b) THE SIGNIFICANCE OF THE FUNDAMENTAL RIGHTS (human dignity, equality, rights of liberty, principle of the social state) AND OF THE 'ECONOMIC CONSTITUTION' for the elaboration of economic law (Zacher Nos 15 and 21 to 25)

For the present study it is of particular importance that the view, prevalent for a long time, that the idea of the 'social market economy' was anchored in the Constitution was later expressly rejected by the Federal Constitutional Court.

According to the latter, the Constitution 'has not opted explicitly for one specific economic system' (Zacher No 22). This means that the German Constitution is not opposed to a more extensive convergence of the economic systems of the Member States in an EEC context. However, the rights of liberty laid down in the Constitution may in particular have a hampering effect, for instance in the event of coordination of some aspects of the right of establishment in the direction of interventionism.

On the other hand an overall macro-economic equilibrium policy and a budgetary policy conforming to the cyclical trend, and therefore if necessary anti-cyclical, are now expressly laid down in the German Constitution, along with the furtherance of a balanced regional development and the encouragement of economic growth (Articles 91a, 104a and 109). This has definitely further facilitated coordination with the economic policy of the other Member States, while the disturbing influence of the independent economic policy of the Länder was weakened by stronger domestic coordination (Zacher No 25).

(c) The strong development of workers' CO-MANAGEMENT AT ENTERPRISE LEVEL AND THE ABSENCE OF A SOCIAL ECONOMIC COUNCIL and of other highly developed institutional bases for cooperation between the authorities and business at national and industry level

The 'concerted action' laid down in the Stability and Growth Act is in fact quite remote from the institutionalized forms of collaboration between business (employers and workers) and the authorities existing in the other Member States. At first sight this heavy stress on company co-management (by employees) and the lack of development of 'co-

management' of the national economic policy by management and labour seems to be an institutional parallel of the original relation between 'market' and 'plan' as the main instruments of economic policy. It remains to be seen whether the shift in emphasis from 'market economy' to 'planning' will also be accompanied in the long run by a shift in emphasis on the institutional plane. It seems certain that the present German forms of institutionalization of co-management at enterprise level and beyond will not make European harmonization of company law and European institutionalization of consultation with management and labour any simpler in the short-term.

(d) THE IDEA OF THE CONSTITUTIONAL STATE

The German idea of the constitutional state is characterized not only by the fundamental rights and the 'economic constitution' but also by a relatively strong and still increasing development of written economic law (Zacher 5/6), by increasing publicity of proposals and measures of economic policy and a considerable and institutionalized influence of independent experts on the public discussion of this (ibid.), and finally by a very strong development of legal protection (Zacher 32). The latter is also reflected in the relatively voluminous German jurisprudence on Community law.

6. Economic law in France

According to the Zijlstra report, French economic policy in 1964 was characterized above all by the framing of concrete objectives in five-year plans, not only with respect to the development of the national economy but also with regard to separate branches of activity and sectors. The attainment of the objectives sought is pursued both directly and indirectly. Especially characteristic were the objectives for separate sectors fostered by conditional incentives and programme contracts, and sometimes also by direct regulations (Zijlstra, p. 36). Today too the main stress of planning in France, as opposed to Germany, still lies on the furtherance of growth. Short-term economic policy (stability policy) has a subordinate function to growth policy (Fromont, III). In addition to the main aim of a balanced economic growth French planning now has the aim of a balanced distribution of economic activity over the whole territory and social progress in the broad sense (ibid.). The tendency already referred to in the Zijlstra report (p. 35) to make planning less of a system for setting quantitative sectoral tasks has been continued in the Sixth Plan under the influence of the steadily growing openness of the French economy to foreign influences and the more neoliberal attitude of the most recent governments. While, as we have seen, German economic policy is thus evolving to some extent in a French direction, French economic policy is evolving to some extent in a German direction. This will certainly facilitate coordination of economic policy in an EEC context. France has also already reinforced the statutory basis of its policy on competition several times independently and thus caused the convergence with the German views to increase further. However, unlike developments in Germany, French planning relates to practically all parts of economic law, which in addition is interpreted very liberally (Fromont, IIa). As a result of this French economic law — in a legal respect too — displays a much clearer system and for that reason does not require such a detailed description as German economic law.

From a *legal point of view* the following should be added about French economic law.

(a) LIMITED PARTICIPATION OF PARLIAMENT

Unlike most other Member States, in France right from the beginning very important substantive economic laws have been enacted not by the legislator in the formal sense but by the government. This applies for instance to the founding of a National Economic Council in 1925, to the 1934 transport legislation, the price and cartel legislation of 1945 and 1953 respectively, the economic penal legislation of 1945, the agricultural market legislation of 1953, the credit legislation, the regulation of the capital market, the structural adaptation of enterprises, regional policy, agricultural structural policy etc. (Fromont, I). It seems clear that for this reason the French Parliament may be expected to exert less pressure than other national parliaments for a greater participation of the European Parliament in substantive European economic legislation. Under the French constitution the French legislator in the formal sense need participate only in the promulgation of new and important regulations. The elaboration and application are reserved for the government, provided that the principles laid down by the legislator are not modified as a result (Fromont, I and IV). However, the legislator is consulted in the preparation and ultimate establishment of the five-year plans. Having regard to the fundamental importance that the French five-year plans have both for economic policy and for the development of law, this is self-evident.

(b) FUNDAMENTAL RIGHTS

Unlike German economic law, the French version does not have a coherent system of fundamental le-

gal principles binding both legislator and administrator (Fromont, V). However, as regards the economic order or the 'Wirtschaftsverfassung', it may be said, according to Fromont, that French law has endeavoured to reconcile the capitalist bases of society with socialist preoccupations. Thus the preamble to the Constitution of 1958 confirms the sacred nature of the right of property by an explicit reference to the Declaration of the Rights of Man of 1789, while the preamble to the 1946 Constitution, to which the preamble of the present constitution likewise refers, posits the principle of nationalization of certain enterprises. French economic law is therefore led in essence by two opposite guidelines, respecting on the one hand the freedom of economic entities and on the other the duty of the state to contribute to economic and social development. However, fundamental new restrictions of the economic freedoms laid down in Article 34 of the Constitution may only be introduced by law (Fromont, loc. cit.).

In principle the two opposite guidelines mentioned run parallel, in our opinion, to the likewise contrary principles of 'market' and 'plan' which we have already encountered in Article 2 of the EEC Treaty and in the development of German law and in fact can encounter in all Member States. They therefore need not lead to serious difficulties in Community coordination of the economic law of the Member States.

Interesting from a viewpoint of comparative law and for the application of Article 90 of the EEC Treaty is the constitutional statement of principle dating from 1946, which demands nationalization of every good and every enterprise operation which has or aquires the nature of a public service or of an actual monopoly. The coexistence of a public and a private sector (the latter predominating in importance) of the economy thus has a constitutional basis in France (Fromont, IV, a). However, there is a tendency for the state to respect the administrative autonomy of public enterprises on the same basis as that of private firms (ibid.). On this point too an approach to the German views may be noted.

The freedom of production and trade is not laid down in the Constitution but in Article 544 of the Code Civile, though it has formed the subject of numerous restrictions (ibid.). As already mentioned, new restrictions equivalent to old ones may, according to the Constitutional Council, also be imposed by the government without consulting the legislator. The freedom of the workers has been much less restricted by the legislator or the government. On the contrary, the Social Security Act of July 1968 prescribes that those covered by social insurance must partake of the fruits of economic growth (Fromont, IV, 2c), while the same principle was established by the Law of 2. July 1970 for the increase in minimum wages (SMIC) (ibid.).

(c) INSTITUTIONALIZED PARTICIPATION OF BUSINESS

In comparison to Germany, the assistance of business (employers and workers) in the preparation and implementation of economic policy in France is institutionalized to a relatively strong and highly differentiated extent. The Economic and Social Council plays inter alia a certain role in establishing the alternative options for the five-year plans (Fromont, II—5—1). On the other hand, the institutionalized influence of the workers at enterprise level is much less strongly developed than in Germany. The institutional participation of business will be further discussed in the next chapter of this report.

(d) THE IDEA OF THE CONSTITUTIONAL STATE

Whereas in Germany a detailed and still increasing definition of economic policy written law may be noted, in the literature for France a contrary development is reported (cf. Farjat, *Droit économique,* pp. 392—398). In particular the far-reaching delegation of regulating power to the government and the furtherance of growth by means of subsidies, tax reliefs, credit policy and programme contracts encourage a 'delegalization' of economic law and the erosion of fundamental principles of law such as the principle of equality.

Although formally speaking legal protection is very fully regulated, the delegalization of economic law in its turn erodes the practical importance of legal protection (Fromont, CHAP. 8, Farjat, op. cit., pp. 395—396). However, it seems conceivable that the absence of specialized administrative jurisprudence in the economic field or other particular causes have contributed to an unsatisfactory degree of legal protection in practice. It is otherwise difficult to explain why French jurisprudence on the law of the European Communities, which is precisely very greatly elaborated on the juridical plane, is also so much less extensive than that in Germany or the Netherlands (cf. reports for the FIDE Congress, 1973). Meanwhile the recent French literature sees in a decision of the Council of State of 11 December 1970 (Crédit Foncier de France) a sign of a fundamental change of course in the direction of greater legal protection, since this decision regards the authorities as bound by simple administrative guidelines (Vedel, *Droit administratif,* Paris 1973, Savy, *Droit public économique, Paris 1972,* De Laubadère, *L'administration de l'économie,* Paris 1971).

7. Economic law in Italy

The Zijlstra report already mentions that the Italian government tries in particular to achieve its programmed objectives by the use of government-run firms as instruments of economic policy and that the objectives for certain branches of industry (and for the less developed regions) are in addition pursued by means of measures of assistance (Zijlstra, pp. 18, 19, 21 and 36). There is no question of an active policy to encourage competition, since none of the attempts to lay a legal basis for this has had any result (Zijlstra, pp. 19—21).

This economic characterization of Italian planning policy still proves largely correct according to the Italian legal report. But in addition Italy, like Germany and the Netherlands, appears to have a large number of laws with mandatory prescriptions of economic law that are not systematically coordinated. Finally, in Italy a far-reaching adaptation of the very different taxation system to that of the other EEC Member States is in preparation, largely autonomously and largely for economic reasons.

From a legal point of view the following points deserve particular attention.

(a) THE CONSTITUTIONAL BASIS AND THE MAIN STATUTORY OUTLINES OF ECONOMIC POLICY

The Italian Constitution, like the German one, contains a number of major principles of economic policy against which economic law can be appraised by the Constitutional Court.

First of all Articles 41 and 43 establish the principles of freedom of private economic enterprise and the principles of the right of property, together with the existing or possible restrictions. The restrictions laid down for private enterprise include not only the principle that the well-being or the safety of the community may not be impaired, but also the principle that liberty and human dignity may not suffer. It is added that the law lays down the programmes and checks required in order that public and private economic activity can be oriented and coordinated for social ends. An important requirement of definition has thus been constitutionally established. The possibility of expropriation in the public interest is less imperatively laid down in Article 43 than in the French Constitution, but in accordance with similar criteria (firms operating essential public services or sources of energy and actual monopolies of primary public interest) (Sacchi Morsiani, III).

The plan or programme of Italian economic policy thus finds its basis in Article 41 of the Constitution and in accordance with that article must be of the nature of a law in the formal sense. According to the same article of the constitution, the objectives of the plan are of a social nature and relate notably to the elimination of the difference between the underdeveloped and the developed regions, bringing incomes in agriculture and those in other sectors closer together and finally working out a system of social security and gradual realization of full employment (Sacchi Morsiani, III). The intervention types of the plan belong to intervention groups I to VI incl. of the common analysis scheme (ibid.). However, as mentioned above, a special emphasis falls on the role of the firms in which the state participates and on the public investment programme and aid-programme in the Mezzogiorno (op. cit., III).

Implementation of the multiyear plans is largely decentralized (institution of autonomous regions, Cassa di Mezzogiorno, state holding companies, economic and social development fund as the aid-implementing agency, Istituto Mobiliare Italiano as the highly autonomous nucleus of the Italian system for providing credit to industry). As regards, the state holding companies, an equilibrium must be carefully sought between the autonomy principle, which also applies to public enterprises, and their responsibility for the implementation of the plan (ibid.).

According to the Italian report, the choice of an open economy made upon accession to the European Communities has led in Italy, unlike France, not so much to a liberalization of Italian economic policy as to a flexible adjustment to foreign developments and to a pursuit of European programming. For the European Communities this orientation entails both dangers (of national measures irreconcilable with the treaties) and promises (of vigorous support for a further development of the European medium-term economic programme).

(b) INSTITUTIONALIZED PARTICIPATION OF BUSINESS

Like France, Italy has an Economic and Social Council instituted by law (CNEL), in which employers and workers are represented. In addition to an advisory function, the CNEL has the power of initiating legislation. Besides the Economic and Social Council, the Chambers of Commerce in Italy have a fairly important task; this is not only advisory, but also relates to regulation, implementation and the settlement of disputes. In addition to employers from the various sectors, the workers are also represented in the chambers (Sacchi Morsiani, Chapter V, Section 1). At firm and industry level there is in Italy no institutionalized co-determination of workers regarding economic policy. The Ita-

lian union movement apparently does not wish to accept joint responsibility with employers for economic policy at these levels. Nor does it emerge from the Italian report that management and labour, as in France, are actively engaged in the elaboration of sectoral plans in the framework of the planning procedure described above.

(c) LEGAL PROTECTION

Article 113 of the Constitution prescribes legal protection by an independent court for subjective rights and legal interests vis-à-vis all actions of the Authorities. While the subjective rights are protected by the ordinary courts, the Council of State, as the administrative court, supervises the legality of the authorities' actions. There is just as little specialized administrative jurisprudence as in France in the field of economic law.

8. Economic law in Benelux

8.1. *BENELUX COOPERATION*

It will be recalled that an economic and monetary union exists between Belgium and Luxembourg, while the three Benelux countries are united in an economic union. In various fields, for instance the establishment of uniform legislation, harmonization of direct taxation, removal of technical and administrative obstacles to trade and monetary cooperation, Benelux cooperation is further advanced than that within the EEC. The experience gained within Benelux may therefore be useful for the solution of similar problems in the European Communities. The importance of the Benelux experience is strengthened by the fact that the economic and social structure, the economic policy and the legal systems of the three Benelux countries, like their national character and their history, display very considerable differences. In fact these differences are no less, and in some respects even greater, than the differences with and between other Member States.

However, in one respect the three Benelux countries are in a comparable position. Being small countries, all three of them — to use an expression of the former Dutch Minister of Foreign Affairs, Joseph Luns — have a relatively large area of 'abroad'. The size of their foreign trade in relation to their national production is considerably greater than is the case with the large Member States. As a result their economies are more open than those of the other Member States to the influence of economic development in other countries. This makes effective medium-term economic policy practically impossible, which is being found an increasing drawback. However, even following an effective short-term economic policy has become very difficult with the present state of liberalization of interstate trade and would become practically impossible in a monetary union with free capital transactions. It is therefore understandable that for the Benelux countries an effective European coordination of economic policy forms a sine qua non for the acceptance of a monetary union and free capital transactions. On somewhat different grounds than for Italy, which sees its medium-term programming above all threatened, vital interests are equally at stake for the Benelux countries on this point.

8.2. *BELGIUM*

Although the greater openness of the Belgian economy and the less pronounced centralization of power in the central government offer fewer possibilities for an active economic policy than in France, the Belgian economic system, viewed in the light of the common analysis scheme, displays great similarity to the French one. The significance of cartel policy is very limited in Belgium, which cannot be said of France. Five-year plans are increasingly occupying just as central a place as in France (binding effect on the authorities, contractual effect for the firms collaborating in its implementation and for the rest an indicative character). As in France, aid policy is highly systematized (Leburton Law). Again as in France, price control plays a relatively large part and in this respect the law has recently come to provide for the possibility of programme contracts, as in France. In the other economic legislation too, many interesting parallels may be drawn with the French situation, inter alia on the matter of freedom of establishment, which in principle is still based on the Allarde Law of 1791. As in France, it can be restricted only by law, which is not easily applied in practice.

So far the Belgian legal system has likewise been greatly inspired by French law, though especially in the literature attention has also been paid in recent years to other legal systems. The Belgian Council of State ensures a comparable legal protection against the authorities to that provided by the French Council of State, also in the field of economic law.

From the institutional point of view it is first of all also important that the basic law of 15 July 1970 already mentioned provides not only for programming but also for economic decentralization, which is connected with the existence of two linguistic groups among the population, displaying considerable differences in demographic, political and economic terms too. Another point of institutional im-

portance to our study is that Belgium, unlike most Member States, does not have an Economic and Social Council as the central advisory body of economic life, but separate central advisory agencies for economic and for social matters. Finally, in Belgium as in the Netherlands there are a number of autonomous statutory collaborative bodies of representatives of employers and workers for separate sectors of business. However, these have fewer powers than the Dutch public bodies.

8.3. *THE NETHERLANDS*

At the time of the Zijlstra report, planning types I and II from the common analysis scheme played a particular part in the Netherlands, and then in a typically macro-economic form not extended to individual branches of industry. A remarkable feature of this is the independent position of the Central Planing Office, which furnishes forecasts both to the government and the Socio-Economic Council and to private enterprise. Medium-term economic policy, although not absent, is nevertheless much less systematic and much less strongly developed in a procedural sense than in Belgium, France and Italy. In general economic political thought has been strongly influenced by Dutch economic science. This in turn was strongly influenced by economic thinking in the Anglo-Saxon countries, but nevertheless displays clear traits of its own. In particular it has made a considerable contribution to the development of macro-economic models of the national economy (Tinbergen). The central position of the Central Planning Office may be largely traced to this 'thinking in models'.

Whilst the Netherlands thus occupied at the time of the Zijlstra report an intermediate position between Germany on the one hand and the Latin countries on the other with respect to planning, the same can be said with respect to the furtherance of competition. This is particularly valid when allowance is also made for the very considerable incentive that international competition exerts on Dutch competition. At present thought is being given to a further intensification of cartel policy.

After conclusion of the Zijlstra report sectoral studies and aid policy also developed much more strongly in the Netherlands. However, aid policy has not so far acquired a highly systematic character, any more than in Germany. This applies in particular to measures of assistance to individual sectors or firms, and to a less extent to regional aid as well. However, a more systematic approach does seem indicated.

Programme contracts are less developed as organizational instruments in the Netherlands than in Belgium and France, but somewhat more strongly than in Germany.

Mandatory prescriptions that usually do not essentially affect the operation of the market mechanism but, as in Germany, have often been worked out in minute detail, play a relatively large part in Dutch economic policy (see Dutch report, V. 5 and Chapter V). With respect to qualitative restrictions on the freedom of establishment and until recently with respect to wage control too Dutch legislation contains or contained much more drastic mandatory measures than the legislation of the other Member States. On the matter of the possibilities of price control Dutch legislation resembles much more closely that of Belgium, France and Italy than that of Germany. A systematically elaborated sectoral policy exists only for agriculture and transport.

As regards its material content, Dutch economic policy therefore occupies a characteristic intermediate position, though with a few very specific features. From the *legal point of view* Dutch economic law which, like the law in various other Member States, displays clear historical strata (Dutch report, I), reveals many more individual characteristics.

(a) INSTITUTIONAL PECULIARITIES

Both short-term and long-term planning and measures of assistance are mainly developed *extra legem* in the Netherlands, unlike Belgium, France, Italy and, as regards planning, Germany too. There is no question of planning legislation, apart from the legal basis of the Central Planning Office, which is of little importance to the content of the actual planning.

In the Netherlands measures of assistance as a rule have no further statutory basis than a budgetary law and their contents are therefore legally defined just as little as the planning. Programme contracts, such as they are, do not have an explicit legal basis either. On the other hand the government cannot promulgate any mandatory prescriptions without the express authorization of the legislator, which is given per subject, usually accompanied by far-reaching material and procedural restrictions. Partly because of this, the number of important economic laws in a formal and substantive sense is greater than in any other Member States. This is reflected in the number of pages in the Dutch report devoted to these.

Another institutional peculiarity of Dutch economic law is the institutionalized participation in various forms of representatives of employers and workers in economic policy.

This participation varies from a consultative function with regard to all important and many less important economic measures via the right of initiative or a monopoly of initiative for the promulgation of measures for giving effect to basic laws (e.g. the 1954 Business Licensing Law, or the declaration of rules on competition as generally binding) to business' own responsibility for the implementation of economic laws or even autonomous regulating powers of organizations of economic life. Of particular importance in this context are the Socio-Economic Council, embodied in the Constitution, as a highly influential advisory body for the whole of social and economic policy, the likewise constitutionally embodied statutory organizations in agriculture, the retail trade, the crafts and a number of other sectors (vertical and horizontal trade associations) and to a less extent the chambers of commerce. See for this the Dutch report under IV. For the way of participation of buisness in the preparation and implementation of social and economic policy other forms also exist, however (see Dutch report Chapter V, under numerous separate laws).

A third institutional characteristic of Dutch economic law is the great influence of independent experts on the preparation and implementation of economic policy. The peculiarity of the Dutch situation on this point lies above all in the way in which the interplay between government, independent experts and representatives of employers' and workers' organizations is regulated. A good illustration of this may be found in the Socio-Economic Council. One third of its members are independent experts, one third employers' representatives and one third workers' representatives. Moreover, the Central Planning Office, as an independent agency, is also at the disposal of the Socio-Economic Council and can therefore also contribute to the objectivization and the scientific foundation of the discussions in the Council. Government officials, as representatives of the ministers concerned, have only an advisory voice in the Council, so as to avoid confusion of responsibilities between government and business.

Mention should finally be made of the fact that by virtue of a recent amendment of company legislation, the works councils of large firms acquire as large an influence on the composition of the board of directors as the shareholders.

(b) FUNDAMENTAL RIGHTS

Unlike the German, French and Italian constitutions, the Dutch Constitution does not contain any specific provisions in the field on economic law, apart from the institutional provisions regarding the statutory trade organizations.

(c) LEGAL PROTECTION

The legal protection of private persons against the authorities under administrative law in the Netherlands is on the one hand very efficiently organized by the institution of a specialized Business Appeals Board. On the other hand the scheme displays defects and gaps. For the competences with regard to economic law are divided between the Business Appeals Board and the Council of State. Moreover, so far the Council of State is not formally speaking an independent court, though a Bill for the amendment of this unsatisfactory situation has now been submitted. Finally, neither the Appeals Board nor the Council of State is competent with regard to a number of important economic laws. However, the gaps thus existing in legal protection may in principle be filled by the ordinary courts (Section 1401 of the Civil Code). See for more details the Dutch report under Chapter VIII.

9. The economic law of the United Kingdom

The common analysis scheme worked out for the original Member States also proved to be quite feasible for the analysis of the economic law of the United Kingdom. The latter is concerned in broad outline with the same subjects and similar instruments which, viewed in the somewhat longer term, are comparable to these occurring in the original Member States. However, a characterization of the economic emphases of economic law in the United Kingdom is hampered by the prevailing two-party system. As a result of the polarized economic objectives and instruments of the two main political parties, the British economic system hovers between a system of very extensive controls, as applied by the Labour government in the period 1966—1970 (with clear parallels with the planning systems in France and Italy) and extremely liberal tendencies to confine the economic instruments to a few monetary instruments, as seriously considered by the Conservatives in the Fifties (Daintith I). Only a relatively stringent cartel legislation and the nationalization of a number of basic industries have remained a fairly constant element in post-war British economic law in addition to economic forecasts and a number of unassailable intervention minima in the monetary field. For the reason stated, historical strata are less clearly visible in British economic law than in that of most of the original Member States. The British report is thus, more than the other national reports, of the nature of a snapshot (Daintith I, last paragraph).

Short-term economic forecasts (12—18 months) have been regularly used since 1941, and medium-term forecasts since 1962, the latter above all as a

basis for the public expenditure programme and thus not, formally speaking, as a guide for economic decisions by business. There is consequently no question of indicative five-year plans in the Belgian, French and Italian sense. Statutory or conventional rules on the preparation or publication of the forecasts do not exist (Daintith, II. 1).

The short-term measures are in fact coordinated via the annual parliamentary budgetary procedure, since the government's budget statement relates to all the intended short-term economic measures (Daintith, II. 2.2).

On the strength of a proposal by the Plowden Committee in 1961, against the background of macro-economic forecasting of the development of the total available sources of income of the British national economy five-year public expenditure programmes are drawn up and since 1969 have also been regularly published (Daintith, II.2.3.). In the preparation of the three-year or five-year forecasts for the development of the British economy representatives of the organizations of employers and workers participate via the National Economic Development Council, the Economic Planning Councils for each of the eight English regions, Scotland and Wales, and the Economic Development Committees for the major industrie. There is thus not the slightest statutory or conventional basis for this planning procedure (ibid.).

The budget is the most important economic instrument for influencing total demand (Daintith, II.2.4.1), and in this connection the United Kingdom, like Germany and the Netherlands, has the system of government authorization — based on the annual Finance Act — to vary tax-rates as part of short-term economic policy. The five-year programme for public expenditure, which also relates to the expenditure of the local authorities and the capital expenditure of public enterprises, is the most important basis for medium-term economic policy (Daintith, II.2.4.2).

Public enterprises and public contracts, the latter since as long ago as 1891, have played an important role in the United Kingdom *inter alia* as indirect instruments of wage and price policy, the public contracts in the postwar period also as indirect instruments of regional policy and in some cases of sectoral structural policy (Daintith, II.2.5).

Aid policy, as in Germany and the Netherlands, is characterized by great volume and differentiation but little system (Daintith, II.3). Besides the tax reliefs that are regulated in detail by law and cases of permanent aid that are likewise based on special laws, British aid policy, like the German and Dutch equivalents, now finds a direct basis in the budget (Appropriation Act). Under the 1966—1970 Labour government this was not the case (Industrial Expansion Act of 1968, of which the general part was, however, repealed by the Industry Act 1971, see Daintith, II.3.2).

Apart from the cartel and monopoly legislation and the relatively strongly developed physical planning and environment protection legislation, mandatory regulations play a relatively unimportant part in the general economic policy of the United Kingdom in comparison to that of the original EEC Member States (Daintith, II.5). Sectoral policy exists for agriculture and fisheries, energy and transport, but is relatively liberal in nature (Daintith, II.6).

Legal peculiarities

(a) FUNDAMENTAL PRINCIPLES

The United Kingdom does not have a constitution. However, the judge-made common law may be regarded as the general background of economic law.

This started from *laissez faire,* combined with the protection of vested rights of property. Under the common law, only Parliament may restrict existing rights of property. This principle, in combination with the parliamentary powers over public finance asserted by the Bill of Rights in 1689, largely determines the extent to which British economic policy needs formal legal expression (Daintith, I). Forecasts, indicative planning and institutional provisions can therefore be regulated outside the law in the United Kingdom by the authorities. As mentioned above, within the framework of the Budget the same applies to aid policy.

(b) LEGAL PROTECTION

Legal protection against decisions by the authorities, although in principle conceded when the authorities abuse their power or act *ultra vires,* is not very effective in practice on account of the unwillingness of British courts to restrict the freedom of the authorities to put their policy into practice (Daintith, II. 8).

10. Some broad conclusions on the separate systems of economic law in their totality

Conclusions on the separate parts of economic law will be recorded in the next two chapters. The economic law of each individual Member State, as mentioned above, displays a more or less considerable internal systematic cohesion, even contrary to appearances. It therefore seems useful to draw a number of broad conclusions for the separate sys-

tems of economic law in their totality in this chapter. In any case, these may be of importance to the comparison of these systems, but to a varying extent also to activities of coordination and harmonization with regard to economic law.

10.1. *THE ECONOMIC ORDER OF THE MEMBER STATES*

In his report Zijlstra assumes that the optimal economic order in the EEC will be one of the mixed type, in which the ideally typical basic traits of the free economy are accepted and the task of the authorities with respect to economic life is of a highly supplementary or 'condition-creating' nature: 'Government policy in such an order is predominantly aimed at bringing the decentralized decision-making units ('agents') of private origin together into as free and harmonious a development as possible, so that the economic process, as a resultant of all the partial decisions of these private agents, can develop consistently and efficiently, in accordance with the principle of healthy competition. This complementary, condition-creating task of the authorities roughly divides into two parts. In the first place there is the task of caring for a sound macro-economic climate, in which the growth of the total effective demand corresponds to the growth of the total production potential, so that neither does unemployment occur as a result of a shortage of effective demand, nor is the inflationary spiral set in motion as a result of excess demand (...). In the second place (...) the authorities have the task of shaping the public institutional and infrastructural framework within which the economic process takes place so that inpediments to sound and effective competition are countered and a stable and vigorous economic growth can be achieved by private enterprise itself (Zijlstra, pp. 49 and 62—63).

The oservations on the economic order in the first and second EEC programmes for medium-term economic policy have a similar purport. Nevertheless, on the strength of the national reports forming the basis of the present report, a number of comments on this characterization seem called for. Even today it is certainly still true that in all Member States the ideally typical basic traits of the free economy have a dominant character, and this applies even more strongly to the tenor of the Treaty of Rome. The establishment of a common market is clearly the basis of the European Communities, from which the economic and monetary union also proceeds as a necessary condition to be further completed. It also seems correct and in line with the trend in the Member States to place the main emphasis in coordination of economic policy on macro-economic and indirectly operating instruments (Globalsteuerung). The argument that the Community institutions are better capable politically, institutionally and legally of coordinating the overall policy of the Member States than their policy with regard to individual sectors or regions or the policy of business itself is also in favour of this. On the latter points the conflicts of interest between the Member States are greater and the powers of the Community are directed more towards countering distortion of competition than to positive coordination of national measures. Nevertheless, developments since the compilation of the Zijlstra report give reason to ask whether the coordination of economic policy should not now go further than is advocated in that report. The following points, among others, may be envisaged in this respect.

In the first place, the simultaneous pursuit in all Member States of growth of freely disposable private incomes, private investments and public expenditure leads to severe inflation, though the extent of this differs from Member State to Member State. It may therefore be asked whether the coordinated quantification of the objectives aimed at, with which a start has been made in the third programme for medium-term economic policy, should not be extended to all targets mentioned in this programme (in the medium-term). As a result, subjects like social security, regional policy, protection of the environment and aid to developing countries then automatically come within reach of the coordination of economic policy in addition to the classic objectives in the fields of growth, employment, price development and balance of payments, which have already been quantified in the third programme. Another argument in favour of such an extension of the field of operation of coordination policy is that experience has shown that the expectation existing at the time of the first programme that overall growth would automatically lead to a more than proportionate growth of the public services was completely unrealistic.

In the second place, measures of assistance have now assumed such proportions in all Member States that systematic coordination at Community level will acquire ever-increasing ascendency over the competition-distorting effects of individual cases. For more and more it will become the rule that the majority of the Member States grant regional aid or aid to the same sectors. Insofar as rational grounds exist for these measures, as defined in the second programme for medium-term economic policy, mutual coordination will in many cases also be the most effective means of countering distortion of competition.

In the third place the matter of environmental protection forms a good example of the fact that coordination of economic policy cannot always escape

detailed mandatory regulations, also for enterprises. However, all Member States have now had the experience in more general terms too that 'Globalsteuerung' has to be combined in certain circumstances with more direct measures. Conversely, the large number of more specific measures in all Member States makes a certain overall coordination of all these measures increasingly necessary.

10.2. *ECONOMIC LEGAL ORDER AND PROBLEMS OF INSTITUTIONAL COORDINATION*

(a) INCREASING DEFINITION AND PLANNING

In various Member States (Belgium, Germany and to a less extent in Italy and the Netherlands too) there proves since the Second World War to have been a tendency towards increasing legal (and sometimes constitutional) definition of economic policy. As this clarifies the policy to be followed the tendency should be encouraged as part of the coordination of economic policy in the Member States. But the French example shows that insight into the interrelation of the individual economic measures can best be furthered in a five-year plan. The institution of coordinated five-year plans in all Member States must also be encouraged for the same reason.

(b) PROBLEMS OF INSTITUTIONAL COORDINATION

The sometimes considerable differences in constitutional structure of the Member States (e.g. in the degree of territorial decentralization of economic policy and in the division of powers between legislator and government) will, on the other hand, have to be respected by the Communities, provided that this does not endanger the uniform application of Community law in all Member States. The situation is different with the participation of management and labour in the preparation and implementation of the coordination of economic policy. On the basis of experience in practically all Member States it seems out of the question that for instance coordinated control of inflation or coordinated furtherance of certain public services will lead to the desired results in the Member States without the actuel participation of management and labour in the preparation of policy at Community level. See the warning in this respect by the former chairman of the Economic and Social Committee, Ludwig Rosenberg, in his article 'Die Verantwortung der Gewerkschaften in einer zukünftigen Wirtschafts- und Währungsunion' (The Responsibility of the Unions in a future Economic and Monetary Union), Europa Archiv 1972, p. 311. As the national reports do not offer sufficient points of contact for this, very concrete recommendations on this point should not be given. It seems certain that the present consultative function of the Economic and Social Committee is inadequate for this. Further, on the strength of arguments advanced by both the unions and employers it seems certain that greater influence of the European Parliament will in itself considerably strengthen the willingness of the private sector of the economy to assist in the implementation of coordinated economic policy. In addition to proposals such as those made in the Vedel Report, one might envisage here a similar parliamentary right of decision to that existing in France with regard to the objectives and later the ultimate establishment of the medium-term programmes for economic policy. But it seems probable that in the more concrete elaboration of important proposals of economic policy too a more appropriate, more direct influence of management and labour would be useful. Since precisely on this point the procedures in the various Member States differ considerably, it might be useful to institute a separate investigation into the optimal forms of participation of management and labour. On account of the important part that independent experts in different Member States play in the preparation of economic policy decisions (Germany, Italy, the Netherlands), such an investigation ought to devote attention to that role too. The main problems in the question thus defined seem to lie on the one hand in the very varied views about such institutional participation among the employers and workers themselves and on the other in guaranteeing the actual ultimate responsibility of the Community institutions politically responsible for the decisions in question.

(c) PROBLEMS OF COORDINATION CONCERNING CONTENT

The fact that since the last war economic law in most Member States has gradually and increasingly been developing in the same direction is, of course, conducive to effective coordination. A number of particular problems proceeding from very different situations with regard to aspects in certain Member States (e.g. the highly divergent wage and price policy, the instrumental function of the Italian state holding companies and the French nationalized banks as against the growing autonomy of the other public enterprises, the fundamental objections to extensive restrictions on the freedom of establishment in Belgium, Germany and France) will be discussed in the next chapter.

A more general problem of content for coordination could, however, proceed from the strong periodical fluctuations in economic policy in the United Kingdom which the British report mentions as a result

of the party system there. The traditional 'stop and go' nature of British short-term economic policy could increase this difficulty. Viewed in the somewhat longer term, the party political fluctuations of British economic policy are perhaps less great than at first sight, however, while the 'stop and go' nature of British short-term economic policy will probably level out of its own account after accession to the Community in connection with the agreements arrived at on the international position of the pound sterling.

(d) THE FORMS OF COORDINATION

As regards the form of coordination of the economic policy of the Member States, it must first of all be pointed out that the enabling character of many important economic laws means in itself that, even with mandatory economic regulations, coordination of the practical application is often more important than harmonization of legislation. Harmonization under Article 100 of the Treaty of Rome of all mandatory rules for the administration of economic laws that are directed towards short-term adjustment of economic processes seems entirely out of the question for political, institutional and practical reasons. A good instance of the impossibility of this is presented by price legislation. However, more permanent mandatory rules for the implementation of basic laws (e.g. technical obstacles to trade and regulations for environmental protection) can and in some cases must be harmonized under Article 100. It seems probable that for the coordination of the more overall and indirect national economic medium-term measures, the Community programmes for medium-term economic policy will increasingly be able to form a suitable general framework. For a more complete survey of the wide range of coordination instruments at the disposal of the Communities, see the first chapter.

CHAPTER III

The principal similarities and differences on aspects of economic law in the Member States and their importance for Community policy

1. Overall objectives of economic policy

In Germany the objective of a broad equilibrium is laid down in the Constitution as the central objective of economic policy. It is further specified in the Law to Promote Stability and Growth of the Economy as the simultaneous furtherance of a stable price level, a high degree of employment, external equilibrium and a lasting and appropriate degree of growth. The balanced development of living conditions in the differing regions are also embodied in the German Constitution as objectives and finally it is laid down by law that the above objectives must be attained within the framework of a free market economy (Zacher, No 14). Social policy in Germany certainly does occupy a less important a place than for instance in France, Italy or the Netherlands (Zacher, 3/2). It seems to follow from the Constitution, the Stability and Growth Law and the concept 'social market economy' that it is somewhat more detached from economic policy than is the case in the latter countries. It appears to be viewed more as a necessary suppelementation of the market economy pursued.

In none of the other systems of economic law examined are the overall economic objectives laid down by law. In France the central objective is economic growth, as a result of which the emphasis automatically falls more than in Germany on medium-term economic policy. In order to ensure regular and continuing growth, use is made of short-term economic policy for the maintenance of the central equilibria (prices and balance of payments) to assist medium-term economic policy. Secondary overall objectives in France are balanced regional development and social progress (Fromon, III). In Belgium and Italy the overall economic objectives resemble the French ones. However, in both countries more stress is placed on balanced regional development. In the Netherlands and the United Kingdom, on the other hand, the central objectives resemble more closely the German objectives, with a comparable main emphasis on the objectives of stability and thus on short-term economic policy.

The Community's overall economic objectives are embodied in Articles 2 and 104 of the Treaty of Rome. At the Hague Summit Conference on 1 and 2 December 1969 they were summarized as 'stability and growth'. The third programme for medium-term economic policy gives compatible guidance figures for the various Member States with reference to economic growth in the period 1971—75, the degree of attainment of full employment, the development of the general price level and the achievement of external equilibrium. However, no less important is the fact that this programme also lists general social objectives to which priority is given in all Member States. These common objectives are as follows: better provision of public services (at the expense of a relatively slower growth of private consumption), protection of the environment, a greater equality of opportunity for the development of the indivudal by means of a better policy regarding education and training, a more just distribution of income and wealth and adaptation of the social security system, with partial extension thereof. Elsewhere in the programme development aid, the adjustment of firms to a larger market and regional policy are mentioned.

Experience in recent years has shown that the medium- and long-term social objectives mentioned, insofar as they lay considerable claim to national income, may without adequate quantitative Community coordination lead to degrees of inflation differing strongly from country to country. As a result, experience shows that they may endanger not only the achievement of the objectives already quantified in the third programme but also the maintenance of the common market as the founda-

tion of an economic union and the possibility of achieving a monetary union. It thus seems necessary to extend the quantitative coordination to the most important of the social objectives mentioned. The prime issue here is not the absolute or relative height of each separate category of expenditure, although this too may sometimes be of importance from the viewpoint of healthy competition and on the strength of the objectives laid down in Article 2 of the Treaty of Rome. However, of greater importance for achieving the central economic objectives of the European Communities is bringing the total call on national income made by public expenditure into equilibrium with private consumption and private investments in the various countries. For this it suffices for each Member State to be separately obliged in a five-year plan to quantify its objectives with regard to these three major categories of expenditure and to concretize these objectives every year. The first obligation — in the medium term — could be based on Article 105 or 235, the second one — in the short term — on Article 103 of the Treaty of Rome. Further, the coordination procedures of the Treaty will, of course, have to guarantee that the objectives of the individual Member States are compatible. In the coordination attention should not be confined to the macro-economic effects of the objectives. It will also be necessary to guard against competition-distorting effects of disparities in the redistribution of national income by public expenditure, insofar as these effects are not in accordance with the objectives of the Community treaties. Whether and, if so, how the use of the instruments for achievement of the objectives has to be coordinated will be discussed in the following sections.

2. Overall institutional aspects

As already explained in the previous chapter, the constitutional and institutional structure of the Member States display considerable differences. These differences, e.g. in the field of the territorial and functional decentralization of economic policy, may in practice tend to hinder Community coordination to some extent. In particular the relatively strong autonomy of the Länder in Germany and of the autonomous regions in Italy may lead to difficulties here. Legally speaking, however, the Member States are responsible for observance of Community law by all their institutions. Under Article 5 of the Treaty of Rome they are also obliged to take all general or particular measures to ensure fulfilment of their Community obligations. The competent Community institutions may therefore confine themselves from a viewpoint of coordination to guaranteeing observance of the above obligations. In this sense also compare the judgment of the Court of Justice of 15 December 1971 in the combined cases 51 to 54—71.

As already remarked in the previous chapter, endeavours will have to be made to organize the coordination procedures themselves in such a way — inter alia by the participation in suitable form of the European Parliament and of management and labour — that economic policy is coordinated to ensure its maximum effectiveness from an institutional viewpoint too. There is a considerable danger that Community directives that come into being at national, regional or sectoral level without the above mentioned representative political and social bodies being consulted will have an inadequate effect and engender strong resistance. Effective coordination is not possible without clear democratic legitimation of authority at Community level.

3. Nature and organization of forecasting as an instrument of economic policy
(national reports, 2nd part, Chapter I)

Forecast that do not lay down future actions, but which should be distinguished from current observations and analysis of the actual development and from projections of the development expected (Zacher, No 32), form in all Member States an important instrument of economic policy. However, they are vey differently organized.

Current observations and systematic analyses of the actual economic development are made in all Member States and at Community level above all by the statistical offices. They naturally form a necessary basis for forecasting the future development.

An explicit statutory basis for forecasting exists only in the Netherlands (Dutch report, Chapter I). 'The Central Economic Plan', according to Section 3, subsection 3, of the law in question, 'shall include collections of figures relating to the future level of production in the widest sense, to the future level and development of prices, of national income and its components to the spending of that income and to all further data of importance to good coordination of economic, social and financial policy'. The forecasting is carried out by the Central Planning Office (CPB), assisted on certain aspects by working committees on which business is also represented. The forecasts relate both to the short-term (the coming year) and — since 1966 — to the medium-term. Although the text of the law would allow of the use of the CPB in task-setting programming and thus as a preparatory economic policy-making agency, in practice preference has been given to an independent and purely objective

task for the CPB. Precisely on account of its independence and objectivity the CPB is a greatly valued adviser not only for the government, but also for the Socio-Economic Council and for private enterprise.

In Germany independent forecasts, in this case by five large scientific institutes, likewise play a big part. But in addition the government works out its own forecasts (Zacher, No 34). Task-setting or evaluating future projections is then worked out by the unions and the employers' organizations (Zacher, No 35). But the principal instruments for diagnosis, forecasting and projection of economic development and economic policy are the recommendations of the Board of Experts for Assessment of Overall Economic Trends, instituted by law in 1963 and composed of five independent experts (Zacher, No 36). Like the Central Economic Plan in the Netherlands, this advice, which does not contain recommendations for concrete measures but in other respects is of an evaluative nature, has a considerable and rationalizing effect on public discussion of economic policy in Germany. It relates in particular to short-term economic policy. Finally, every year the Federal Government defines its attitude towards the advice of the Board of Experts in its Annual Economic Survey. In addition to a diagnosis, a forecast and short-term projection and a programme for economic policy in the current year, this survey also contains a forecast and an evaluating projection of medium-term development (Zacher, Nos 39 and 40). For the organization of legally prescribed forecasts in various subfields see Zacher, Nos 32 to 50.

In France the organization of forecasting does not contain any legal guarantees of independence and objectivity. The forecasts are compiled by the same services as are responsible for task-setting, but awareness is growing that a clearer distinction between forecasting and setting tasks is desirable (Fromont, Chapter I). In Italy too no clear distinction seems to be made organizationally between forecasting and programming, but the influence of independent experts is greater here than in France (Sacchi Morsiani, Chapter I). In Belgium it is precisely the influence of business on the forecasts that seems to be greater, but there is likewise a legal separation of forecasting and programming, with guarantees of objectivity for the former. The Bureau for Economic Programming instituted in 1959 engages in both forms of planning (Schrans, sub) I and III). In the United Kingdom short-term forecasts have been regularly published since 1968 and irregular forecasts of medium-term development since 1963. Statutory, conventional or organizational guarantees of the independence and objectivity of the forecasts do not exist here either (Daintith, II.1).

On the strength of the experience both in the various Member States and at Community level, statutory or other guarantees of the independence, expertise and objectivity with which forecasts are made seem of very great importance. The danger on confusion of scientific analysis and political objectives is reduced in this way. Government, parliament and business are all confronted with objective, perhaps unpleasant facts and probabilities. These are more illustrative of the tasks to be performed and the nature and content of the measures required for this than task-setting figures that are not accompanied by objective forecasts of the probable development if different economic policy alternatives are followed. Finally, a government cannot reasonably be held responsible for any errors in an independently compiled forecast by the firms relying on that forecast. When, on the other hand, the forecasts are mixed up with task-setting, business will be able to present the political account in the event of major discrepancies, for instance in the form of requests for aid or protective measures.

At Community level there is the following point too. Experience has shown that Community forecasts, if they are to be good ones, require expert machinery capable of working out the interdependences of the national forecasts.

It is not enough to add together the national forecasts. The considerable departures that reality displays from the quantified objectives in the third programme for economic policy further heavily underline the danger of setting tasks that have not been compared with objective expectations. The result is that no serious attempts are made to take steps consonant with the severity of the task to be performed. The responsible authorities can take refuge in the argument that development has been disappointing and that the forecasts that formed the basis of the task-setting have proved too optimistic. As forecasting and task-setting were not separated, no supervisory agency can therefore fault the responsible Community policy-making agencies. Finally, precisely for the Community coordination of economic policy, great value must be attached to the rationalizing effect of objective forecasts on public discussions in the Member States, in business and in the Community institutions.

It thus seems necessary to conclude that either the Council, or the Commission, will have to institute an independent and expert office for forecasting. This office will have to cooperate closely with national independent institutions and with the Community Statistical Office. Its forecasts will have to be published without any national or Community policy-making agency having any right of censorship.

4. Task-setting programming, overall and indirect measures
(national reports, 2nd part, Chapter II)

4.1. *THE CONCEPTS 'OVERALL AND INDIRECT MEASURES'*

In emulation of the French report (Fromont, Chapter II) actions by the state tending to influence the economy as a whole are regarded here as overall measures. Actions by the state tending to influence the economy without granting precisely defined benefits (measures of aid) or without imposing precisely defined obligations on certain firms are regarded as a way of intervening indirectly. They consist mainly of utilization of the economic weight of the public sector of the economy, and in particular that of the budget.

4.2. *THE RELATION BETWEEN SHORT-TERM AND MEDIUM-TERM PROGRAMMING*

As France has gained the most experience with indicative programming and in that country the various problems in this connection have been thought through the most rationally, the French views on this form of planning will serve as point of departure in this section. Another argument in favour of this is that from the historical point of view there is no doubt that Community views on this matter have been inspired above all by the French example. However, the French vice-president of the Commission, Robert Marjolin, made an effort to find a synthesis with the then as yet fundamentally different views in Germany upon the introduction of medium-term economic policy. Thus the coordinative function of the market was postulated and the word 'plan' avoided. But in the first programme in particular it was explicitly laid down that the objectives would not be quantified. On this point in particular there was great mistrust and fundamental objections in Germany. As mentioned above, it was not until the third programme that a start was made with quantification of the principal objectives. Careful allowance was also made for the experience gained in the other Member States.

As regards the relation between short-term and medium-term programming, there seems to be no doubt that the French view is also the most rational one if it is felt that the growth objective occupies too central a place in France. Opinions may in fact differ about the objectives of medium-term programming (the relation pursued between growth of productive investments, growth of public services, growth of private consumption and more qualitative objectives like reasonable income distribution and environmental protection). But there cannot be any doubt that the attainment of those targets is always endangered if care is not permanently taken to maintain the fundamental equilibria of Article 104 of the EEC Treaty. As this stability policy must therefore have been worked out in such a way that attaining medium-term objectives is not hampered, the French thesis that short-term economic policy must be made to serve medium-term economic policy (Fromont, III) must be considered correct for all Member States and also for the Community as a whole. If one of the planned growth norms is exceeded too much, the restrictive measures to be taken will in practice especially hit private investments and public services, which always occoupy an important place in medium-term programming. Short-term economic policy must therefore be directed towards safeguarding medium-term planned objectives.

From a legal point of view, too, the recommended priority for medium-term programming likewise has various advantages. To start with, in this way a rational cohesion can be guaranteed in the multiplicity of measures of economic law which now is all too frequently absent from the practice of most Member States. It can hardly be ensured in the separate laws themselves. For prescribing in separate laws that there should be consultation with other ministers on certain concrete measures proves in practice to be completely inadequate for attaining a rational cohesion in the whole of economic policy. In the second place fundamental principles of law, permanent provisions of economic law and measures for attaining medium-term objectives automatically acquire in this way a logical position of priority in economic policy.

It is therefore advisable that all Member States introduce medium-term programming (cf. Zijlstra report, pp. 62—68). As such programming as a rule is of only indirect influence on the operation of the common market, an obligation to that effect probably could not be imposed on the strength of Article 100 but only on the basis of Article 235 of the EEC Treaty. As already mentioned in the first section of this chapter, the directive in question could among other things lay down which objectives have to be quantified in the medium-term programmes, while it could also contain regulations on the Community coordination procedure to be followed.

Thought could be given to prescribing in all Member States the promulgation of a basic law which at the same time regulates the main outlines of the short-term programming and the instruments to be used in this (short-term economic policy). In this way comparable Stability and Growth laws could be enacted, which would form a fortunate synthesis between the legal situations in the various Member States examined. The institutional and

procedural aspects of the regulation of programming in the medium- and short-term in such Stability and Growth laws will, of course, have to be left in principle to the national legislators on account of the different constitutional situations. It will be possible to leave a large degree of freedom to the Member States also with regard to the choice of the instruments to be used. Meanwhile, in connection with parliamentary practice in the United Kingdom, and having regard to Article 189 of the Treaty of Rome, the possibility could also be left open of a political commitment of a government towards parliament, not laid down in a law, with the same content as the basic law advocated here.

4.3. *LONG-TERM AND MEDIUM-TERM PROGRAMMING IN THE MEMBER STATES*

Although the French Government carries out many long-term studies (often up to 1985), these merely have the significance of contributions to the preparation of the five-year plans. The latter relate notably to economic growth, physical planning and social progress, but not for instance to incomes policy, as the unions are opposed to this. The French plans are of an indicative nature, although in fact they are firmly binding on the government in a political sense. They also form the basis for a policy concerted with business. The plans always relate to the economy as a whole, and sometimes to individual branches of industry as well. With the exception of the regional aspects, they have no statutory basis but are themselves approved by law. The approval law for the Fourth Plan lays down that henceforth parliament must also approve the principal objectives of a plan before it is elaborated. Further, the government must report annually on how far it has been implemented. The plans are implemented by application of all the instruments of economic law described in the French report (see for further details Fromont, Chapter II, Section 1 and Section 3).

Belgium medium-term planning is clearly inspired by the French example, but, as mentioned previously, does have a general statutory basis, the basic law of 15 July 1970. The Belgian medium-term programmes must also be approved by parliament. Unlike the French example they are formally binding on the government and they also form the basis for a stronger contractual binding of the enterprises assisting in the implementation than the French five-year plans. For the rest they are of an indicative nature, like the French example (Schrans, III).

As already mentioned, Italian medium-term planning even has a constitutional basis, but in practice dates only from 1967 (with a precursor in the Vanoni Plan, which related to the 1955—64 period). Social and regional objectives play an even greater part in the Italian programmes than in those of France and Belgium. Like the Belgian programmes. the Italian five-year plan is binding on the central government (though not on the autonomous regions, or at most indirectly via the national investment policy). For the rest the plan is of an indicative nature only. There is no question of lines of policy geared to those of business and thus 'binding' the private sector as strongly as in France and Belgium (Sacchi Morsiani, Chapter II, Section 1 and Section 3).

The situation regarding medium-term programming in Germany is much more complicated and thus less clear than in the three Member States already discussed (Zacher, Nos 51 to 69). Five-year programmes that are comparable to some extent to medium-term planning in Belgium, France and Italy are notably prescribed in the Stability and Growth Law in the field of public finance of Bund and Länder (Zacher, Nos 82 to 84). Although this is not legally prescribed, the Federal government further includes in the annual economic surveys projections for the next five years as well, relating to the whole economy (Zacher, No 85). However, these are less binding as regards the economic policy to be followed than the five-year plans in Belgium, France and Italy.

In the Netherlands and the United Kingdom medium-term planning with respect to the development of the economy as a whole has not yet acquired a permanent place in economic policy either. As a result, the various objectives of economic policy in the medium-term are pursued with less cohesion than would have been possible if five-year plans had been regularly compiled. However since 1966 medium-term forecasts have been regularly published in the Netherlands. Further, a start has been made with a multiyear budgetary policy (Dutch report, Chapter II, Section I and Section 4, § 2). In the United Kingdom regular medium-term forecasts have likewise been published regularly since 1968, while medium-term planning, as in Germany, relates mainly to public finance. But, as in Germany, there are also annual medium-term economic assessments (Daintith, II.1 and II.2.3.).

Against the background outlined above, it is certainly understandable that Community coordination of the general economic policy of the Member States has made most progress in the field of public finance of the Member States. On this point reference may also be made to the priority given to the coordination of budgetary policy in the resolution of the Council and of the representatives of

the governments of the Member States of 22 March 1971 regarding the realization in stages of the economic and monetary union. However, the coordination of budgetary policy relates above all to the short-term which, for the reasons stated above, does not guarantee a rational relation to medium-term economic objectives. Now that all the Member States examined have accepted a medium-term budgetary policy, the coordination could extend to this more than has been the case so far. The recent developments in Germany and the United Kingdom may further give rise to the expectation that within the near future the rationality of continuing to coordinate the budgetary policy against a background of more comprehensive medium-term economic plans will come to be realized in all Member States. At that moment consideration can be given to a better organization and coordination of medium-term economic policy, as advocated under 4.1 and 4.2 of this chapter.

4.4. *SHORT-TERM PROGRAMMING* (short-term economic policy)

In the field of short-term programming the situation from the viewpoint of comparative law is somewhat different than that regarding medium-term planning. The Netherlands has the longest experience with this. Under the relevant law of 1947 the Dutch Central Economic Plan is published annually for the purpose of coordinating government policy in economic, social and financial fields. Like the 'macro-economic reconnaissances' which, since 1961, have preceded the plan by six months, it relates solely to the coming year. As explained in Section 3, the Central Economic Plan, though it is only of the nature of a forecast, does nevertheless have a great influence on the economic policy of both the government and private enterprise. The broad recommendations of the Socio-Economic Council on the socio-economic policy to be followed in the short-term often have great influence in practice. But, unlike the Central Economic Plan, these recommendations are of a task-setting nature. Among the instruments proper to short-term economic policy, in addition to the budgetary, fiscal and monetary instruments of importance in all Member States, wage and price policy plays a particularly important part, and to a less extent construction licensing policy and, most exceptionally, limited control of a few aspects of foreign exchange transactions (Dutch report, Chapter II, Sections 1, 2 and 6).

In German economic policy, short-term programming (Annual Economic Survey, guidelines and concerted action) occupies a central position, as in the Netherlands. This is on the basis of the Stability and Growth Law of 1967. However, unlike the Dutch Central Economic Plan, the Annual Economic Survey is also of the nature of a (non-binding) explanation of the proposed economic and financial policy. It also contains (equally non-binding) guidelines for harmonizing the policy of local authorities, unions and employers organizations (Zacher, No 70). The guidelines are discussed in an informal exchange of views between the ministers concerned, representatives of the Bundesbank and the Bundeskartellamt, members of the Board of Experts, representatives of credit institutions and of workers' and employers' organizations ('concerted action', Zacher, No 71). In particular the autonomy of private employers' and workers' organizations in the field of wage development is scrupulously respected (Zacher, No 72). The central instrument of short-term economic policy in Germany is budgetary policy. Under the Stability and Growth Law of 1967 this presents in particular important possibilities for interim manipulations of the economy in the short-term by the government which may also relate to the rates of taxation (Zacher, No 75). From a short-term programming point of view the advice of the above mentioned Board of Experts is also of great importance (Zacher, No 80).

In the United Kingdom, too, budgetary policy is the central instrument of short-term economic policy. However, the budgetary procedure also offers the government an opportunity of giving, in the Budget statement, by means of economic forecasts, a survey of the whole of the proposed short-term measures. Certain forms of control of wage development are not absent from these measures but, as in the Netherlands, encounter considerable opposition (Daintith, II.2.2).

Unlike the Netherlands and Germany, in France short-term programming has no statutory basis. It takes the form of an economic and financial report appended to the annual 'loi des finances'. But in practice the defence of the fundamental equilibria in the short-term occupies an increasingly important place. In this use is made not only of overall and indirect instruments, but also of the whole range of instruments of economic policy (measures of assistance, programme contracts and binding regulations, while respecting the autonomy of management and labour with regard to wage policy, however).

In France too short-term economic policy is based on short-term forecasts (budgets économiques). These are drawn up twice a year by ministerial officials and discussed at a meeting of senior officials under the direction of the Ministers of Economics and Finance. Once a year four members of the parliamentary committees concerned participate in the discussions too (Fromont, Chapter II, Section 2).

In Italy short-term programming is regarded as a one-year part of medium-term programming. Therefore, unlike short-term economic policy in the countries discussed previously, it is not primarily directed towards stability but in principle is of the same nature as medium-term programming. Thus there is no question of short-term economic policy in the true sense (Sacchi Morsiani, Chapter II, Section 2).

Belgian short-term economic policy is most similar to the French version. As in France, price control plays an important role (Schrans VI A).

Community coordination of Member States' short-term economic policy may be of a mandatory nature under Article 103, paragraphs 2 and 3, of the EEC Treaty. However, in practice this has not progressed much beyond joint consultation as referred to in paragraph 1 of Article 103. On the basis of the situation in the various Member States briefly summarized above, it is understandable that in this consultation the main emphasis falls on budgetary policy, though more comprehensive forecasts and recommendations are not absent. As already stated above, the continuation of short-term economic policy against the background of annual plans with respect to the whole economy is also necessary. These annual plans must then further be compiled again as part of five-year plans. The fact that in Germany and France in particular the complete autonomy of management and labour with respect to the establishment of wage development is accepted as a matter of principle and without any restriction seems to exclude obligatory coordination of wage development. Control of the development of profit via price control, particularly in Germany, likewise encounters difficulties of principle in Germany and more practical objections elsewhere. Though in practice the development of profit is largely governed by the market situation, this is not always in the direction sought by short-term economic policy. This applies in particular to firms with a strong market position (see Appendix). In none of the Member States does control of the incomes in the liberal professions occur. In view of the macro-economic insignificance, such control could be important only for psychological reasons, and then as part of a general incomes policy.

Summarizing the situation with respect to the *development of incomes*, it thus seems difficult to arrive at influencing the main constituents of national income and notably of by far the most important component — wages — via short-term economic policy. One reason why this gap in the instruments of short-term economic policy is very serious is that wage development, unlike price development, is only slightly coordinated by the functioning of the common market in the various Member States. As a result, divergent wage developments occur much more strongly than divergent price developments. This can lead to serious disturbances of competition and thus, in extreme cases, even endanger the existence of the common market, as the French wage development in 1968 showed. Since the mandatory wage control that had proved possible for several decades in the Netherlands ran into growing opposition from the unions, the Netherlands has been trying to get a grip on the development of the principal components of national income by means of a macro-economic 'social contract' which at the same time ought to relate to the main categories of spending. Extending further than the German 'concerted action', this social contract would yield a kind of macro-economic variant of the Belgian and French programme contracts. In principle the experiment also seems interesting for other Member States and for the Community coordination of short-term economic policy. For in this way the autonomy of management and labour is respected in principle. The Council's resolution of 5 December 1972 (Official Journal C 133, p. 12) also seems to be seeking a solution in this direction in the first paragraph of point II. Another possibility of getting a hold on wage development would be to have the public sector, notably civil servants' salaries, function as wage leader. Elements of this solution may be found in the policy in France and the United Kingdom, though with only moderate success. Since above all the — often very labour-intensive — public services are usually the direct and (via restrictions on spending) indirect victim of an excessive wage development, there is also much to be said for this solution. From the point of view of coordination of wage development in the various Member States it would also be a considerable gain in itself if sectors with strong international competition were to act as wage leaders. In any case it seems advisable — in a Community context too — to continue pursuing an effective incomes policy as a part of short-term economic policy. The desirability of this is rightly indicated in the programmes for medium-term economic policy too. Like the rest of short-term economic policy, this incomes policy ought to be conducted as part of medium-term incomes policy. This should relate not only to growth of incomes but also to income distribution. In conformity with the Council's resolution of 5 December 1972, it should in addition relate not only to incomes from work (of employed and self-employed persons) but also to incomes from capital.

As regards the principal *categories of expenditure*, the present concentration of Community coordination on budgetary policy naturally entails the danger that in particular the public services are restricted. Coordinated short-term influence of the level of private investment seems possible mainly

via a Community capital market policy. Judging by the above mentioned resolution on the realization of an economic and monetary union, this is also being pursued.

The self-financing possibilities of business are even now being coordinated to a certain extent via the price mechanism through the operation of the common market. As evidenced by the previous chapter and Section 7.6 of this chapter, in various Member States there are political and sometimes very fundamental and constitutional objections, or objections embodied in other principles of law, to direct investment control. As a result, Community coordination directed towards obligatory investment control is out of the question. Nevertheless, the Dutch idea of a macro-economic social contract which would also relate to the level of investment also seems interesting in this context of expenditure control. Control of private consumption via short-term economic policy is taking place in some of the countries examined with some success by means of the legislation on the hire purchase system to be discussed below. Further, for all Member States the instrument of short-term increase or reduction of direct or indirect taxes, which has an explicit legal basis in Germany, the Netherlands and the United Kingdom may be recommended. However, the effectiveness of this instrument is conditional on the expenditure-restricting effect of tax increases not being cancelled out again by means of wage indexation. On this point statutory or other effective measures seem desirable in all Member States. From a Community point of view increases in indirect taxes have the advantage that as a result of the country of destination principle they do not change the competitive situation between firms from various Member States. When direct taxes are increased, a competition-disturbing effect of this kind is difficult to avoid in practice. Moreover, on oligopolistic markets it is difficult to prevent the direct tax increase being passed on via a price increase. Raising indirect taxation and a directly resultant restriction of private consumption may be accompanied by a less stringent restriction of public services than would otherwise be necessary. This direct tie with the pursuit of a balanced restriction of the various categories of spending may make the tax increase more readily acceptable from a political point of view. In this respect too the idea of a social contract may be important. The package of public services rendered possible may form an obvious compensation for the restriction of private consumption. In view of the harmonization of rates sought for the principal consumption taxes a certain degree of Community coordination of tax increases and reductions will, of course, be desirable in due course. And the increasing similarity of the short-term economic trend in the Member States also seems to be make a coordination of this kind more and more feasible. Rate differences of a few per cent will presumably remain possible even within the framework of harmonized rates of turnover tax and consumption taxes.

4.5. *THE OVERALL INSTRUMENTS OF ECONOMIC POLICY*

Partly because comparative studies have already been published on the main aspects, this subject can be dealt with in brief after the preceding sections. For legal details see the national reports.

The most important overall instruments of economic policy in all Member States are overall budgetary policy, overall taxation policy, overall policy with respect to public investments and overall monetary policy. For the concept 'overall instruments' see Fromont, Chapter II, Section 4. Overall policy with regard to public investments forms a very important instrument for attaining the objectives of medium-term economic policy in France and in Italy (especially France, including the investments of the public sector of the economy). By reduction of the number of special discount rates French economic policy is also acquiring a more overall character than before. However, selective credit policy still plays a big part there (Fromont, Chapter II, Section 4, IV). For Italy, besides the close ties between these overall instruments and five-year plans, further economic details that may be mentioned are the modernization of budgetary policy (Sacchi Morsiani, Chapter II, Section 5, I) and the modernization of taxation policy (op. cit., Chapter II, Section 5, II). In Germany foreign economic and monetary policy, as an overall instrument of economic policy, plays a more important role than in the other Member States, a role which moreover is laid down by law (Zacher, Nos 104 to 110 and 115). An aid to Community coordination of economic policy is the fact that Article 4 of the Stability and Growth Law expressly obliges the Federal Government first to exhaust all possibilities of international coordination (Zacher, No 108). Further details that may be mentioned are the authorization of the government introduced under Articles 26 and 27 of the Stability and Growth Law to raise or lower income and company tax for reasons of short-term economic policy by 10 % and to accelerate or decelerate collection of these taxes together with the Gewerbesteuer (trade tax) (Zacher, Nos. 97 and 98). As in the Netherlands and Luxembourg, the strong progression of income tax in Germany has an automatic anti-cyclical effect (Zacher, No 99). In the Netherlands too a modernization of budgetary policy is being prepared, inter alia by revision of the Accountabiliy Law of 1927 (Dutch report, Chapter II, Section 4, § 2). As a further de-

tail the pursuit of 'macro-economic programme contracts' (social contracts in addition to the longer-standing coordination in the Socio-Economic Council may be recalled. From the Dutch report and from the bill recently submitted with regard to exchange transactions, one further has the impression that control of domestic and foreign capital transactions occupies a relatively important position in the Netherlands.

From the *legal point of view* the following points will deserve special attention:

Coordination of the policy of the decentralized territorial authorities with central policy should be guaranteed by statutory national regulations in Member States with a large degree of regional or local fiscal and budgetary autonomy. Examples of such regulations may be found in the German and Dutch reports. For Community coordination of economic policy no great difficulties have become apparent so far on this important point.

Both for the coordination of economic policy and for the economic policy of the European Communities themselves, it is highly important that in Germany, the Netherlands and the United Kingdom expenditure policy, including aid policy, can according to the national reports concerned be based directly and exclusively on the budget. Except for a number of funds expressly regulated in it (Guidance and Guarantee Fund(s) for agriculture and Social Fund), the Treaty of Rome seems to allow of an identical view at Community level. It is clear that this point is inter alia of great importance to the concrete content of the budgetary powers granted to the European Parliament. However, for Italy a different view applies under Article 1 of the Italian Constitution. The third paragraph of this article lays down that not only state income but also state expenditure must have a legal basis in other substantive laws than the law approving the budget. However, it does not follow from this — and for the parliamentary powers this is also important — that the substantive legislation must precede the budget item. It may also follow it (Sacchi Morsiani, Chapter II, Section 5, I). The choice between the two systems that the Community institutions will make has, as stated, important political consequences. But in addition the differences of opinion also have a practical significance for the clarity and systematic nature of the Member States' aid policy. The problem will therefore be reverted to in that context.

A third legally important point is the degree of legally guaranteed independence of the Central Bank. The extremes in this respect are formed by Germany, where the independence of the Bundesbank is expressly laid down in Article 12 of the law in question (Zacher, No. 111), and France, where many of the most important monetary decisions are taken by the 'Conseil national du Crédit', a body of fairly broad composition which in practice, however, always follows the directives of the government. Although the Central Bank in France, too is more than a purely executive agency and its suggestions are often adopted by the government, its dependence on the latter may perhaps nevertheless present some problems for decision-making in the planned system of central banks (Fromont, II—2. 4. D). Legally speaking, the other countries occupy intermediate positions. But in practice the autonomy of all central banks is fairly great, while conversely a certain degree of collaboration between central bank and government occurs in all countries in practice. The point is, of course, of great importance to the 'system of central banks' being pursued under the resolution of 22 March 1971. The complicated and time-consuming decision-making procedures of the Council of Ministers make it extremely desirable that necessary monetary decision can be taken in the short-term within this system of central Banks, whether or not after consultation with the Monetary Committee. Perhaps prior to this the powers of the central banks will have to be harmonized. As this harmonization would be required not so much in the interests of proper functioning of the common market as for achieving other objectives of the Treaty, it would probably have to be based not on Article 100 but rather on Article 235 of the Treaty of Rome. As regards transactions with non-EEC countries, Article 70 of the Treaty can perhaps also be used as a legal basis.

The directive or regulation concerned could leave a few very fundamental decisions, for instance on the point of changes in exchange rates, to the Council of Ministers, while in emulation of the legislation of for instance the Netherlands and the United Kingdom (see the reports in question under Chapter II, Section 4, § 3) the Council, at the proposal of the Commission, could also be granted formal, authoritiy to give the 'system of central banks' instructions on the policy to be followed. If there is good contact between the central banks, it will probably not be necessary in practice to make much use of such authority. Mandatory coordination of the use of all other overall instruments mentioned as a part of short-term economic policy can take place under Article 103 of the EEC Treaty. Whether this mandatory coordination must be preceded by an overall harmonization of the pattern of the budget, the national systems of taxation or the national monetary legislation is a question which cannot yet be answered in general with certainty. Consequently, this report recommends such harmonization on only a few points.

Medium-term coordination should be performed as part of the Community and national indicative

five-year plans. By defination it need not be of a mandatory nature. The coordination of mandatory national regulations with reference to short-term economic policy will be reverted to below (see 7.2).

4.6. *PUBLIC ENTERPRISES AS INDIRECT INSTRUMENTS OF ECONOMIC POLICY*

As the public sector of the economy, particularly in Italy, forms an extremely important instrument of economic policy, the Italian situation will be taken as the point of departure for this. First of all a distinction must then be made between enterprises performing public services and subject to state control regarding price determination, investment policy and other aspects of mangement, and the enterprises in which the state participates as a shareholder. In the first case criteria of 'general' or 'socio-economic' earning power, established as part of a general economic programme, are decisive for the whole policy of the firm. The legislation with regard to corporate bodies is inevitably applicable, at least in principle: in this case efficiency and the principle of legality are not easy to reconcile in practice. As instruments of economic policy the enterprises in which the state participates are therefore much more important. Here the ballast of statutory regulations and the concomitant bureaucracy is less. The major state holding companies — IRI and ENI — and their subsidiaries have a great degree of autonomy. However, conformity of their policy with general economic policy is assured by personal contacts between the Minister for State Participations and the managements of the state holding companies and via directives of the Committee for Economic Programming (CIPE). These directives may relate inter alia to the volume of investment and the part of this that has to be made in the less developed regions. The state holding companies are legally obliged to operate in accordance with the principle of profitability. On various points, e.g. in the cartel legislation drafted, public enterprises in Italy occupy an exceptional position. See for further details Sacchi Morsiani, Chapter II, Section 4.

In France the use of public enterprises as instruments of economic policy has been much more confined to the big public utilities in the fields of power supply and transport. However, on the basis of the Nora Report of 1967 the government has also begun to increase the autonomy of the public utilities.

The same applies to their investment and changing policy (Fromont, Chapter II, Section V). But elsewhere in his report Fromont points to the participation of the — largely nationalized — banks in credit policy, a highly important instrument of French economic policy (Fromont, Chapter V, Section 2, III). On this point, though, the nationalized banks are treated no differently from the private ones in the legislation. Nevertheless, the state has furthered the foundation of a large number of special financial institutions, of which it usually appoints the mangements and which have the task of contributing to financing the government's investment policy. Thus to a limited extent one can still speak of an instrumental participation of public enterprises in French economic policy.

In the United Kingdom the importance of public enterprises to investment policy and wage and price policy seems fairly considerable (Daintith, II. 2.5).

In Belgium the five-year plans are binding on public enterprises as regards their investments (Schrans, II). They are often exempt from the general rules of law.

In Germany and the Netherlands there is likewise a fairly extensive public sector of the economy. The public utilities in particular are under more or less strict control of the central or decentralized authorities here too. In other sectors of business considerations of general economic policy play a particular part in the decision of the authorities to found or participate in enterprises, and to a smaller degree in the management of the enterprises in question. Unlike the situation in Italy, there is no question in these countries of a systematic instrumental use of public enterprises or participations as part of medium-term economic policy. Strangely enough, public enterprises in Germany are nevertheless largely excepted from cartel legislation (see the reports concerned, Chapter II, Section 5).

The Zijlstra report regards the public sector of the economy as a major problem and contains lengthy and important remarks on it (pp. 29—31, 43, 49—52 and 60—70). The report notably fears that an instrumental use of public enterprises to serve the general objectives of economic policy will only be tenable in the long run if certain privileges and exceptional positions are granted. 'At a further stage this may lead to a situation', according to the report, 'in which private enterprise is placed in so unfavourable a position in respect of the government-run enterprises that either it will have to be successively taken over by the authorities or given considerable support. Above a certain limit that cannot be fixed with exactitude a further expansion of the system of public enterprises may therefore start the nation on a downward path whose terminus is the centrally controlled economy' (op. cit., p. 29). The report contains in the main two recommendations for economic policy. The first recommendation is concerned with coordinated surveillance of the public sector to see that it does not exceed one or more of the three limits stated in the

report of territorial demarcation of markets (public utilities), of costing requirements of the optimal size of an enterprise, inevitably leading to the creation of a monopoly ('natural monopolies'), and of the primary nature of the goods and services produced (op. cit., pp. 49—50). In view of the reservation with regard to the right of property in Article 222 of the Treaty of Rome, this recommendation seems difficult to put into practice. But against this is the fact that in the common market one of the criteria for nationalization in the constitutions of France and Italy — the existence of a factural monopoly — will not often have been complied with. On account of the tendency emerging from most national reports to strengthen the autonomy of public enterprises on the basis of a profitability principle, Zijlstra's second recommendation seems more feasible. This policy recommendation is for harmonization of the instrumental value of the public sector at nil (op. cit., p. 52). To the extent that this should not prove possible, harmonization of instrumental use ought to take place as part of medium-term Community planning (op. cit., p. 52, elaborated on pp. 68—70). Article 90 of the Treaty of Rome also seems to proceed from the principle of harmonization of the instrumental use of the public sector at nil. In particular the Member States will not be permitted in principle to maintain or institute for the public sector any protective measures, exceptional positions or fiscal, financial or other privileges that are forbidden by the Treaty for private enterprises. Nor may they impose any restrictions of competition on public concerns and equivalent enterprises. Further, they may not oblige these to engage in discrimination or other competition-distorting practices that are forbidden for themselves or for private enterprises (Article 90, paragraph 1). The enterprises of the public sector themselves come under the Treaty's rules on competition. An exception applies under Article 90, paragraph 2, solely for enterprises entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly. But this exception too holds good only insofar as application of the general rules of the Treaty would hamper performance for the task entrusted to them. In no case may the development of the volume of trade be influenced to an extent at variance with the interests of the Community. The latter addition prevents the Member States from laying down for these enterprises regulations that are themselves at variance with other provisions of the Treaty. Instances are import levies, discriminating taxation of imported products and measures having the same effect, such as quantitative import restrictions. The Commission is entrusted with guaranteeing the application of these various principles, which clearly tend towards the nil point advocated by Zijlstra (Article 90, paragraph 3). The question now arises whether, if necessary, Article 90 also allows of Zijlstra's subsidiary solution, harmonization of instrumental use as part of the medium-term economic programmes. This does in fact appear to be the case.

For in principle Article 90 declares not just the rules furthering competition but all rules of the Treaty applicable with regard to government policy (Article 90, paragraph 1) or the enterprise policy itself (Article 90, paragraph 2) in the public sector of the economy. The rules relating to coordination of the economic policy of the Member States are thus also applicable. Insofar as the public sector of the economy is used as an instrument of economic policy, the Commission even has at its disposal, under Article 90, paragraph 3, exceptionally effective powers for bringing instrumental use into line with the aims of coordination. However, in the case of paragraph 1 of Article 90 the Commission, in the exercise of its coordinative powers may permit no exceptions, and within the framework of paragraph 2 in any case no major exceptions, to the Treaty articles relating to free and undistorted movement of goods, persons, services and capital. The latter is important, since it emerges from the national reports that the public sector enjoys certain privileges or statutory exceptional positions in various Member States whose effect on international competition ought to be examined in more detail. Attention will have to be paid not only to the differences in privileges of the public enterprises but also to the differences in burdens imposed. The question to what extent and in what way the Community itself ought to participate in due course in the public sector of the economy is not considered in this study.

4.7. *OTHER INDIRECT INSTRUMENTS*

Among other indirect instruments most of the reports deal in particular with the deliberate use for purposes of economic policy of the government's demand function on the market (marchés publics).

On 27 April 1968 the French government laid down principles for a deliberate policy in this field which provide in particular for an accelerated reform of the industrial structures. For this purpose, under the further directives of 10 October 1969, when awarding contracts the quality of the firm's management and the efforts made by the firm to reduce costs and improve the services performed must also be taken into account (Fromont, Chapter II, Section 6). In the Netherlands there is no question of a more or less systematic use of the public markets. Commercial principles (the most favourable offer from the commercial viewpoint, attention being na-

turally paid to quality, delivery time, etc. as well as price) prevail in this field too (Dutch report, Chapter II, Section 7). In Germany and the United Kingdom public contracts are used as instruments to serve various purposes of national economic policy, but less systematically than in France. This is understandable, if only because these countries do not have medium-term programming comparable to the French five-year plans (see Zacher, No 151 and above all No 165, and Daintith, II.2.5). In any case, the instrumental nature of public markets in France as part of systematic industrial policy must not be overestimated. The primary aim is a rationalization of public contracts.

Coordination in this field will have to guarantee above all that on public markets too no discrimination on the grounds of nationality occurs in law or in fact. Articles 30, 57 and 100 of the EEC Treaty can be applied for this, and this is already being done. With regard to contracts of public enterprises Article 90, paragraph 3, can also be used for this purpose. Insofar as the Community institutions, on the strength of the situation in the various Member States briefly summarized above, are prepared to permit instrumental use of public markets for objectives of economic policy, the principle of nondiscrimination will have to be respected in this connection. This need not present any insurmountable difficulties if public markets are used for overall purposes of economic policy. However, the use of public markets for purposes of regional or sectoral policy does not seem compatible with the principle of nondiscrimination mentioned unless there is strict harmonization of the policy of all Member States. To a limited extent it will also be possible to use Community contracts or Community-coordinated national contracts as instruments of economic policy. In this case too the principle of non-discrimination will have to be observed. For this fundamental Article 7 applies to Community institutions themselves too.

The other indirect instruments of economic policy that are mentioned in some reports (notably the German and Dutch ones) are discussed elsewhere in this report.

5. Measures of assistance
(national reports, 2nd part, Chapter III)

(a) In this summary report it will suffice to make a few general remarks on the importance of this instrument of economic policy and the problems of coordination that arise at Community level in this connection.

(b) It clearly emerges from the national reports (II.3) that measures of assistance now occur to a considerable extent in all Member States and have developed into a central instrument of economic policy.

(c) Partly in connection with the legal view prevailing in those countries that measures of assistance can be based directly on the budget, the measures in Germany, the Netherlands and the United Kingdom form a rather unsystematic and unclear whole. On the strength of the above legal view, these countries have hardly any statutory standards in the field of assistance. The German Stability and Growth Law does, however, prescribe in its Article 12 that every two years a report must be published on the aid policy followed, while there are also private publications. In the Netherlands the government usually informs parliament of its most important policy intentions by letter.

(d) In Belgium, France and Italy aid policy is based on a much more highly developed standardization and systematization of substantive law from both the legal and the administrative point of view. This is bound up on the one hand with the above mentioned legal view in those countries that the budget alone does not offer an adequate legal basis for measures of assistance and that in addition to this formal legal basis definition in terms of substantive law is necessary. On the other hand, the more systematic nature of aid policy in these countries is naturally connected with the medium-term programming policy existing in these countries. Assistance and sometimes also 'negative financial incentives' (levies in various forms) are obvious instruments for supporting a policy of indicative planning.

(e) The principal objectives of general measures of assistance applicable to the whole of the economy and the whole territory that emerge from the national reports are the following: furtherance of exports, furtherance of saving and investment, furtherance of the regrouping of firms, furtherance of research, protection of the environment and influencing the short-term economic situation.

(f) The principal objectives of a non-general kind emerging from the reports are the furtherance of a balanced regional distribution of economic activities over national territory, aid to certain sectors, aid to housing, aid to hotel-building, aid to vocational training and retraining.

(g) The forms of assistance encountered are extremely varied. The most important forms are tax reliefs (often applied on behalf of the objectives listed under (e) applying to all firms), loans

(selective provision of credit, loans at a low rate of interest and loans that need not be repaid in certain circumstances), credit guarantees and other forms of guarantee, differental charges for power and transport, non-recoverable bonuses and conditional or unconditional other forms of direct subsidization. Finally, indirect forms of assistance, such as government contributions to research institutes on behalf of industry. In addition, preferential awards of public contracts, the provisions of services free of charge or sale of land at reduced price and infrastructural measures in favour of certain enterprises, and also state participation in firms will, however, also have to be regarded as measures of assistance in certain circumstances (Zacher, Nos 164 to 166, Dutch report, III, Section 1, Sacchi Morsiani Chap. III, Sections 1 and 6). Checking against Article 92 of the EEC Treaty will present particular difficulties when other provisions of the Treaty enter into consideration for application, notably the regulations regarding the free movement of goods, services, persons and capital. The best example from practice is formed by semi-fiscal charges of which the proceeds go to domestic firms. With the exception of the tax reliefs, exemptions and discriminatory application of mandatory regulations in favour of certain enterprises are dealt with elsewhere in this chapter (Section 7 below).

The tax reliefs may be of the nature of generally valid statutory reliefs, but in some Member States they may also be reliefs granted on a discretionary basis to certain enterprises and thus individualized (Fromont, II—3.1). Most other forms of assistance are applied at discretion on account of their nature. In order to avoid arbitrariness in their application, this inevitably discretionary nature of the greater part of aid policy makes it of great importance that the Member States lay down general lines of policy on the application.

(h) Community policy with regard to the aid policy of the Member States, will, on the strength of Article 92, have to be directed primarily towards countering distortion of competition to the detriment of enterprises from other Member States. With respect to regional aids and measures occuring in all or practically all Member States in favour of certain branches of industry, this countering of distortion of compeition will, however, have to be increasingly accompanied by rationalization and harmonization of the aid measures. In this connection rationalization means above all the requirements that measures of assistance are not used to prop up antiquated industrial structures or to found unprofitable new enterprises and that they are suitable in form, content and imposed conditions to guarantee as well as possible the attainment of economic objectives that are rational from the Community viewpoint. Without a Community regional policy and a Community sectoral policy for the branches of industry in question this is difficult to attain. As mentioned above, the second programme for medium-term economic policy contains a number of useful criteria for a rational aid policy, to which interested readers are referred. Community policy seems clearly to be developing in the direction indicated, too. See for this the 'First report on competition policy', annexed to the Fifth General Report on the activities of the Communities, pp. 125—164, and published in April 1972. It emerges from the national reports that the autonomous policy of most Member States is also evolving clearly in the direction of greater economic rationality of aid policy.

Where measures of aid are not rational or where they are given to firms or to branches of industry which are not assisted or less assisted in most Member States the Commission when applying Article 92 will inevitably refuse such aids so as to avoid unreasonable harm to the competitors from other Member States. An example of a measure of assistance which is not rational in purpose, form and content would be the case of assistance towards operation of an unprofitable enterprise in a branch of industry that is not supported elsewhere and for which the Community as a whole has a considerable overcapacity.

An important and as yet unsolved problem is formed by the unequal effect that regional measures of assistance may have on certain branches of industry in the various Member States. Instances are again branches of industry with structural overcapacity. However, according to the report quoted, a solution to this problem is in preparation.

(i) As noted above, there is at present a great difference in transparency and systematic nature of aid policy between Belgium, France and Italy on the one hand and Germany, the Netherlands and the United Kingdom on the other. This difference reinforces the argument already adduced in this report for introduction of a medium-term Community-coordinated economic policy in all Member States. Such a policy will also be able to benefit a coordinated and rational aid policy of the Member States which does not have the effect of distorting competition in trade between Member States. According as the Commission's policy displays a clearer line, it will also be easier to ask all Member States legally to lay down general lines of policy regarding the measures of assistance.

(j) As regards Community policy, the question further arises of the extent to which it is desirable that the Community itself also makes greater use of the instrument of aid than is the case at present (Investment Bank, Social Fund, Agricultural Fund and specific measures within ECSC and Euratom). This certainly seems expedient in respect to regional policy, since uniform regional development is vital to the proper operation of the Monetary Union pursued. For in a monetary union the Member States lose the exchange rate as an instrument for combating severe regional unemployment. In the third programme for medium-term economic policy it is even rightly asked whether in the long run a monetary union does not require a much more radical financial harmonization between the Member States. In the field of sectoral policy a possibility of Community aid likewise seems desirable above all in two cases. The one case concerns measures of assistance for furthering research or development of clearly European importance. In spite of Article 92, paragraph 3 (b), experience in the past period shows that these are difficult to get started as purely national ventures without financial support from the Community. The second case concerns branches of industry where a coordinated aid policy would be of great importance but could not be instituted without Community participation in the financing.

(k) As regards the legal basis of Community measures of assistance, reference may first be made to what has already been said about this above (Chapter II, 4.5). A reasonable compromise between the various legal points of view seems to be offered by the Italian attitude that measures of assistance must be based not only on the budget but also on a substantive regulation, and that this substantive regulation can also be established after approval of the budget item. In all the cases mentioned a legal basis for the substantive regulation can certainly be found in Article 235 of the Treaty of Rome.

6. Programme contracts
(national reports, 2nd part, Chapter IV)

The concept 'programme contract' was introduced in France in the 1960 interim plan. The need had arisen for a summary in quasi contracts per enterprise of the various discretionary financial facilities granted (tax concessions, loans and subsidies). In this way an even more rational relationship with the objectives of the five-year plan could be obtained than by attaching conditions to the various facilities separately. The most accurate definition was given in 1962 by the Ministry for Industry: Quasi contracts are reciprocal agreements or declarations of intent between the State and an enterprise aiming on the one hand at the performance by this enterprise of a programme of investment research or production and, on the other hand, the appropriate financial aid (loans from the FDES, grants towards technical research, equipment bonuses, letters of permission, authorization to have recourse to the financial market etc.)' (Fromont, Chapter IV). The benefits granted by the State in a programme agreement may also consist in exemption from mandatory regulations. The principal examples of this are the fiscal advantages mentioned (Chapter IV, Section 1) and the contractual price controls differing from mandatory price regulations (Fromont, Chapter IV, Section 2). Introduced in 1966, by the beginning of 1970 the contractual price controls in industry had already developed into the form of price control most used. On 28 February 1970 107 price programme contracts concerned more than 90% of the branches of industry. The obligations that the industrial enterprises assume relate not only to price determination but for instance also to programmes of increasing productivity, export and research. On the other hand, programme contracts with commercial and service organizations relate mainly to the price policy to be followed. So far programme contracts for whole branches of industry have been concluded with the steel industry and the computer industry (Fromont, Chapter IV, Section 3). The greater autonomy of public enterprises already mentioned is likewise accorded in programme contracts (Fromont, Chapter IV, Section 4).

So far the French example has been followed notably in Belgium (Schrans, V, V A and VI). In the other countries examined this new instrument of economic policy has as yet not or hardly developed (see the reports concerned under Chapter IV). Naturally care must be taken that the government does not make promises as part of a programme contract that are in conflict with Articles 30, 53, 62 and 92 of the Treaty of Rome.

Since most Member States make little or no use of the instrument, it seems improbable that within the foreseeable future a Community-coordinated use of this instrument by the Member States can be pursued for the attainment of specific objectives (e.g. of sectoral policy). However, the Communities themselves could conclude programme contracts within the limits of their financial resources. Instances might be the European Investment Bank, the Social Fund and the Agricultural Fund and also joint development projects as part of industrial policy. Further, attention has already been drawn above to the possibility of macro-economic programme contracts, which are being experimented with in the Netherlands. In principle this in-

strument too could be used at Community level, but this would have to be preceded by a very strong Europeanization of the organizations of employers and workers.

Insofar as connected with the granting of financial advantages to be borne by the state, the Belgian and French programme contracts can be checked against the objectives of the Community under Articles 92 and 93 of the EEC Treaty. Greater problems are presented by the programme contracts from the viewpoint of coordination. From the economic point of view laxer price controls for the enterprises in question can certainly yield an advantage comparable to a subsidy. As these laxer price controls may serve inter alia to promote exports, the result may also be entirely comparable with the purpose and operation of a forbidden export subsidy. Nevertheless, Article 92 does not seem applicable here, since these financial advantages are not paid for out of state funds. It will therefore be necessary to fall back on more general articles of the Treaty, in particular Articles 101 and 102. In a certain sense these form the lex generalis of Articles 92 and 93. However, perhaps the enterprises that are exempt from certain mandatory regulations may be regarded as enterprises to which 'special or exclusive rights' have been granted within the meaning of Article 90, paragraph 1. Should this prove possible upon closer examination, the procedure of Article 90, paragraph 3, can be applied in some cases. This procedure is more effective than that of Article 101 or 102.

7. Mandatory regulations
(national reports, 2nd part, Chapter VI)

7.1. *INSTITUTIONAL LEGISLATION*

The general institutional situation of the Member States in the field of economic policy has already been dealt with in Chapter II of this report and Section 2 of this chapter. The problem of general political decentralization has also already been discussed. This section will discuss the role of a number of special institutions, not forming part of the central institutions or the decentralized authorities of the state, with special tasks in the field of mandatory regulations and other subjects of economic law.

(a) CHAMBERS OF COMMERCE AND INDUSTRY

All the Member States examined have Chambers of Commerce and Industry as territorially representative bodies of the local or regional economy. However, there are differences in name, legal character, composition and powers. For the purposes of this report the following points seem of particular importance. As a rule the Chambers are statutory bodies. In Germany, Italy and the Netherlands the task of the Chambers includes the issuance of certificates of origin, which are of great importance in the correct application of the EEC regulations in the field of foreign economic transactions. But in Italy and the Netherlands in particular they also have a statutory task in the implementation of various other laws. In those cases too, of course, the powers to take binding decisions are of particular importance. In Italy these powers are mainly in the field of industrial property rights other than patents, technical customs disputes and the issuance or certification of various documents. These documents relate to such matters as the founding or closure of enterprises. In a number of exceptional cases the Chambers also have powers in the field of the right of establishment (Sacchi Morsiani, Chapter V, Section 1, I). In the Netherlands the Chambers play a part inter alia in the application of the Commercial Register Law, legislation on establishment, the Clearance Sales Law and the Law restricting the gifts system (Dutch report, Chapter V, Section 1, § 2, and Section 7).

From the point of view of Community coordination the participation of Chambers of Commerce and Industry in the implementation of mandatory regulations of economic law may present some problems. This applies in particular when these mandatory regulations originate from Community law (customs legislation) or have formed the subject of Community coordination or harmonization (company law or the right of establishment) or when in their application other regulations of mandatory Community law (e.g. the general and particular prohibitions of discrimination on the grounds of nationality) have to be considered. In those cases there will have to be adequate guarantees of thorough supervision and legal protection against incorrect decisions.

(b) PUBLIC ORGANIZATIONS OF CERTAIN BRANCHES OF INDUSTRY AND LIBERAL PROFESSIONS

The most comprehensive regulation in this field is to be found in the Netherlands, with its Industrial Organization Law of 1950. Under this law statutory organizations of trade and industry with major regulatory and administrative tasks, often of a mandatory nature, can be instituted. They also have important financial means of their own. The Socio-Economic Council mentioned above (the SER) was itself instituted by the above law as the senior agency of trade and industry. In addition to its advisory powers already mentioned, it has a number

of — less important — mandatory powers. Institutions for the economic organizations for separate sectors of industry have developed above all for agriculture, fisheries, the industries processing agricultural produce or fish, the trade in these products, the retail trade in general and the crafts (Dutch report, Chapter V, Section I, § 1).

The public organizations or other organizations with statutory tasks for liberal professions are not dealt with in the Dutch report and occur only sporadically (the most important example is the legal profession).

In France, in addition to the Chambers of Commerce and Industry, there are chambers for agriculture and crafts. In addition to the chambers for agriculture there are the much more important 'offices publics professionnels', public institutions of differing kinds for the implementation of agricultural policy, which are co-administered by representatives of agriculture. In addition the private 'sociétés professionnelles et interprofessionnelles' play an important part in the implementation of economic policy not only in agriculture but also in industry. They are under state control (Fromont, Chapter V, Section 1, I and II).

In Germany functional decentralization of mandatory powers takes place in general by means of 'horizontal' functional deconcentration of tasks within the state organization (Zacher, No 195). In this connection, in addition to institutions which are also found in other Member States, mention may be made of a German peculiarity, the highly independent 'Bundesoberbehörden' (superior federal authorities), such as the influential Bundeskartellamt (Federal Cartels Office), the Bundesamt für die Gewerbliche Wirtschaft (Federal Office for Trade and Industry), the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry) and the Kohlebeauftragte (Coal Commissioner) (Zacher, No 248). Here too there is evidence of an obvious reserve on the part of leading German politicians to grant representatives of trade and industry true joint responsibility for economic policy. As autonomous public occupational and professional organizations — with only limited economic powers — the craft chambers, the agricultural chambers of the liberal professions play a part in addition to the Chambers of Commerce and Industry (Zacher, No 255). These organizations have mandatory powers mainly in the field of professional discipline (Zacher, No 257) and sometimes — notably the craft chambers — with regard to admission to the occupation or profession (Zacher, No 259). They have important tasks in the field of vocational training (Zacher, No 258). Public professional organizations — with above all statutory disciplinary powers — have been instituted in Italy for a very large number of liberal professions (Sacchi Morsiani, Chapter V, Section I, II).

From a Community point of view, the same applies to the trade, industrial and professional organizations discussed here, mutatis mutandis, as was mentioned above with regard to the Chambers of Commerce and Industry. State control and legal protection will have to be regulated in such a way that the Community institutions can supervise the correct application of Community law. On account of the great differences in this field between the various Member States, it seems pointless to attempt harmonization of the public organization of individual branches of industry or professions. The sectors for which they exist and the powers granted them differ too much for that. Moreover, compulsory harmonization would again be in conflict with the principle of the Member States being responsible for their own organization. It seems more feasible to aim in sectors with a highly developed Community policy at the foundation of Community-regulated private organizations which, as in France, can participate in implementation of policy. It is therefore understandable that, above all in the field of the common agricultural policy, such an endeavour may in fact be noted.

7.2. *REGULATIONS OF SHORT-TERM ECONOMIC POLICY* (national reports, 2nd part, Chapter V, Section 2)

This subsection will deal in succession with the mandatory regulation of prices (7.2.1.), wages (7.2.2.), the credit system (7.2.3.), the hire purchase system (7.2.4.) and other points of application of short-term economic policy (7.2.5).

7.2.1. *PRICE REGULATION*

All the countries examined have a general statutory basis for mandatory price regulations. In Germany, however, the highest courts have ruled that the use of price control as an instrument of active economic policy is inadmissible, only application of defensive purposes being admissible (Zacher, No 274). In practice, therefore, price fixing measures are an exception in Germany (Zacher, No 275), also as regards special sectors (Zacher, Nos 276 to 286). In the Netherlands and the United Kingdom the application of price legislation had been rejected for political reasons at the time of compilation of this report, but only recently so in both countries (1971 and 1970 respectively). Only in Belgium (Schrans, VI A), France (Fromont, Chapter V, Section 2, I) and Italy (Sacchi Morsiani, Chapter V,

Section 2, I) does mandatory price control form an important instrument of short-term economic policy. However, in Belgium and France, as mentioned above, a clear connection has been established between price control and medium-term economic programming (Chapter III, 6, above). This connection is in line with the view developed above all in France that short-term economic policy is only an instrument for adjusting the economic process for the sake of the derived medium-term economic development.

A comparison of the development of prices in the various Member States shows no clear correlation between the rate of price increases and the existence or not of mandatory price regulations. Price increases in the past years have not always been higher in Member States or branches of industry for which no price ceiling was fixed than in those where this had been the case. It thus seems that other economic circumstances or other economic measures can lead to at least just as stable a price development as price measures can. With respect to these other measures one might first of all envisage measures for strengthening price competition. These are consequently regularly recommended by the OECD and the European Communities (see also the Appendix to this report). In addition the state can usually exert influence on the general price development via its own policy either directly (rates of taxation and charges for public services) or indirectly (restriction of overall demand by monetary policy, increased taxation and restriction of government spending). In the case of cost-push inflation it will sometimes also be possible to exert influence on cost development without mandatory regulations being required. Partly on account of the fundamental objections that exist to price control in a number of Member States, Community furtherance of a comparable degree of price stability in all Member States need not therefore entail any harmonization of price legislation for the time being. Provided that harmonized objectives are attained on this point, the Member States may be left a considerable degree of freedom in the choice of the measures to be taken. Greatly differing price developments would of course in the long run not be compatible with a monetary union.

Insofar as national price measures are applied these may not enter into conflict with Community law. The danger of this is the greatest in sectors where the Communities themselves possess price-regulating powers (agriculture, transport, coal and steel). In other sectors too national price policy may, however, enter into conflict with Community law. In particular, minimum prices and fixed prices, by hampering imports of foreign goods or services at a lower price, may conflict with Article 30 of the Treaty of Rome. As emerges from the Commission's directives on the strength of Article 33, paragraph 7, of the EEC Treaty, the fixing of maximum prices may, however, also yield in some cases measures of the same effect as quantitative import restrictions. As already explained when discussing the price programme contracts, a detailed price policy may also lead to other forms of distortion of competition. The Commission will therefore — under the supervision of the Court of Justice — have to continue with the gradual development of a number of lines of conduct to ensure that the price policy of the Member States is in conformity with the Treaty.

7.2.2. *WAGE REGULATION*

In all the countries examined wage determination is left in principle to free bargaining between employers and workers. In all countries examined (with the exception of the United Kingdom?) the result of free bargaining effecting a whole branch of industry can further be declared generally binding on all enterprises of that branch of industry in the part of the country concerned. All the countries examined, with the exception of Germany (Zacher, No 289) also have a legal minimum wage. On the other hand, only the Netherlande (Dutch report, Chapter V, Section 2, § 3) and the United Kingdom (Daintith, II.5.2.1) have a statutory possibility of mandatory influencing of wage increases for purposes of short-term economic policy. However, in those countries too use of this possibility summons up great opposition on the part of the unions. In all other Member States there are fundamental objections to mandatory intervention in this field.

Having regard to the situation in the different Member States thus summarized, it will not be possible for the time being to direct coordination of the short-term economic policy of the Member States with respect to the development of incomes towards equivalent possibilities of direct mandatory intervention in wage increases. However, the spending of private incomes can be mandatorily restricted in favour of public services or as part of a balanced restriction of all categories of expenditure via a taxation policy, coordinated if necessary. However, this is conditional on it being impossible to pass on tax increases on the strength of wage indexation. The effect of excessive national wage increases on the balance of payments cannot be compensated for in a monetary union by unilateral devaluation. Excessive wage increases, differing from Member State to Member State, will therefore have to be countered otherwise than by compulsion (see Chapter III.4. above).

As remarked above (Chapter II, 10.2), until the European Parliament and management and labour exert a greater influence on the main outlines of

economic policy, most of the other solutions to this important aspect of the problem of short-term economic policy do not seem feasible. In recent years even massively increasing unemployment as a result of excessive wage increases has no longer proved always to lead to sufficient moderation. Thus the operation of the market mechanism can only be relied on to a limited extent for regulation of wage development with reference to short-term economic policy.

7.2.3. *CREDIT REGULATION*

It is rightly remarked in the German and Italian reports that (the possibility of) mandatory regulation of the credit system is one of the most important instruments of short-term economic policy (Zacher, No 291; Sacchi Morsiani, Chapter V, Section 2, III). This also applies to Community short-term economic policy. All Member States have largely equivalent powers for restricting credit (see the cited places in the German and Italian reports and further Fromont, Chapter II, Section 4, IV, sub 3, Daintith, II.5.2.2., Dutch report, Chapter V, Section 2, § 5, Schrans, VI A). This simplifies coordination of national credit policy at Community level. As the central banks in most of the countries examined (notably in Germany, Italy, the Netherlands and the United Kingdom) exert in law or in fact a predominant influence on credit policy, it will in the main be possible for community coordination to take place by means of the system of central banks being sought. However, it is possible that for this an amendment of Belgian and French legislation is required, since in these countries the 'Commission bancaire' and the government (Conseil national du crédit on the proposal of the Minister of Economics and Finance) respectively have a greater influence. It ought to be investigated to what extent too a more extensive harmonization of credit legislation is necessary under Article 100 of the Treaty of Rome. In particular the German powers in this field perhaps seem inadequate in comparison to the powers in other Member States (see Zacher Nos 113, 142 and 291). Really mandatory measures will probably be required just as little at Community level as in the majority of the Member States. Insofar as formally mandatory measures are required, the government will have to be called in in most Member States. Similarly, at Community level mandatory coordination of measures of credit policy can be effected only by the Council of Ministers, on the strength of Articles 103 of the EEC Treaty.

Legislation on the credit system does not as a rule relate solely to the short-term economic policy aspects. In addition it usually relates to micro economic supervision of banking business to guarantee the public's interests. The German, Dutch and Italian reports in particular contain relatively detailed information on this. Harmonization of national legislation on this point will be necessary not so much in the framework of the coordination of the economic policy of the Member States as in that of realization of the right of establishment and the free provision of services in the banking sector (Article 57, paragraph 2, and Article 66 of the Treaty of Rome).

For the establishment of a common market with undistorted competition the competitive situation between the banks and the possibility of using the banks in a selective credit policy as an instrument of medium-term economic policy are likewise of importance. For the possible regulation of the first point in the legislation regarding supervision of the banks, notably with regard to control of bank mergers, the Dutch and Italian reports contain useful information. The problems of Community coordination on this point do not differ essentially from those in the field of cartel and monopoly legislation in general. They can be solved within the framework of Articles 85—90 of the Treaty of Rome (see Chapter IV, 7.5 below). Compulsory participation of the banks in a selective credit policy in favour of certain enterprises or groups of enterprises, according to the national reports, plays a particular part in France (Fromont, Chapter V, Section 2, III sub 2) and Italy (Sacchi Morsiani, Chapter V, Section 2, III—3). From the economic point of view, these are measures of assistance which at Community level give rise to similar problems of coordination as other measures of assistance. From the legal point of view the Commission may, however, have to base its coordination policy on this point on Article 90, paragraph 3, as well.

7.2.4. *LEGISLATION CONCERNING HIRE PURCHASE SALES*

As an instrument of short-term economic policy this legislation has proved particularly important in the postwar period in France (Fromont, Chapter V, Section 2, IV) and the United Kingdom (Daintith, II.5.2.2a). True, the Belgian, Italian and Dutch reports mention (under VI A, Chapter V, Section 2, IV and Chapter V, Section 2, § 6 respectively) comparable powers under short-term economic policy to prescribe accelerated repayment. However, in these countries the practical significance of these powers for short-term economic policy proves less than in the two countries first mentioned. The German report states no comparable powers.

Most legislations regarding hire purchase sales at the same time contain regulations to protect the public. The Italian and Dutch reports in particular contain extensive details of these.

As long as hire purchase sales have not assumed any great volume in international trade, harmonization or coordination of the application of the legislation in question does not seem urgent. From the point of view of short-term economic policy this is an instrument that does not seem of such importance that its use or otherwise should be imposed on the Member States. If its application in exceptional cases were to lead to discriminatory interference with imports (for instance through less favourable hire purchase terms for imported products), action could be taken against this under Article 30 et seq. of the Treaty of Rome. Dutch legislation still contains a number of establishment regulations (with regard to hire purchase financiers and door-to-door canvassers) which have to be appraised on the strength of Articles 52—57 of the Treaty of Rome.

7.2.5. *OTHER MANDATORY REGULATIONS OF SHORT-TERM ECONOMIC POLICY*

The German and Dutch reports also contain references to a few other mandatory regulations of great importance to short-term economic policy in those countries. In this connection the German report specially mentions the mandatory regulations relating to foreign trade and payment transactions. Mention is also made of the provision in exchange legislation that subjects indexation of debts in German currency calculated with reference to other currency or the price of gold or other goods and services to the approval of the central bank (Zacher, No 293). Regulations of the former kind naturally also occur in other Member States, though there they are not so clearly regarded as instruments of short-term economic policy as is the case in Germany. As long as no common capital market has come into being, exchange legislation presents particularly great possibilities here. The problems of coordination in this field are discussed in the section on the legislation for foreign trade and exchange transactions (Chapter III.7.4 below). Permanent regulations on rate clauses in private contracts like the Article 3 of the German Currency Law mentioned by Zacher, though certainly of importance to short-term economic policy, will have to be coordinated in monetary policy rather than in short-term economic policy.

The Dutch report states the importance that consideration of short-term economic policy may have if social insurance legislation is amended for instance in the determination of the date of introduction of extensions of the social security system or of increases of contributions or benefit as part of the existing legislation (Dutch report, Chapter V, Section 2, § 7). For the time being there seems to be no reason for mandatory coordination of this point under short-term economic policy.

7.3. *LEGISLATION FOR SITUATIONS OF SHORTAGE* (national reports, 2nd part, Chapter V, Section 3)

7.3.1. *LEGISLATION FOR SITUATIONS OF SHORTAGE IN OPERATION*

The national reports with respect to France, Italy and the Netherlands supply information under Chapter 5.3 on legislation in force in those countries in connection with the housing shortage (and the shortage of some business premises). From the information supplied it may be derived that only in part of the Netherlands is a permit system still in force for the use of housing, based on the Housing Accommodation Law 1947 (Dutch report Chapter V, Section 3, § 1, II). However, in recent years abolition of this rationing system with respect to the housing accommodations available had been proceeding apace. In the three countries mentioned, on the other hand, rent control is still of practical importance. Liberalization in this respect seems to have made the least progress in Italy, where as late as 1970 the freezing of rent increases — with many amendments — was extended until 31 December 1973 and also applies to small business premises. In France rent control relates in particular to dwellings built before 1948 and those built in cities since 1948. Rents in the Netherlands have gradually been liberalized in much of the country since 1967. As rent control mainly makes its effect felt within the Member State concerned, coordination of the policy regarding to it does not seem an urgent matter.

Legislation relating to scarcity of land, water and minerals and other natural resources is dealt with elsewhere in this report (Chapter III, 7.6 and III 8.1 below).

7.3.2. *RESERVE LEGISLATION FOR EMERGENCIES*

Legislation for shortages caused by war, the danger of war and other emergencies is strongly developed above all in Germany and the Netherlands, but also occurs in other Member States.

The British Emergency Powers Acts of 1920 and 1964 are of particular importance in practice to situations of shortage caused by strikes. However, like the powers in the event of a food shortage under the Agriculture Act 1947, they can also be applied to other emergency situations (Daintith, II.5.3).

The French ordinance of 7 January 1959 relates expressly to national defence in the event of war and the threat of war, and can lead to a completely centrally controlled economy. A law dating from 1969 regulates the use of the mercantile marine in the same extraordinary circumstances (Fromont, Chapter V, Section 3).

The German constitution makes provision for extensive emergency powers to be granted to the institutions of the Federation in the event of war or the threat of war (Zacher, No 294). However, these powers have no specific economic significance. But also the laws containing precautionary measures for special economic emergencies concentrate on the case of war and threat of war. The most general regulation in this field is contained in the Economy Safeguarding Law of 3 October 1968, which contains reinforced powers for exercising general control on production, processing, distribution and the provision of services (Zacher, Nos 296 and 297). An interesting point is that even this law still contains a guarantee of the fundamental principles of the market economy: 'The regulations shall be limited to the absolute minimum. Their content shall be such that they interfere as little as possible with the freedom of economic activity and have the least possible effect on the productive capacity of the economy as a whole'. The law in question also regulates the obligation to keep stocks as a preparatory measure. Further-reaching obligations of this kind exist under separate laws, in particular in the field of crude oil (Zacher, No 297). For the food supply the Food Safeguarding Law also contains extraordinary powers for other emergencies than war and the danger of war. There are further emergency laws for transport than war and the danger of war. There are further emergency laws for transport, water supply and manpower (Zacher, Nos 300 to 305.) For certain other emergencies separate regulations and organizations make measures possible (Zacher, Nos 305 to 309).

Like Germany, the Netherlands has very complete emergency legislation. However, the Dutch legislation can be applied in the event of other extraordinary circumstances than war and the danger of war. Eight laws are dealt with in the report. A Bill for an emergency law for prices discussed in the report is still under consideration in the States-General (Dutch report, Chapter V, Section 3, § 2, I to IX).

It is thus apparent that at least four Member States possess powers in the extraordinary circumstances stated to take over complete control of production and distribution. Quantitative distribution measures must inevitably be accompanied by control measures for imports and exports. It is therefore clear that utilization of the exceptional powers stated in the reports can put the common market partially or wholly out of operation. Article 224 of the Treaty of Rome seems not so much to allow of this possibility explicitly as to assume it. However, the obligation is added to consult together in order to prevent the functioning of the common market being adversely affected by such measures. Now that various Member States have detailed legislation on this matter, it seems advisable that, as a precautionary measure, the Commission already starts to further such consultation. This consultation would have to be particularly directed towards the introduction of harmonized rationing measures and mutual assistance in situations in which interstate trade has not been fully dislocated by acts of war or disorders, but other emergencies as stated in Article 224 exist. In this way Community solidarity could be maintained in emergencies too.

In situations of shortage not connected with the emergencies mentioned in Article 224, the Council can take regulatory action under Article 103, paragraph 4, of the Treaty of Rome. This power has also been repeatedly used already. The practice of its application shows that the Council's measures may both relate to the prevention of a shortage (compulsory stockpiling, authorization of measures to encourage imports) and tend to authorize the Member States to apply export-restricting measures. Danger of war or war elsewhere in the world may also lead to application of Article 103, paragraph 4. Article 224 is not affected by this.

7.4. *FOREIGN ECONOMIC RELATIONS* (national reports, 2nd part, Chapter V, Section 4)

The application of the largely comparable legislation of the Member States regarding foreign trade and foreign payments (reports, Chapter V, Section 4) may not, of course, enter into conflict with the Community legislation on the four freedoms, the harmonization of legislation (including customs legislation) and common trade policy, as interpreted by the Court of Justice. It seems to follow from recent jurisprudence of the Court that purely formal licensing systems may also be at variance with the provisions of the Treaty. Commercial policy vis-à-vis non-member countries will not so much have to be coordinated as replaced by a common commercial policy (Article 113). It does not seem opportune to go into the problems of the common commercial policy in this report, since it does not fall under the main theme of this study.

In the field of capital transactions the liberalization of transactions within the Member States, as the reader will be aware, is much less advanced than with regard to the other freedoms provided for by

the Treaty (free movement of goods, persons and services). This is both in accordance with the Treaty and with the close ties between capital market policy and monetary policy existing in the economic reality of all Member States. There are also links with short-term economic policy and medium-term economic policy. In France supervision of international capital movements is deliberately also used as an instrument of industrial policy (Fromont, Chapter V, Section 4, III). This report will not go further into the great drawbacks of the non-existence of a common capital market. In view of the links with other aspects of the non-existence of a common capital market. In view of the links with other aspects of economic and monetary policy mentioned above it is self-evident that the resolutions of 22 March 1971 relating to the realization of the economic and monetary union deals in close interconnection with further liberalization of the movement of capital and coordination of the capital market policy of the Member States. The close link with the coordination of the rest of economic and monetary policy will certainly automatically come up for discussion with that coordination in practice, so that it is understandable that the resolution contains no clear pronouncements on that. It emerges from the various Commission documents on the subject that the institution of a common capital market will also require various measures for harmonization of legislation. Both the resolution on the economic and monetary union and the Treaty of Rome itself (Article 70) also make provision for coordination of the regulation of capital transactions with non-member countries. The links that exist on this point in the various Member States with economic policy in general and also in some cases with foreign policy in general may hamper this coordination. Examples of such links may be found above all in the German and French reports. In intra-EEC trade exchange control will, of course, gradually have to be abolished. But in addition such harmonization of exchange legislation will be necessary that the system of central banks to be set up can coordinate the application.

7.5. *REGULATIONS CONCERNING MARKET STRUCTURE* (rules governing competition) (national reports, 2nd part, Chapter V, Section 5)

It will be known that Germany has very detailed cartel legislation. As mentioned above, the 'market economy' there forms an independent aim of economic policy. In the German view, attainment of this aim also automatically furthers attainment of the objectives of stability and growth. Consequently, in the German view cartel policy can also be practised with a high degree of autonomy by the Federal Cartels Office. The law assumes a prohibition of cartels, but allows of a number of exceptions (Zacher, No 355). The government has also proposed that a preventive control of important mergers be introduced (Zacher, No 365). Supervision of abuse of economic power is already possible. For the German views on the relation between supervision of concentration and other forms of economic policy see the extract from the official point of view of the Brandt Government with respect to the 1971 Annual Report of the Federal Cartels Office, appended to the present report.

For a more detailed survey of the main outlines of German law on this matter, reference may be made to the German report. However, within the framework of this summary it is also important that the central place which the endeavour to maintain effective competition occupies in German economic policy has also been explicitly laid down in other important economic laws. Thus instruments of commercial policy can also be utilized for the furtherance of competition, and respecting and even promoting a free-market framework is also expressly prescribed in the Stability and Growth Law (Zacher, Nos 336 and 366). General economic policy is further directed towards free international trade, abolition of 'dirigiste' and protective measures, privileges, etc. (Zacher, No. 366). Exceptions to the principle of market economy exist notably for public services, agriculture, fisheries, transport, elements of power supply, credit and insurance and the labour market (Zacher, Nos 338 to 352). Certain rules for competition, which in principle is free, are laid down in the legislation against unfair competition (Zacher, No 368) and the regulations regarding clearance sales, hire purchase transactions, discounts, price publicity and 'rules of competition'. Finally, the German report also deals with the legislation on industrial and intellectual property rights in this connection (Zacher, No 369). Declarations of 'generally binding' or compulsory cartelization are rejected on principle (Zacher, No 372). If mandatory regulations are needed for a branch of industry, the legislator must attend to them (ibid.).

Despite considerable differences in legislative technique and procedure the practical results of British cartel legislation (Daintith, II.5.5) probably come, closest to those of Germany. British legislation also proceeds from the assumption of conflict with the national interest, which can be refuted by relatively few cartels. Multilateral resale price maintenance is automatically forbidden in the United Kingdom too. Control of mergers is already in force. British cartel and merger control, like German car-

tel policy, is predominantly exercised by bodies that are entirely or highly independent. Finally, since cartel and monopoly legislation is one of the relatively few areas of important legislation that are maintained broadly by governments of the two big parties, its place in the whole of economic policy in the United Kingdom seems almost as fundamental as in Germany.

In all other countries examined there are ties which are much stronger institutionally and in their content between cartel and concentration policy and other aspects of economic policy. In France competition is not officially regarded as an end in itself, but solely as an instrument for the attainment of other goals of economic policy (Fromont, Chapter V, Section 5, § 1). However, formally speaking, French legislation, like German legislation, starts from an interdictory principle, and the practical application too is rather strict in principle, indeed in some respects (resale price maintenance and exclusive sales agreements) even stricter than German legislation. However, the quantitative importance of cartel policy (number of cases dealt with) is much less than in the Federal Republic and the United Kingdom, even though the individual competition-limiting practices (refusal to sell, individual resale price maintenance, etc.) are sometimes more stringently regulated. In addition, the freedom of competition is limited more strongly than in Germany by rules (e.g. a ban on discrimination and a prohibition of selling at a loss). But above all the French government is less chary than the German one about actively promoting self-organization of trade and industry, restructuring, cooperation and concentration (Fromont, Chapter V, Section 5, § 2, and Chapter V, Section 5, § 3). Use is made of a wide range of instruments for this: special mention may be made of the following in addition to the sectoral planning procedures already discussed: bankruptcy legislation, new forms of cooperation regulated by law (société conventionnée and groupement d'intérêt économique) and the use of measures of assistance in various forms. Finally, general economic policy and legislation in France are less embued with the principle of competition than in Germany. But, as mentioned above, in the practice of the last ten years partly under the influence of the European Communities, there has been a clear tendency perceptible towards greater convergence of French and German policy, also on the point of the importance of competition. Thus in France too supervision of abuse of economic power has been introduced.

Dutch cartel legislation is based on the principle of abuse, without a general legal presumption of conflict with the national interest as in the United Kingdom (Dutch report, Chapter V, Section 5, § 1, I). However, Dutch law does contain elements of interdictory legislation (notably with regard to multilateral and, for some important branches of industry, individual resale price maintenance too). These interdictory elements can be further expanded by law. As in the United Kingdom, there is also compulsory notification, which simplifies supervision of all agreements made. Amendment of cartel agreements in such a way as to increase competition is regularly enforced. In 1971 the Socio-Economic Council was asked by the government to advise on the introduction of a general interdictory principle. Enterprises in a powerful economic position which abuse their position may have imposed on them for instance an obligation to supply goods or a ban on conditional sales; price provisions are also possible; obligations to supply in particular have already been repeatedly imposed (in cases of boycott). The connections with other objectives of economic policy emerge inter alia from the use of the law for purposes of price control and from the possibility of declaring competition-regulating agreements generally binding. The statutory organizations of trade and industry already mentioned in this report can also lay down generally binding agreements in restraint of competition to a limited extent, but these may not stand in the way of healthy competition (Dutch report, Chapter V, Section 5, § 2, II and Section 3, § 2). For mergers, apart from the supervision of bank mergers by the Netherlands Bank, there are solely rules of conduct for mergers of the Socio-Economic Council. However, these serve mainly to protect the interests of shareholders and employees (Dutch report, Chapter V, Section 5, § 3, I). The Socio-Economic Council has, however, been asked about the desirability of more extensive merger control. All in all, Dutch cartel legislation and competition policy seem to occupy an intermediate position between that of Germany, France and the United Kingdom.

The attempts to introduce cartel legislation in Italy have still not succeeded. The Bill presented is based on an interdictory principle and contains an important exceptional position for the public sector (Sacchi Morsiani, Chapter V, Section 5). Belgian legislation on cartels is hardly ever applied in practice (Schrans, VI—D). It is based on a principle of abuse.

The difference pointed to in the policy of the Member States with respect to competition do not yield such great problems from the viewpoint of Community coordination as might be feared at first sight. For, as soon as agreements in restraint of competition or abuse of economic power (in the Commission's opinion monopolizing mergers, too) can influence commerce between the Member States, the rules of the Community treaties relating to competition (Articles 65 and 66 of the ECSC Treaty and 85 and 86 of the Treaty of Rome) and directly valid

in all Member States are applicable. In this way a uniform policy can be largely guaranteed with respect to all competition-distorting business practices liable to affect the proper functioning of the common market. Many authors rightly argue that this proper functioning of the common market can also be hampered by sales offices and other forms of national cartels that do not directly relate to imports or exports. Coordination of national cartel policy with respect to cartels and positions or power with purely local effects certainly does not seem urgent. Article 65 of the ECSC Treaty is also applicable to that. The main problem that has still not been sufficiently settled therefore seems to be the gearing of national cartel policy to Community policy in cases coming under both Community law and national law. Problems on this point cannot occur when under Community law an agreement in restraint of competition is forbidden which has been admitted under national law. In such a case the precedence of the prohibition under Community law is an established fact. As the experience of the past period shows, it does not give rise to difficulties in practice either. Nor will a strict national interdictory practice with regard to national cartels be liable to cause any difficulties. But dangers of insufficient coordination threaten in cases in which a national cartel authority forbids international agreements on the strength of its national legislation, while this may perhaps appear desirable at a later date from the viewpoint of Community policy. In those cases it thus seems desirable with respect to intended national prohibitory orders and other orders to the same effect to introduce under Article 87 of the Treaty of Rome an obligation for national cartel authorities to inform the Commission and this would have a limited suspensive action. The limited suspensive action could then be extended by the Commission in preparation of an order of its own. The need for regulation of this matter is strengthened by the accession of the United Kingdom, since there the application of cartel legislation is in the hands of an independent tribunal. Problems of coordination in the relationship with other national cartel authorithies can as a rule also be solved without mandatory regulations, given the existing close cooperation with the Commission. Formally speaking, problems may, however, arise in the Federal Republic too on this point on account of the autonomy of the decisive departments of the Federal Cartels Office.

As emerges from the various national reports, there is often a close connection between the nature of the cartel policy of a country, its economic structure and its general economic policy. In France and Italy cartel legislation is clearly subordinate to medium-term planning and also shows obvious traces of the latter. On the other hand, in Germany the foundations of the 'market economy' exert a considerable effect precisely on other aspects of economic legislation.

With regard to the combination of furtherance of competiton and planning which is sought, the Community cannot, for various reasons, pursue an average of the policy of the Member States. It has already been argued above that on the point of medium-term programming the Community will have to follow the direction of France, Belgium and Italy rather than that of Germany, the Netherlands or the United Kingdom, though, otherwise than in France, for the time being a sectoral policy must be pursued in exceptional cases only. Conversely, it seems desirable that the Community continues its cartel and concentration policy, which highly furthers competition in comparison to the average policy of the Member States. Now that the broad outlines of Community cartel and concentration policy have been mainly laid down by numerous test case decisions of the Commission and by judgments of the Court of Justice, a greater quantitative result of the combating of forbidden restraints on competition will have to be sought. Furthermore, after combating such restraints relating directly to interstate trade, attention will also have to be paid to national agreements hindering the proper functioning of the common market more indirectly. Although, as remarked above, Community law is also applicable with regard to these national cartels, a rational division of work would be furthered if all Member States had equivalent possibilities of combating these national cartels at national level. Though adaptation of national cartel legislation to Community law does not have to be prescribed, it does seem desirable. The steps taken by France, Italy and Luxembourg in this direction must therefore be applauded.

A relatively stringent cartel policy and more generally clear free-market point of departure of Community policy in the field of industry, commerce and other sectors is advocated in the first place by the arguments that may be adduced against cartels in general. For these arguments, see Zijlstra's views (Zijlstra report, pp. 50—55). However, this calls for two comments. In the first place the EEC cartel policy of the last ten years has rightly made it clear that Zijlstra's highly negative opinon of cartels (op. cit., p. 54) is of particular importance with respect to cartels controlling the market. Forms of collaboration between firms that do not control the market need a much more nuanced point of view. As long as the influence on market conditions is 'discernible', the indictory principle should, it is true, form the point of departure of active control. But this point of departure should not render useful forms of collaboration impossible. 'Trifling cases' in which the collaboration cannot harm the position of outsiders as a result of the small share

of the market held by the participants may even be left entirely out of consideration. The second comment is that Zijlstra's predominantly positive view of the merger movement (op. cit., pp. 56—57) seems correct only as long as mergers do not lead to monopolies or control of the market by a very small number of enterprises. At the time of publication of his report the danger of control of the market by one or a few firms was not great, but it has now become quite real in a number of sectors. On this point too the Commission seems to be adopting the correct line of conduct.

However, there are also a number of special additional reasons for the Community to follow a relatively sharp anti-cartel and anti-monopoly policy. In the first place, the competition-furthering effect of imports for the Community as a whole is less than for the individual Member States, which have a much higher import ratio. As a result, cartels comprising all or practically all manufacturers of a certain product of the Community are less under pressure from outside competition than is the case with cartels covering all the producers of one Member State. For that reason alone close supervision of market-controlling agreements is called for. In the second place, the Community institutions have insufficient powers for the time being and the conflicting interests between the Member States with regard to the separate sectors of business are as a rule too great to make an efficient sectoral Community policy possible. With a strong intergovernmental set-up in particular, conflicting national interests make an efficient division of work by systematic sectoral policy impossible as a rule. Coordination of the micro-economic decisions by the market usually leads to better results. In the third place, in a number of Member States there prove to be such fundamental or practical objections to 'self-organizations' of business, to sectoral policy with the participation of business and to any other form of systematic sectoral policy that these stand no chance with the present institutional relationships in the Community.

7.6. *REGULATIONS REGARDING ACCESS TO THE MARKET* (national reports, 2nd part, Chapter V, Section 6)

7.6.1. *PHYSICAL PLANNING* (national reports, 2nd part, Chapter V, Section 6, § 1)

As the national reports show, legislation on physical planning displays great differences from Member State to Member State in objectives, legal instruments applied and more or less detailed manner of elaboration. As regards the objectives, of particular importance to our study is the extent to which there are connections between physical planning policy, the regional aspects of general economic policy and the new objectives in the field of protection of the environment. As regards the legal instruments used, this subsection deals exclusively with the mandatory regulations regarding the freedom of establishment.

In this connection special mention should be made of the mandatory regulation of the establishment of enterprises in the Paris region. Above certain minimum limits, this regulation includes on the one hand the requirement of a licensing permit and on the other a system of differentiated charges on the erection and extension of buildings. The connection with decentralization policy regarding industrial and other economic activities finds clear expression (Fromont, Chapter V, Section 6, § 1).

The Italian report deals in particular with legislation in the field of urban planning. This legislation has no restrictions with respect to freedom of industrial establishment. The migratory movements (notably from south to north) are followed rather than guided (Sacchi Morsiani, Chapter V, Section 6, § I). The decentralization of economic activities is pursued in another way in the five-year plan (investments in state holding companies, measures of assistance, infrastructural works). This has already been dealt with in preceding sections.

General German legislation on physical planning contains only obligations for official agencies and in particular no restrictions on the freedom of establishment of enterprises (Zacher, No 377). However, through land organization and regional measures of assistance physical planning does definitely have consequences for investment activity (Zacher, No 378). And in addition there are supplementary instruments for the promotion of economic activity on behalf of regional equilibrium and regional development (ibid.).

In the United Kingdom, on the other hand, there is a very close link between physical planning, which is very highly developed statutorily (Town and Country Planning Acts), and the economic policy for distributing industry and employment. In the latter framework planning permission is essential for, but not a guarantee of, building approval in the context of physical planning. The system is applied throughout the country (Daintith, II.5.6.1).

Dutch physical planning legislation resembles most closely that of the United Kingdom, but the link with economic decentralization policy is less strongly developed than in the latter country. From national via provincial to local level physical plans in the Netherlands become increasingly stringent in nature. At local level binding instructions are also given to enterprises, including licensing systems

(Dutch report, Chapter V, Section 6, § 1). Various other laws relating to aspects of physical planning may also restrict the choice of location of enterprises. Consideration is being given to introducing into the overpopulated west of the country a regulation resembling that for the Paris region.

From a viewpoint of coordination of economic policy the aspects of physical planning that are not primarily economic ones seem mainly of importance in the field of infrastructural works for transport and in the frontier districts. Mere plans which are not concerted with each other are still regularly drawn up. The coordination of the compilation of the international road plan still leaves much to be desired too. As regards the economic aspects, for attainment of the objectives of regional policy of the Community it would certainly be advisable to strengthen the ties between physical planning for regional distribution of employment in all Member States. A closer study of the experience in the United Kingdom and in the Paris region would be of great use for this. Further, the legislation relating to land consolidation or more generally the legislation regarding the lay-out, acquisition and use of agricultural land are of particular importance to Community agricultural structural policy. This specific point will be reverted to in the section on sectoral policy. Finally, there seems to be no doubt that the battle against environmental pollution cannot be viewed in detachment from policy with respect to physical planning and regional distribution of industrial activity. When this aspect is also taken into account, the expectation seems justified that the systems of licences for the establishment of business which in particular restrict the freedom of choice of location will come to play a greater part than is at present the case in most countries. From a Community point of view there need in principle be no objection to such a development.

7.6.2. *CONTROL OF FOREIGN INVESTMENTS*
(national reports, 2nd part, Chapter V, Section 6, § 2)

In most countries examined there is a certain degree of control of foreign investments, mainly for reasons of monetary or short-term economic policy (Zacher, No 380, Daintith, II.5.6.2, Dutch report, Chapter V, Section 6, § 2, and Section 4). Only in France and Italy are foreign investments subject to control for reasons of industrial or sectoral policy too. In France direct investments by non-nationals of EEC countries are subject to control as and when the economic situation so requires. All foreign investments (also those from other Member States) are further subject to control for reasons of balance of payments policy. The legal basis is exchange regulation (Fromont, Chapter V, Section 6, § 2, I). Financial investments (portfolio investments and loans) are also subject to certain controls, but these are connected more with capital market policy and balance of payments policy than with industrialization policy. The same applies to contracts for industrial and certain intellectual property rights (Fromont, Chapter V, Section 6, § 2, II and III).

In Italy there is a licensing policy particularly for foreign investments in the petroleum and natural gas industry, insurance and banking. For the rest foreign investments are not impeded. On the contrary, they are legally encouraged by guarantees with regard to the possibility of transferring profits abroad (Sacchi Morsiani, Chapter V, Section 6, § 2).

From the Community point of view it is, of course, first of all important that equal opportunities of establishment are created for the nationals of the various Member States together with a common capital market within the Community. As regards investments coming from non-member countries, coordination, given the views in most Member States, only seems conceivable as regards the monetary and short-term economic policy aspects for the time being. As a basis for coordination Articles 70 and 103 qualify in particular. With regard to the aspects of industrial policy, views differ too strongly.

7.6.3. *QUANTITATIVE INVESTMENT CONTROL*
(national reports, 2nd part, Chapter V, Section 6, § 3)

There is a statutory possibility of quantitative restrictions on domestic investments in Belgium (Schrans, VI E), France (Fromont, Chapter V, Section 6, § 3), the Netherlands (Chapter V, Section 6, § 3) and the United Kingdom (Daintith, II.5.6.3). For the German situation on this point cf. Zacher, Nos 397 to 402. By quantitative restrictions of investments are meant regulations controlling investments in number, sum invested, productive capacity, volume of demand vis-à-vis supply already available or other quantitative criteria. Instead of the distinction made in this report between qualitative and quantitative investment restrictions, a distinction could also be made between subjective investment restrictions (relating to the firm management) and objective ones (business restrictions relating to the firms). The latter distinction, which would fit in better with German linguistic usage might, however, give rise to considerable misunderstandings in some other Member States. Consequently, in accordance with the uniform grouping,

the term 'quantitative investment control' has been employed in this section. In all Member States there are objections in principle to this kind of restriction of freedom of establishment. However, the countries allow of exceptions to this principle.

The Dutch basic law on the matter permits quantitative investment restrictions for a number of special situations. However, it has not been applied for years. In Belgium a regulation is in force for the flour industry only. In France and the United Kingdom quantitative investment restrictions are of importance to only a few sectors, and then as part of a more comprehensive structural policy. Germany and Italy do not have any mandatory quantitative investment restrictions, but solely measures to encourage investment. With regard to public enterprises the measures in Italy may also, be of a mandatory nature (Zacher, No 381, Sacchi Morsiani, Chapter V, Section 6, § 3). As the problem of quantitative investment restrictions proves to be important in practice only as part of a more comprehensive sectoral policy or in connection with the question of public enterprises, from the Community point of view it will have to be solved notably in that connection. As a rule, the functioning of the common market will make national quantitative investment restrictions for controlling productive capacity outside the framework of a Community sectoral policy fairly meaningless. For the national legislator is not capable of restraining the productive capacity in or imports from other Member States. Effective control of productive capacity would be possible only at Community level, but seems very difficult to realize politically and organizationally outside the sectors of agriculture, transport and perhaps energy too.

In sectors of small and medium-sized business (e.g. pharmacies) and other sectors with purely local markets (e.g. restrictions on the establishment of department stores in small municipalities) quantitative restrictions on establishment present problems from a Community point of view mainly in connection with the right of establishment. The fundamental objections of various Member States that in those sectors too a harmonized policy of quantitative establishment control is hardly conceivable from the political point of view. Summing up, therefore, it seems advisable to reject in principle quantitative restrictions of the freedom of establishment outside the framework of Community sectoral policy. For special situations exceptions to this principle may be permitted, provided that the objectives of the Treaty of Rome in the field of the right of establishment are not endangered as a result. According to the national reports, these exceptions will probably not be numerous. Italian legislation with respect to the retail trade is discussed in the following subsection.

7.6.4. *QUALITATIVE ESTABLISHMENT REQUIREMENTS* (national reports, 2nd part, Chapter V, Section 6, § 4)

On the strength of the principle of the freedom to conduct a business which has already been discussed several times, France has personal qualitative requirements for establishement or rather prohibitions on carrying on a business mainly for objectified reasons of public safety, morals or health. Reasons of public safety or morals also cover matters which elsewhere are ranked under standards of good character or reliability, such as a clean record with regard to certain kinds of offences. For certain professions, such as bankers, insurers or insurance agents, there are stricter requirements of this kind (Fromont, Chapter V, Section 6, § 4, I).

Unlike some other Member States, France does not make a clear distinction between the qualitative establishment requirements relating to persons and to business installations. In particular, reasons of public safety or health can lead to both kinds of establishment requirements. Thus in this context the French report mentions licensing systems for protecting persons living in the vicinity of dangerous or objectionable factory installations (a law dating from 1971, amended several times since then) in addition to laws relating to the production of war material, private detective agencies and a dozen other industrial and business activities. Licensing systems on grounds of economic policy exist only in connection with a more comprehensive sectoral policy (Fromont, Chapter V, Section 6, § 4. II). It should be mentioned that on the strength of the constitutional pecularities of France dealt with in Chapter II all the restrictions of the freedom of establishment mentioned are based on a formal law.

Germany proceeds from the principle of freedom of choice of occupation laid down in Article 12 of the Constitution. The Federal Constitutional Court has derived from this that access to a profession or occupation may not in principle be made subject to subjective or objective restrictions. On the strength of this principle, certain restrictions of the freedom to *conduct* a business are more readily accepted than restrictions of the freedom of *establishment.* Furthermore, subjective guarantees of public order referring to persons are more readily accepted than objective establishment regulations on the strength of circumstances beyond the control of the person concerned. The latter are considered admissible only as an ultimate remedy if fundamental Community values cannot be protected in some other way (Zacher, No 382). With regard to independent economic activities the constitutional principle of the freedom of choice of occupation is supplemented by the principle of the freedom to

conduct a business, which has been laid down since as long ago as 1869 in Article 1 of the Industrial Code. Like the French Code Civil the Industrial Code does, however, allow of statutory exceptions and restrictions with respect to the principle (Zacher, No 384). Carrying on a business may be forbidden. This is notably possible on account of unreliability or the danger of impairment of central legal values, and also in accordance with a proposed legal amendment for the protection of other very great general interests or of the workers. The conduct of business may also be subject to a licensing system (Zacher, No 388). In the broad outlines of elaboration too German law seems in principle to be closely related to French legal views on this. The German report does, however, create the impression that German law is more varied and elaborated in greater detail and that requirements of vocational training or professional ability and solvency requirements play a somewhat greater part (Zacher, Nos 396 and 398). The number of regulated professions and business activities also seems greater in Germany than in France. The report even explains that an exhaustive survey has never been attempted either by the authorities or by economists. The report itself therefore only gives examples, though these are numerous in themselves (Zacher, No 388). The German parallel to the French Public Nuisance Act of 1917 is to be found in Article 16 of the Industrial Code: 'The erection of installations which, as a result of their location or the nature of the business premises, may involve considerable disadvantages, dangers or nuisance for the owners or occupants of neighbouring land shall be subject to the permission of the competent authorities'. But in addition there are numerous special statutory requirements made of industrial installations (Zacher, No 397).

As has already been remarked in the discussion of quantitative investment restrictions, in particular every 'criterion of need' is disputed with special vigour by jurisprudence under Article 12 of the German Constitution (Zacher, No 399). Nevertheless in the interest of exceptionally important Community goods there are exceptions to the prohibition of criteria of need which exists above all in the transport sector (Zacher, No 400). The German report also contains valuable information on the regulation of the relation between private freedom of establishment and the existence of public utilities, and further on regulations with regard to activities connected with the exercise of public power (Zacher, Nos 403 to 406). As comparative material on these last two points is absent from most of the other reports, they will not be dealt with further.

Belgian legislation on this subject resembles in principle French law and likewise proceeds from a statutory principle of freedom to conduct a business. Otherwise than in Germany, publication is regularly made of the business activities for which a licence is required in advance (Schrans, VI E). Requirements of professional ability play an even somewhat greater part in Belgium than in Germany (ibid.).

Requirements of good character or financial soundness are, on the other hand, the main criteria in the United Kingdom for qualitative requirements for carrying on a business. Requirements of professional ability for admittance to certain branches of activity seem to play no significant part there (Daintith, II.5.6.4).

The situation in Italy and the Netherlands is quite different from that in the countries mentioned above. According to the Italian report, in Italy licensing systems mainly play a part in connection with sectoral policy (Sacchi Morsiani, Chapter V, Section 6, § 4, and Chapter VI). Otherwise than in Belgium, Germany, France and the United Kingdom they thus primarily serve objectives of economic (sectoral) policy. In the field of the retail trade Italy also has a licensing system operated by local authorities on the basis of a criterion of need. However, revision of this system, which greatly hinders modernization of the Italian distribution system, is in preparation (Sacchi Morsiani, Chapter V, Section 7).

In the Netherlands too establishment legislation is primarily regarded as an instrument of economic policy which is distinguished rather sharply from the legislation on public order. Except with regard to admittance to some liberal professions, where the situation is different, in the existing licensing systems for enterpreneurs or enterprises requirements of good character therefore play hardly any part (Dutch report, Chapter V, Section 6, § 4). The legislation for protection of public health or safety or other considerations of public order — such as the Dutch law on nuisance — is only exceptionally marged with other restrictions of the freedom to conduct a business. It is consequently dealt with separately in the Dutch report, Chapter V, Section 8). The fundamentally different background to the economic policy of Dutch establishment legislation outlined here thus also entails practical differences. Perhaps it has something to do with the absence of a written fundamental right of freedom to conduct a business. However, in political practice this freedom has always been regarded in the Netherlands too as a valuable possession not to be treated lightly. The number of sectors for which there are licensing systems seems on balance to be less than in Germany and France. The Netherlands too rejects in principle the use of a criterion of economic need.

Since the Netherlands, as mentioned above, has no five-year plans, Dutch qualitative establishment legislation must not be considered within the frame-

work of medium-term economic policy either. In Germany terminology it is much rather a part of the 'Dauerordnung'. The principal economic objectives pursued will be briefly summarized here.

The first group of laws contains primarily requirements of professional ability or other guarantees of the level of conduct of a business in the interests of the branch of trade or industry itself (Business Licensing Law 1954, Retail Trade Licensing Law, Insurance Agency Law, see Dutch report, Chapter V, Section 6, § 4, I). A second group of laws lay down requirements for admittance to and often also for the exercise of economic activities for protection of the public (Dutch report, Chapter V, Section 6, § 4, II). This group includes the laws relating to the insurance business, some provisions from the Credit System (Supervision) Law, a few provisions from the Hire Purchase System Law, the Moneylenders Law, the Pawnshop Law, the Pensions Funds and Saving Funds Law, the Law containing provisional measures relating to building societies, the Law on supplying labour 1965 and the Labour Placement Law 1930. Objectives of public order in establishment regulations for trade and industry are pursued only in the Provision of Medicines Law, the Cinema Law, the Drink and Catering Trade Law and Article 437, paragraph 4, of the Criminal Code regarding itinerant waterborne buying and vending (Dutch report, Chapter V, Section 6, § 4, III).

Summarizing, there are considerable differences between the qualitative standards of the Member States with regard to the possibility of conducting a business. These differences are based on a fundamental difference of opinion. Particularly in France and Germany, the legally — in Germany also constitutionally — established principle of the freedom to conduct a business has led to restrictions of this freedom being based primarily on considerations of public order. Notably in Italy and the Netherlands, on the other hand, such restrictions primarily find a basis in considerations of economic policy. Belgium and the United Kingdom occupy an intermediate position. The differences in point of departure have also led to major differences in elaboration. To start with, the point of departure of public order is more likely to lead not only to preventive supervision with an accompanying licensing system but also to possibilities of repressive measures intervening in further conduct of a business and possibly for forbidding it. In the second place, the differences in point of departure may lead to differences in determination of the sectors for which regulation is introduced. In the third place, in the Belgian, German and French systems there is no clear dividing line between regulations regarding access to the market for reasons and requirements of public order with regard to the business installation, the manner of carrying on the business and so on. It is consequently not surprising that on this point of national legislation a uniform systematic arrangement proved unattainable in the national reports. A more important aspect is that the coordination of all provisions concerning access to nonwage-earning activities and the exercise thereof, as prescribed by Article 57 of the Treaty of Rome, is considerably handicapped by the above differences in objective, method, scope and content of those provisions.

These difficulties are further aggravated by the fact that in a number of Member States there proves to be a large number of those provisions of public order, although this does not exclude the applicability of Article 57, paragraph 2, if those regulations are of a general nature applicable to both the country's own nationals and to aliens. Article 56 relates only to specific regulations for aliens. Examples of such specific regulations may be found in Fromont, Chapter V, Section 8, III.2.

Finally, when one reads in the German report that in Germany even chimney sweeps are charged with activities in exercise of public authority, it becomes clear that application of the exceptive provision for activities in exercise of public authority (Article 55 of the Treaty of Rome) has led to many difficulties.

For the time being it seems sensible, having regard to the fundamental differences of opinion emerging from the legislation of the Member States on this point, to continue the pragmatic approach of the Commission and the Council. Once again equivalence of effect of the measures taken seems more important than equivalence of applied criteria and methods of intervention. It does, however, seem advisable to aim in accordance with a uniform classification into sectors at better publicity with regard to all licensing systems existing in the Member States with reference to access to and exercise of non-wage-earning activities. It further seems advisable to aim at a better coordination of the various licensing systems that may exist side by side for a given establishment. Perhaps it will not be possible to channel together all the licensing procedures that have to be gone through for one given establishment. Nuisance legislation, physical planning, environmental protection and other regulations on considerations of public safety or public health are, however, very closely interconnected in their objectives. For this reason procedures for application for licences should not be organized entirely independently of one another, at least in these fields of legislation.

7.6.5. *GRANTING CONCESSIONS FOR NATURAL RESOURCES* (national reports, 2nd part, Chapter V, Section 6, §§ 5 and 6)

In view of natural circumstances and considerations of technical and economic rationality, only a limited number of operators can participate in the

prospecting for and above all the production of the principal subterranean natural resources (coal, petroleum, natural gas, the most important ores and a few other minerals like salt). Moreover, in both the production of minerals underground and in surface workings the legal relation to the owner of the surface must be regulated. Finally, guarantees for various Community interests tend to be created here. In this field all Member States therefore have more or less comparable general concession systems. In addition, the Dutch report mentions separate statutory concession systems for peat digging, draining and impoldering, excavations and water extraction, while the French report refers to a concession system for waterfalls (chutes d'eau). The Italian report also deals with the concession systems for the use of public land.

The most important differences in the legislation concern the regulation of the manner and extent of state participation in the working or the profit derived from it. This varies from an exclusive working right for hydrocarbon compounds (Italy) or coal (United Kingdom) for a state enterprise, via state participation rights in private operation (Dutch Mining Law for the Continental Shelf), to fixed royalties (the most usual system). Partly in connection with the proviso for regulation of the right of property in Article 222 of the Treaty of Rome, the Community will have to accept these differences.

On the other hand, from a Community point of view there must of course be supervision to ensure that in the granting of concessions there is no discrimination on grounds of nationality. Further, care must be taken that no conditions or obligations are imposed on the holders of concessions which lead to discrimination in accordance with nationality or to the favouring of certain groups of industrial customers. Finally, other conditions may exist with respect to marketing of the minerals produced that give rise to coordination problems. This will be reverted to when discussing the legislation in the field of energy policy (Chapter III.8.3 below).

7.7. *REGULATION OF SPECIFIC ASPECTS OF MARKET BEHAVIOUR* (national reports, 2nd part, Chapter V, Section 7)

The regulations discussed in this subsection contain notably rules with regard to market behaviour without which freedom of competition might have socially undesirable consequences for the competing business themselves or their employees, for other branches of industry or for customers. Other regulations primarily serve the transparency of the market. As all regulations dealt with in this subsection relate only to secondary aspects of market behaviour, then by definition they leave the principal possibilities of competition (with regard to quantity, quality, prices and conditions of delivery and payment) intact. Harmonization thus does not seem particularly urgent in general. The relative urgency of harmonization of certain aspects of this category is broadly indicated below.

7.7.1. *UNFAIR COMPETITION*

A separate study in depth has already been published on this subject with proposals for harmonization (Ulmer, The law on unfair competition in the Member States of the European Economic Community). It will therefore not be discussed at length here. On account of the close connection with cartel legislation, part of the legislation in this field has been dealt in various national reports under that category (Zacher, Nos. 427 to 443, Fromont, Chapter V, Section 5, § I). A distinction must be made between general rules in the field of unfair competition and special regulations on certain forms of market behaviour. Only the latter may be regarded as part of economic legislation in the narrower sense. Examples in most Member States are formed by the legislation on the opening hours of shops, on clearance sales and on giving extras, bonuses or discounts. In France and Belgium resale at a loss is also forbidden (Fromont, Chapter V, Section 5, § 1 to 2, and Schrans, VI F). In the United Kingdom the only specific legislation in the field of this subsection is that relating to shop hours. (Daintith, II.5.7.). Insofar as the specific regulations dealt with here relate only to the retail trade, differences may lead above all in the frontier districts to international distortion of competition. Harmonization of the legislation relating to the giving of presents seems the most urgent in this category, since in this field differences in legislation may also have consequences outside the frontier districts. One could envisage on the one hand gift campaigns in interstate trade (e.g. by producers or mail order firms), and on the other the harming of enterprises whose normal business is selling products given as presents.

7.7.2. *REGULATION FOR CONSUMER PROTECTION*

Some of the regulations dealt with under 7.7.1. serve to protect both competitors and customers. In addition, in all Member States there are rules for competition which serve primarily or even exclusively to protect customers. The regulations in hire purchase legislation aimed at consumer protection should be included among these. Others that belong to it are the French and Belgian bans on conditional sales and snowball sales systems (Fromont,

Chapter V, Section 7 I—3, and Schrans, VI F). The regulations for countering misleading of the public in the field of prices and qualities also form part of this group (Fromont, Chapter V, Section 7, II, Schrans, VI F, Daintith, II.5.8). Harmonization of legislation in these fields seems just as urgent as harmonization of the legislation on free gift systems.

7.7.3. *REGULATIONS FOR FURTHERING TRANSPARENCY OF THE MARKET*

Apart from the possibilities of laying down price indication regulations which occur in most Member States, in this connection mention should be made of the organization of trade fairs, public markets, produce, stock, insurance and freight exchanges and auctions (Zacher, Nos 414 and 415). As this subject — with the exception of the stock exchanges — has not been dealt with in most national reports, it will not be discussed further here. Discriminatory provisions in stock exchange regulations with regard to the negotiability of shares and other securities from other Member States must, of course, be done away with as part of the liberalization of the movement of capital. Regulations concerning the division of commodities into economic quality classes (commercial classification legislation) are dealt with only in the German report (Zacher, No 421). The latter group of regulations can naturally hamper imports of products from other Member States. See for the problems arising in this question Chapter III.7.8.2 below as well.

7.8. *REGULATIONS OF PUBLIC ORDER* (national reports, 2nd part, Chapter V, Section 8)

Under this heading the national reports in some cases discuss general regulations of private law, criminal law and police law, and also traffic and building regulations (Zacher, Nos 425 and 426). Also mentioned are special laws for countering fraud (Fromont, Chapter V, Section 8, II, Daintith, II.5.8) or for protection of public order and morals (Fromont, Chapter V, Section 8, III) or for protection of national art treasures (Fromont, Chapter V, Section 8, IV). On account of their great importance to Community coordination of economic policy or to the freedom of interstate trade, only two groups of regulations will be further discussed here. These groups comprise on the one hand the rules concerning protection of the environment and on the other product regulations on considerations of public safety or health. The product regulations relating to definition and economic quality can also best be dealt with in this connection (Fromont, Chapter V, Section 8, II).

7.8.1. *PROTECTION OF THE ENVIRONMENT*

Legislation for protection of the environment is already very highly developed in Germany (Zacher, Nos 427 to 443), the Netherlands (Dutch report, Chapter V, Section 8, § I) and the United Kingdom (Daintith, II.5.8.e). In France too, in addition to the general law of 1917 for the protection of the surroundings of industrial installations against nuisance, there is legislation in the field of air and water pollution (Fromont, Chapter V, Section 8, V). In Italy the basic law in the field of air pollution is still applied in practice only with respect to the heating of houses, while general legislation in the field of water pollution is still absent (Sacchi Morsiani, Chapter V, Section 8).

As remarked in the statement of 22 March 1972 of the Commission to the Council regarding a Community programme in the field of environmental protection, the latter problem confronts the Communties and the Member States with major new problems. In the first place, technical collaboration and coordination of the standards of permissible pollution is particularly necessary with regard to 'trans-frontier' air and water pollution. This requires — in various combinations — among other things close cooperation between the riparian states of the international rivers, the North Sea and the Mediterranean. As this cooperation will not always involve all Member States and will on occasion also involve non-member countries, it seems conceivable that the Communities will in part leave this technical cooperation to other bodies than Community institutions, with a guarantee of their vital interests. The connection with other aspects of Community policy does not seem so great here that the Community could not leave the details of the technical cooperation within the framework of general guidelines to other organization or forms of collaboration, for instance for the Rhine, the Meuse, the Moselle, the North Sea and the Mediterranean respectively. The same applies mutatis mutandis to the technical cooperation and coordination of measures in the field of air pollution by industrial installations. Again within the framework of certain general guidelines this can be largely left to bilateral cooperation between the Member States involved on each occasion. Air pollution and further polluting effects of marketable products will, on the other hand, have to be combatted by harmonization of the national regulations with respect to the products concerned. The measures to be taken in this respect will, after all, have to be geared to one another down to details, in order to avoid technical obstacles to interstate trade.

A second aspect of protection of the environment relates to calculation of the costs of the environmental protection measures. Here the economic

aspects prevail and the Community must therefore fully accept the responsibility in principle. Different principles in this field might lead to severe interstate distortion of competition in the conditions for establishment and production. In this respect the Commission concurs with the point of view that these social costs must be assigned to the products or activities that have caused the costs. However, in its proposal of 22 March 1972 the Commission rightly comments that the requirement of undistorted competition in no way requires complete harmonization of all air and water pollution standards. In view of the cumulative effects of international air and water pollution by industry coordination of the measures to be taken is definitely necessary to that extent. This has already been mentioned. Insofar as no external effects occur in other Member States, it is, however, a sound idea for the Member States to gear their measures to the differing degrees of air, water and soil pollution existing in the various territories of the Community. In that case these differences in measures cannot yield distortion of competition any more than other differences in natural conditions of competition.

In the third place, to EEC will, according to the Commission's proposal, have to take the environmental protection aspect into account in its common commercial, agricultural and transport policy. The same applies to its supervision of national aid measures, social policy, investment policy in the associated developing countries, energy policy, regional policy, industrial policy and policy with regard to research and development.

Finally, it is clear that the problem is also of special importance to the other two Communities. In connection with previous parts of this report, it seems useful also to point to two more general aspects. The first is the close connection between protection of the environment, physical planning and regional policy that should exist not only in an economic and technical sense but also in an administrative sense. A large number of measures, prohibitory standards and licensing systems and other mandatory regulations on the one hand and measures of aid, charges and other financial measures on the other must be combined into a well-coordinated and efficiently organized body of measures. Presumably in this connection central coordination of policy (at Community and national level) will have to be accompanied by a usually highly territorially decentralized implementation. The powers in some of the fields of policy mentioned, notably that of physical planning and nuisance legislation, can hardly be used with full knowledge unless this is done at a very local, decentralized level. Probably the combination with regional or national procedures for obtaining licences can also be best organized at this level. In this connection reference has already been made to British experience. In the Netherlands the coordination of the application of the various licensing systems with respect to the establishment of very large firms is organized by what is called a 'covenant procedure' (Dutch report, Chapter V, Section 8, I, III—9). In this procedure the various agencies concerned with establishment agree on the same line of conduct.

The second general aspect relates to the connection with medium-term economic policy. Protection of the environment makes a relatively heavy call on national income and as a rule the costs are passed on in the prices. Environmental protection will therefore tend to raise prices. It is of essential importance that it does not further aggravate inflation indirectly via wage indexation and that allowance is made for the claims of environmental protection in the growth of other categories of expenditure. This can best be considered as part of medium-term economic policy, and it once again underlines the necessity of calling in management and labour. For here both growth policy and incomes policy are at stake.

7.8.2. *COMMODITY LEGISLATION*

Most of the reports contain brief data (the Dutch report goes into detail) on the general statutory framework in which regulations relating to the composition, the designation, the packaging and the use of certain products can be promulgated for reasons of public health or safety, sometimes also for reasons of consumer information or rationalization. Differences between the standards laid down and the method of supervision may, as the reader will be aware, lead to very considerable obstacles to interstate trade, and it is therefore understandable that the harmonization of this kind of regulation forms the most extensive part of the Community's activities for the harmonization of legislation.

The technical and methodical problems arising in these harmonization activities cannot be discussed here. From a legal point of view three distinctions seem of particular importance. The first distinction is that between regulations of public order, which *are* allowed by Article 36 of the Treaty of Rome to hamper imports or exports, and commercialization regulations of a different, notably economic kind, which are *not* allowed by that article to hamper exports or imports. In the first case only harmonization of legislation under Article 100 (or 43) of the Treaty of Rome can present a solution. In the second case recourse may also be had to Article 30 or Article 36. Otherwise than one might expect on the strength of the text of Article 36 at first sight, successful action can also be taken before the competent court against much of the import-hampering

effect of the legislation on industrial, commercial and intellectual property on the strength of Article 36 or 85 of the Treaty of Rome. On this point there is an extensive jurisprudence of the Court of Justice, to which reference may be made. The second distinction is that between on the one hand mandatory regulations of public order and on the other indirectly mandatory standardization of qualitative regulations worked out by private organizations. The latter standards may acquire an indirectly binding character for instance because the authorities, functioning as a principal, refer to them (Fromont, II—5.8.B.b). Even if the authorities make these standards binding but leave the laying-down of them to private organizations, the obstacles to interstate trade proceeding from differences from country to country cannot simply be eliminated by harmonization of the legislation under Article 100 of the Treaty of Rome. Rather, it is primarily of importance here that the private standardization institutions of the various Member Stats arrive at harmonization of the standards or at Community standards. Consequently, development is in that direction. Meanwhile, a closer comparison seems desirable with respect to the legal protection existing in the various Member States against actually discriminating standards of the private institutions. It appears from a recent German publication that gaps can easily come into being on this point (Ulrich, Rechtsschutz gegen überbetriebliche Normen der Technik, Ferdinand Enke Verlag, Stuttgart 1971). The third important legal distinction is that between the harmonization of the content of the material standards and the solutions of the problems of the competence of the national authorities in their application. The principle of territoriality with regard to actions by the authorities means that only a system of joint recognition of acts of control and administrative orders can prevent double checks or no checks at all, which in their turn tend to hamper imports.

8. **Mandatory sectoral regulation** (national reports, 2nd part, Chapter VI)

8.1. *AGRICULTURE AND RELATED SECTORS*

The most regulated sector in all Member States is agriculture. The material content of the national policy of market regulation is largely determined by Community agricultural policy. For this sector the national reports are therefore particularly of importance for obtaining a rough idea of agricultural structural policy, which is still very inadequately harmonized. They are also of importance for obtaining insight into the very different ways of implementing the common agricultural policy. Mandatory regulations of importance to the structural reforms in agriculture may be found:

in the Netherlands notably in the Agricultural Holding Law (report, Chapter VI, Section I, § 2) and the Land Consolidation Law (report, Chapter VI, Section I, § 3);

in France notably in leashold legislation, the legislation on the inheritance of agricultural land, supervision of and encouragement of the expansion of farm size (Fromont, Chapter VI, Section 1, I and II) and the legislation on the various forms of cooperation between farmers (Fromont, Chapter VI, Section 1, III);

in Germany notably in land legislation and within the framework of aid measures (Zacher, No 454) while;

in Italy structural policy seems to be conducted almost exclusively by means of aid measures (Sacchi Morsiani, Chapter VI, III).

Of course measures of assistance also play an important part in agricultural structural policy in the other Member States, but in this subsection the mandatory sectoral regulations are primarily considered.

The national reports confirm the impression that the mandatory instruments of structural policy are most developed in France.

Two further remarks also seem important within the context of this study. In the first place, in most Member States so many different aspects of agriculture are regulated that it is of great importance to coordinate the effects of the various regulatory measures.

Market regulations has its effects on structural development. Conversely, the different structural measures can influence market conditions and in certain circumstances distort them. The structural policy of the Member States will therefore have to be much more strongly coordinated at Community level. This applies in particular to all the different kinds of measures of assistance, since this instrument occupies a very important place in all Member States. However, attainment of the Community's objectives in the field of farm size may for instance also be hampered by leasehold law and land legislation. This too may give rise to unequal conditions of competition. The second remark concerns the importance of the agricultural sector and the relation between agricultural market policy and inter alia monetary policy, common commercial policy and general income distribution. These factors, and also the connection between agricultural structural policy and regional industrialization policy and protection of the

environment, make it an urgent matter that agricultural policy as a whole be fitted better than up to now into medium-term economic policy.

8.2. *TRANSPORT*

The second sector highly organized in all Member States is that of transport. Within this overall report reference must be made to the national reports for the fairly considerable differences between the national legislations. As is the case for agriculture, the Treaty of Rome offers a clear legal basis for a common policy on this. However, in practice this common policy is still very inadequately developed. This is harmful not only for a rational international division of work in this important service sector itself but also for the optimal development of interstate movement of goods. It further gives rise to sometimes considerable distortion of competition. For general economic and monetary policy at Community level, transport policy is important above all in connection with regional policy.

8.3. *ENERGY*

For the differences in legislation in this sector too reference may be made to the national reports. Coordination of the general energy policy of the Member States as part of a common energy policy is, on the strength of the Treaties, possible only on a strongly liberal basis, but does entail the need for a fairly large number of harmonization measures. Certainty of long-term supply at the lowest possible price, equal access of all customers to the primary sources of energy and equivalent rules for competition between the various kinds of energy should be the principal objectives here. On account of the great dependence on imports, the common commercial policy in this sector will have to play an important role vis-à-vis the producing countries. It is also the condition for the final adjustment of the French regulations governing crude oil. In the event of a shortage of certain forms of energy Article 103, paragraph 4, allows of every necessary degree of shortage measures. However, up to now it has not been necessary to go further than laying down regulations in the field of stockbuilding. Measures of intervention with regard to investment policy can if necessary be based on Article 235 of the Treaty of Rome. The same applies to the encouragement of new initiatives in the fields of exploration and working.

Between energy policy and medium- and long-term economic programming there is again a very obvious link. The possibilities of growth of the economy of the Member States after all depend in part on the possibilities of the energy supply. There are also close ties with the problems of protection of the environment, transport policy, industrial policy and other aspects of Community policy. Finally, a difference in energy prices leads to sometimes severe distortion of competition.

8.4. *OTHER SECTORS*

Other sectors for which in the section on binding sectoral regulations of the national reports a comprehensive, interrelated policy is stated are:

(a) house-building (Fromont, Chapter VI, Section 4, Zacher, No 456);

(b) the pharmaceutical industry (Fromont, Chapter VI, Section 5, Sacchi Morsiani, Chapter VI, VI);

(c) the press and cinema (Fromont, Chapter VI, Section 6);

(d) crafts (Zacher, No 446);

(e) credit and insurance (Zacher, No 451, Sacchi Morsiani, Chapter VI, Section 6, IV and V).

But in fact non-economic motives form the basis for the mandatory provisions in the first three sectors, for (a) reasons of urban planning, public health and safety, for (b) motives of public health, for (c) considerations of cultural policy. The economic objectives of sectoral development are mainly pursued in these sectors too by means of measures of assistance. German craft legislation seems to have been inspired more by the professional ethics of the old guild system than by considerations of rational economic policy. In Germany and Italy too the legislation on credit and insurance is not primarily directed towards the development of these sectors as such, but rather towards the protection of public interests or — in the case of the banks — their use as an instrument of monetary policy. It has already been remarked above that Community coordination on the first point will have to be effected within the framework of the realization of the right of establishment and the free movement of services in this sector. The coordination problems with regard to the instrumental function of the banking system have already been discussed in another connection.

8.5. *CONCLUDING REMARKS ON SECTORAL POLICY*

The German report in particular states a number of mandatory measures for other fields of industry, trade and services than the ones mentioned here. However, these are too individual to make it pos-

sible to speak of a real sectoral policy in respect of them. Summarizing the entire situation emerging from the national reports, mandatory regulations are obvious exceptions as instruments of a coherent sectoral development policy. They occur above all in the sectors of agriculture, transport and energy. The limited use that the ECSC has made of its mandatory powers of regulation in the coal and steel sectors also seems to confirm that as a rule mandatory regulations do not form an essential instrument for sectoral policy. The instruments of indicative planning, aid and programme contracts are of much greater importance.

Sectoral policy at Community level — especially in the case of strongly intergovernmental procedures — encounters special problems proceeding from the conflicting interests of the Member States. As mentioned above, it can hardly be expected of a national minister that he sacrifices his less efficient national enterprises for the sake of a better international division of work. Consequently, he will not be readily prepared to cast his vote in favour of coordination measures resulting in that. This drawback makes itself felt the most strongly when mandatory measures are taken for that purpose. As long as the concrete elaboration of sectoral policy cannot be left to a supranational body which bears responsibility only for the interests of the Community as a whole, it will therefore be difficult for an efficient Community sectoral policy to develop. Not only on the strength of the 'Wirtschaftsverfassung' of the European Communities but for this practical reason too the optimal division of work in the common market will therefore have to be left as a rule to the operation of the mechanism of competition. Only in the few sectors in which the interests of most of the Member States run parallel can a better sectoral structure be expected of a common sectoral policy. In the other cases the measures of assistance and programme contracts of the Member States will have to be coordinated by the Commission with the primary aim of preventing distortion of competition to the disadvantage of certain Member States. This will also have to be the main aim in the supervision or harmonization of mandatory national regulations.

9. Enforcement of economic law
(national reports, 2nd part, Chapter VII)

It emerges from the national reports that the sanctions for ensuring that mandatory regulations of economic law are complied with differ quite considerably in the Member States. These differences relate among things to the degree of specialization of economic penal law, the nature and extent of the sanctions, the liability of corporate bodies to punishment and the significance of administrative and civil-law sanctions in addition to penal sanctions. From a Community point of view these differences may present considerable drawbacks above all in offences against Community law or against national mandatory law harmonized by the Community. This is of importance for instance to Community legislation in the field of agriculture or transport, common customs legislation and the harmonization of technical regulations with regard to the composition of products. Community regulations in these fields lose much of their value as a guarantee of equal treatment of all Community enterprises if broadly the same sanctions for the same offences are not guaranteed. Moreover, difficulties of detection and prosecution may occur when the enterprise is established in a different state from the one in which the offence was committed.

Harmonization of the severity of the sanctions actually applied cannot, of course, be achieved solely by harmonization of the statutory possibilities of sanction. However, this does not exclude the possibility of harmonization of the definitions of offences, requirements of guilt, punishments and further sanctions being of importance to a uniform sanctioning of all standards of Community law or national law based on Community law. Viewed in the long term, it may perhaps prove necessary to extend the area for which Community law itself regulates the sanctions and where Community organizations also apply these sanctions themselves. An intermediate solution would be to authorize a Community organization to appeal to the Court of Justice against national court judgments after sufficient harmonization of national sanction law with respect to offences against EEC law (or national law derived from this). In the field of prosecution it may perhaps be necessary in the long run in some cases to create a right of denunciation for a Community organization.

However, the most urgent priority seems to be the more efficient regulation of the division of powers between the Member States in sanctioning. By better cooperation in detection, prosecution and the execution of sentences, by amendment of the applicable principle of territorialiy in penal legislation in favour of the country of establishment, or by a combination of such arrangements, the difficulties of effective sanctioning arising from the applicable principle of territoriality ought in any case to be eliminated.

10. Legal protection
(national reports, 2nd part, Chapter VIII)

Regulation of the legal protection of enterprises and individuals against the authorities also proves to vary greatly in the legislation of the Member

States. The differences relate inter alia to the division of powers between administrative courts and ordinary courts, the degree of specialization of administrative law in the economic field, the kinds of legal acts against which an appeal may be made, the grounds for appeal and the nature of the decisions that the various courts may make. Thus the competence of the Italian court is confined to a strict check on legality. One gains the impression from the various national reports that the readiness of the court to restrict the freedom of decision of the authorities in the economic field differs quite considerably. According to the reports on France and the United Kingdom, this readiness is relatively small in the countries mentioned.

All these differences are in turn important from a Community point of view above all to the extent that verification against Community law is involved. For the question of the extent to which the statutory and practical differences in the regulation of legal protection has also led in practice to an unequal degree of legal protection in the original Member States, reference should be made to the reports of the 1973 FIDE congress in Luxembourg. In anticipation of this comparative study of jurisprudence in the Member States on Community law and the ensuing discussion, it does not seem appropriate as yet to formulate recommendations for this.[1]

[1] See for this in particular the *General Report for the sixth international congress for European law* (Luxembourg, 24-26 May 1973) by P. Verloren van Themaat on jurisprudence with respect to a European economic order.

CHAPTER IV

Summary and principal recommendations

1. Summary of the preceding chapters

Purpose and method of the study

1. It is examined to what extent, for the establishment of a common market and for the realization of an economic and monetary union, harmonization of the economic law of the Member States is necessary and how this harmonization can be achieved. The development of the Communities' own economic law comes up for discussion only indirectly (Chapter I.1).

2. Both the establishment of a common market required by Article 2 of the Treaty of Rome and the coordination of economic policy required by that article call for numerous measures of harmonization or coordination of national economic law. While the establishment of a common market usually requires lasting and binding common standards, this is much less the case with respect to the coordination of economic policy. This leads to new institutional problems (Chapter I.1).

3. Both for the comparative analysis of the economic law of the Member States and for the analysis of the economic law and the instruments of coordination of the European Economic Community, the planning typology by Professor Zijlstra, published by the Commission in 1966, proved to be a usable point of departure. After a few adaptations of the typology to the objectives of the present study, both the economic law of the Member States and the instruments of coordination of the Treaty of Rome were divided into the following eight groups of instruments:

1. economic forecasting;
2. indicative short- and medium-term planning, supplemented by overall and indirect instruments for attainment of the objectives set;
3. measures of assistance;
4. programme contracts;
5. mandatory regulations;
6. sectoral legislation;
7. enforcement of the law and
8. legal protection (Chapter I.3 and I.4).

The unity of the national systems of economic law

4. In the Community activities of coordination in various fields of economic law, the cohesion displayed by each national system of economic law may not be lost sight of (Chapter II.1). In this respect the following are particularly important:

— the varying role of older historical strata in current law (II.2);

— the considerable extent to which in some cases either the market economy idea or the orientation by a five-year plan proves to permeate the whole economic law of a country (II.3, 5 and 6 and the whole of Chapter III);

— the greatly differing state organizations and further institutional provisions (Chapter II. 5—9 and Chapter III.2);

— the greatly differing importance of constitutional rules and differently based general principles of law to economic law (Chapter II.5, II.6 and II.7);

— the extent and manner of participation of management and labour in economic policy (Chapter II.5—9);

— the degree of statutory definition of economic policy and the importance of legal protection against the authorities (Chapter II.5—9);

— the special importance of the public sector of the economy as an instrument of economic policy in Italy (Chapter II.7);

— the independent position of the Central Economic Planning Office and the great variety of forms of participation of management and labour in economic policy in the Netherlands (Chapter II, 8.3);

— the influence of the two-party system on economic law in the United Kingdom as a promoter of discontinuity (Chapter II.9).

Besides points of divergence from the national systems, points of increasing convergence between the national systems as a whole are noted, especially on the important point of the economic order pursued, the relation between 'market' and 'plan'.

Economic order, legal order and institutional order

5. Above all on institutional grounds, but also having regard to the development trends in the Member States, Community policy should be directed primarily towards completion and maintenance of the common market and coordination of the macro-economic policy of the Member States. Nevertheless, this optimal economic order outlined in the Zijlstra report for the Community now deserves some amplification. The quantification and coordination of national objectives should now be extended to all general, economic and social objectives mentioned in the third programme for medium-term economic policy. Furthermore, measures of assistance have now assumed such proportions in all Member States that systematic coordination at Community level will gradually have to acquire more weight vis-à-vis the individual appraisal of competition-distorting effects. Finally, all Member States have now had the experience that 'Globalsteuerung' must also be accompanied by more direct measures for certain subjects or in certain circumstances. These measures will have to be coordinated at least broadly, but in many cases also in detail at Community level (Chapter II.10.1 and III.1).

6. The tendency towards greater statutory definition of economic policy and towards the compilation of five-year plans evident in various Member States deserves to be encouraged in all Member States from a viewpoint of Community coordination (Chapter II.10.2 and conclusions 14 and 20 below).

7. In view of the experiences in the Member States, for the success of the coordination of short- and medium-term economic policy special attention will have to be paid to the participation of the European Parliament and of management and labour (Chapter II.10.2 sub b).

8. Harmonization of all mandatory implementing regulations of economic laws directed towards short-term adjustment of economic processes seems out of the question for political, institutional and practical reasons. Policy here will have to be directed more towards overall coordination of the practical effects. Mandatory harmonization of legislation will be more possible and necessary with respect to lasting mandatory implementing regulations of national basic laws (Chapter II.10.2 sub d).

9. For the coordination of the more overall and indirect national economic measures in the medium-term, including measures of assistance and programme contracts, the Community programmes for medium-term economic policy will increasingly have to form the general framework (Chapter II.10.2 sub d).

The central economic objectives

10. Only in Germany are the central economic objectives laid down by law — in part even constitutionally. Germany, the Netherlands and the United Kingdom lay somewhat more stress on the objectives of stability. Belgium, France and Italy somewhat more on the objectives of growth. These differences in emphasis on objectives are accompanied by different views with regard to the relation between short-term economic policy and medium-term economic policy. The social objectives of the Member States that are economically relevant on account of their call on national income run parallel with regard to their nature, as appears from the third medium-term economic programme. It is argued that the quantification and Community coordination must be extended to these social objectives. Otherwise, both the attainment of those objectives themselves and the realization of a monetary union and the maintenance of the common market are endangered (Chapter III.1).

Differences in state organization

11. Provided that the Member States guarantee that autonomous decentralized agencies also observe Community law, the differences in state organization between the Member States do not form a hindrance to the necessary coordination of economic policy (Chapter III.2).

The organization of economic forecasting

12. The organization of economic forecasting in the various Member States displays considerable differences. It is argued that, in view of the experien-

ces in the Member States and the Communities, it is necessary for technical reasons and to strengthen the effectiveness of coordination of the economic policy of the Member States to entrust forecasting at Community level to an independent body. This must, however, cooperate closely with national independent bodies in this field (Chapter III.3).

Overall economic policy in the short- and medium-term

13. Following the relevant French ideas on this matter, it is argued that short-term economic policy should serve the objectives of medium-term economic policy. Short-term economic policy must consist in short-term adjustment measures so as to safeguard the medium-term objectives. There are not only economic but also strong legal arguments for this (Chapter III.4.2).

14. The preceding conclusion means that all Member States should introduce medium-term programming. The structure of this, notably a listing of the objectives to be quantified, should under Article 235 of the Treaty of Rome be harmonized in connection with conclusion 10. With regard to the quantification itself of the various objectives, considerable national variations may be admitted subject to the broad coordination stated under point 10 of this summary (ibid.).

15. In medium-term planning in Germany, France and Italy the legislator participates; in Italy, indeed, by constitutional rule. The objectives, procedures and legal nature of the five-year plans in these Member States display a number of differences. Germany has a legally prescribed five-year planning of public finance, but in practice in addition informal five-year projections for the whole economy. The actual situation in the Netherlands and the United Kingdom is closest to that in Germany. Against the background of the situation in the Member States it is understandable that Community coordination of the economic policy of the Member States has made the most progress with respect to external economic policy. It is argued that, on the strength of what is remarked under 13 and 14 and in view of the recent developments in Germany, the Netherlands and the United Kingdom, this coordination can and must be extended to medium-term budgetary policy. It must moreover be performed against the background of more comprehensive medium-term plans (Chapter III.4.3).

16. Short-term programming, with differences between the two versions, is the furthest developed in the Netherlands and Germany, where it has a statutory basis, particularly strongly developed in Germany. However, the other Member States also have one-year plans or forecasts. With the exception of Italy, all Member States in addition have a short-term economic policy that may clearly be distinguished from medium-term policy and which is directed towards the fundamental short-term equilibria. As regards the instruments of short-term economic policy, budgetary policy and other overall and indirect instruments everywhere occupy a central position. Considerable differences relate above all to wage and price policy. In France the whole range of instruments of economic policy is also available for short-term economic policy. Community coordination of short-term economic policy may be of a binding nature for the Member States under Article 103 of the Treaty of Rome. Having regard to the views on this existing in the various Member States, the coordination will have to relate primarily to budgetary policy and other overall and indirect instruments. However, a coordination restricted to this would endanger the necessary public services. For this reason various legal methods are also recommended for getting a hold on the development of wages and other incomes and their spending, without entering into conflict with the fundamental views on this question in the Member States (Chapter III.4.4).

17. The most important overall instruments of economic policy in all Member States, with the differences in emphasis stated in Chapter III.4.5, are budgetary policy, taxation policy, the policy with respect to public investments and monetary policy. In Germany foreign economic and monetary policy also plays a big part in maintaining price stability. In the Netherlands there is also an endeavour to arrive at macro-ecenomic programme contracts with the central organizations of employers and workers. The most important legal problems indicated for Community coordination relate to the decentralized territorial authorities, the statutory basis of the expenditure policy of the Member States and the statutorily established degree of independence of the Central Banks. The report contains recommendation for solutions to these problems. The last-mentioned problem is of essential importance to the functioning of the system of central banks aimed at by the Communities (Chapter III.4.5).

The public sector of the economy

18. In view of the situation as described in the Member States and under Article 90 of the Treaty of Rome as interpreted by the Court of Justice, the Commission should follow a more active policy of coordination with respect to the public sector of the economy than it has done so far. Nor can this policy of coordination be directed exclusively towards countering distortion of competition and other direct and indirect infringments of the provisions of the Treaty with regard to the establishment and

maintenance of the common market, though this aspect will have to be to the fore in supervision. In exceptional cases, however, the coordination can and must be directed as well towards accordance with the objectives of Community coordination of the economic policy of the Member States (Chapter III.4.6).

19. The last important indirect instrument of economic policy dealt with in the national reports is that of the public markets (marchés publics). Community policy in this field must continue to be directed as before towards countering discrimination on account of nationality. An instrumental use of the public markets coordinated in exceptional situations will have to respect this principle of non-discrimination (Chapter III.5).

Measures of assistance

20. After a summary of the relevant situation in the Member States, the following recommendations in particular are made with regard to measures of assistance. In the first place, from the viewpoint of coordination, on account of the discretionary nature of the greater part of aid policy, it is of great importance that the Member States lay down certain general lines of policy for the application.

In the second place, the supervision by the Commission under Articles 92 and 93 of the Treaty of Rome will, it is true, have to be aimed primarily at countering distortions of competition. With respect to regional measures of assistance and aid measures occurring in all or practically all Member States in favour of certain branches of industry, this countering of distortion of competition will, however, have to be accompanied to an increasing extent by rationalization and harmonization of the national measures. In the third place the transparency and national and Community cohesion of aid policy will have to be furthered in the framework of national and Community indicative five-year plans. The Community itself will have to use the instrument of aid above all more strongly than up to now in the field of regional policy, but in two specified situations also in the field of sectoral policy. With regard to the legal basis of Community measures of assistance a compromise is recommended between the Belgian, French and Italian views on the one hand and the British, German and Dutch views on the other on a basis of the Italian constitutional provisions as explained in the Italian report (Chapter III.5).

Programme contracts

21. Reference is made to the new possibilities and difficulties entailed for the Communities by the instrument of programme contracts developed above all in France and Belgium. From the legal point of view, Community supervision of programme contracts presents special difficulties. Only programme contracts connected with measures of assistance can be coordinated under Articles 92 and 93 of the Treaty of Rome. Programme contracts connected with exemptions from price regulations and other generally binding prescriptions may perhaps have to be coordinated under Article 101. The question of the extent to which Article 90 also qualifies for application deserves closer study (Chapter III.6).

Mandatory regulations of economic law. Decentralized agencies with mandatory powers

22. In addition to the principal central and territorially decentralized general political agencies, public representative bodies of business or professional life play a part in the creation or implementation of mandatory regulations of economic law. In Germany, Italy and the Netherlands the Chambers of Commerce and Industry must be mentioned first of all in this connection. Reference is made to the legal problems that may arise here from a viewpoint of Community coordination and their possible solution. The same is done with regard to the public — in France also private — agencies or institutions that exist for certain sectors of trade and industry in France and the Netherlands. On the strength of the view existing in Germany that the responsibilities of private enterprise and the authorities must be separated as much as possible, that country does not have any parallels to the forms of organization existing in France and the Netherlands with respect to individual sectors. On the other hand, horizontally and functionally deconcentrated state organizations with a great measure of independence ('superior federal authorities') play a much more important role in Germany than in other Member States. However, Germany — like Italy — does have public organizations for liberal professions and for crafts with mandatory powers in the field of professional discipline. In all these cases too similar legal problems arise from a Community viewpoint to those presented by the Chambers of Commerce and Industry in Germany, Italy and the Netherlands. Community harmonization of the statutory organizations for individual sectors or occupations seems from a Community point of view unnecessary and, in view of the greatly differing national situations, impossible. It seems more feasible to aim at Community-regulated private organizations in sectors with a highly developed Community policy. These could then, as in France (and with respect to qualitative requirements and the auction system, in the Netherlands too), be

called upon to assist in implementation of the policy. It is therefore understandable that, above all in the field of common agricultural policy, an endeavour in this direction can in fact be observed (Chapter III.7.1).

23. With regard to the *price stability* to be pursued, on the strength of the arguments stated in the report the objectives to be attained must be coordinated, but not the instruments to be used. In particular harmonization of mandatory price regulations is not necessary. However, care must be taken that national price regulations applied do not conflict with mandatory Community law (Chapter III.7.21).

24. The coordination of short-term economic policy in the field of *income* development cannot be directed either towards direct mandatory intervention in wage increases. For indirect possibilities of influencing income development, see Chapter III.4.4. However, it will be possible mandatorily to restrict the spending of private incomes in favour of public services or as part of a general restriction of expenditure by regulating hire purchase or by fiscal or semifiscal measures. If incompatibilities occur, the national mandatory measures can and must be coordinated mandatorily at Community level under Article 103 of the Treaty of Rome. However, the powers of coordination regarding this aspect seem incapable of use without a greater influence of the European Parliament and management and labour on the establishment of the main outlines of economic policy (Chapter III.7.2.2 and 7.2.4).

25. Mandatory regulation of the *credit system* for reasons of short-term economic policy is already possible in all Member States. It is recommended that an investigation be carried out to ascertain to what extent harmonization of legislation is necessary for an effecitve coordination of the use of this important instrument of short-term economic policy. In any case this will be necessary as regards the bodies authorized to apply it. In the interests of Community coordination the Central Bank should always have a minimum of powers of its own in this respect. Mandatory coordination of mandatory short-term economic measures ought to be applied here too by the Council of Ministers under Article 103 of the Treaty of Rome. However, efforts must be made to have the coordination of the informal policy, which is more important in practice, performed by the system of central banks being aimed at. Furthermore, coordination of the regulations regarding supervision of the conduct of bank business for the protection of the public will be necessary under Article 57, paragraph 2, and Article 66 of the Treaty of Rome. However, it does not seem necessary with respect to this supervision too to prescribe mandatorily that implementation of the legislation must be entrusted to the Central Banks. Finally, the report deals with the problems of coordination arising with regard to regulation of competition between the banks and with respect to the use made of them in a selective credit policy. It is argued that in essence the same kind of problems are concerned here as in competition policy in general (Chapter III.7.2.3).

26. On the question of *legislation for situations of shortage,* preventive coordination seems desirable with respect to the reserve legislation existing in at least four Member States for shortages in emergencies. As the legislation in question usually allows of complete control of the distribution of goods, it forms a potential impairment of the free movement of goods between the Member States. It is advocated that, by consultation as referred to in Article 224 of the Treaty of Rome, solutions be sought in advance which assure the continued survival of Community solidarity and interstate trade even in emergencies as mentioned in that article. In other situations of shortage than those stated in Article 224, the Council can exercise regulatory power under Article 103, paragraph 4. Use has also repeatedly been made of this power already (Chapter III.7.3).

27. Mandatory regulations with regard to *foreign trade and foreign payments* will first of all not be permitted to conflict with the Community regulations in the field of the four freedoms, the harmonization of legislation (including customs legislation) and common commercial policy. As the latter must take the place of the foreign commercial policy of the Member States, on this point no coordination problems occur in the sense attached to this in the present report. However, the situation is quite different with respect to coordination of the regulation on capital transactions. This will have to be done within the Community in close connection with the coordination of the rest of monetary and economic policy. This coordination will have to be accompanied by a fairly large number of directives for the harmonization of legislation under Article 100. For this reference may be made to the various publications and proposals of the Commission in connection with the establishment of a common capital market. Both Article 70 of the Treaty of Rome and the resolution of March 1971 regarding the realization of an economic and monetary union also require coordination of capital transactions with non-member countries. In this connection exchange legislation will also have to be harmonized in such a way that the system of central banks to be set up can coordinate the application. (Chapter III. 7.4).

28. *Cartel legislation* and its application in the various Member States and the influence of views on cartel policy on other aspects of economic law and economic policy of the Member States prove to display great differences. However, it is argued that from the material point of view sufficient unity of

policy can be achieved on the strength of the rules for competition of the Community treaties, though in this connection a system of conflict settlement of a procedural kind is advocated. While Community medium-term planning must be more strongly developed than is the case at present in Germany, the Netherlands and the United Kingdom, the Community will, as a counterpart, have to follow a relatively stringent anti-cartel and anti-monopoly policy. This policy will have to be gradually extended to the most important national forms of cartel too. In addition to more general arguments, economic, institutional and legal considerations applying specifically to the Communities favour such a policy (Chapter III.7.5).

29. The legislation of the Member States with regard to *physical planning* likewise proves to display great differences. It is recommended that the coordination between physical planning, regional economic policy and protection of the environment be strengthened in all Member States and that in this connection a closer study be made of British and French experience in this field. The expectation is further voiced that the three aspects of economic policy mentioned will increasingly lead in interrelation to licensing systems. These may in particular limit the freedom of choice of location. From a Community point of view there would seem in principle to be no objection to such a development (Chapter III.7.6.1).

30. Licensing systems for *foreign investments* for reasons of general industrial policy or sectoral policy exist solely in France and Italy. From a Community point of view a harmonization of policy on this point vis-à-vis non-member countries does not seem urgent. Primarily it is important to ensure that the same possibilities of establishment in the various Member States exist for the subjects of the various Member States and that a common capital market is created (Chapter III.7.6.2).

31. Quantitative restrictions of *domestic investments*, prove to occur only exceptionally and even then not in all Member States. In practice they are always connected with a more comprehensive sectoral policy for the branch of industry in question. From a Community viewpoint too it will be possible to aim at them only in such a framework and even then only most exceptionally. In sectors with purely local markets quantitative restrictions on establishment present problems from a Community viewpoint mainly in connection with the right of establishment (Chapter III.7.6.3).

32. *Qualitative establishment requirements* play a much bigger part in most Member States than quantitative restrictions on establishment. The principles of freedom to conduct a business valid in Germany and France have led in those countries to a greater reticence than in Belgium and the Netherlands in this respect. However, this German-French reticence is less valid with respect to the application of non-economic criteria of public order. In Belgium, the Netherlands and Italy it is precisely economic criteria that play a bigger part. In its turn, the situation in the United Kingdom is more like that in Germany and France. The distinction between countries where establishment legislation is based primarily on considerations of public order and countries where it proceeds primarily from economic objectives sometimes proves to be connected with principles of law that were already laid down in the nineteenth century. The distinction has important consequences from the point of view of scope, technique and systematic arrangement of the legislation. The distinction, based on fundamental differences of opinion, forms an obstacle difficult to surmount for coordination of the right of establishment as prescribed in Article 57 of the Treaty of Rome. It is therefore recommended that the pragmatic approach of the Commission and Council be continued, a number of concrete suggestions being made (Chapter III.7.6.4).

33. In view of Article 222 of the Treaty of Rome, extensive harmonization of the *concession systems* for natural resources existing in the Member States is not possible. However, in this field of legislation too the principle of non-discrimination should be respected. For this purpose suitable directives on the procedures to be followed can be promulgated (Chapter III.7.6.5).

34. Harmonization of regulations on *specific aspects of market behaviour* that leave the principal possibilities of competition intact does not seem very urgent as a rule. Chapter III.7.7. deals with the situation in the Member States regarding this fairly extensive field of legislation and the resultant problems for the Community. A number of recommendations are also made on the priorities to be observed in harmonization proposals.

35. With regard to *protection of the environment* the Community will above all have to assume responsibility for the principles of allocation of costs and the harmonization of regulations with respect to marketable products. With respect to technical regulations for industrial and other permanent installations, a broad Community coordination of the criteria to be applied seems necessary, but not an extensive harmonization of the implementing regulations. Insofar as no external pollution effects occur in other Member States, it seems sounder for the Member States to gear their measures to the differing degrees or air, water and soil pollution existing in the different territories of the Community. Reference may be made to the Commission's proposals for this. A number of comments are added

for the connection with physical planning and regional policy. Mention is again made of the need for good coordination of licensing systems operating side by side (Chapter III.7.8.1).

36. The various legal problems arising with the necessary harmonization of *commodity legislation,* based on considerations of public order, are discussed in Chapter III.7.8.2.

37. A coherent *sectoral policy* with mandatory regulations occurs in the Member States solely in the sectors of agriculture, transport and energy. The sections in the national reports on sectoral policy seem to confirm that outside these three sectors mandatory regulations do not as a rule form an essential instrument for sectoral policy. Much more important for this are the instruments of indicative planning, aid and programme contracts. In principle these instruments can also be applied at Community level. However, sectoral policy at Community level — especially in the case of strongly intergovernmental procedures — encounters particular difficulties proceeding from conflicting interests of the Member States. Coordination of the development of the various sectors will therefors have be left to the market as a rule.

Apart from a few exceptions, the policy of the Community institutions will thus have to be aimed primarily at countering distortion of competition. However, the Commission will to a gradually increasing extent have to counter distortion of competition by coordination and rationalization rather than by abolition of measures of assistance (Chapter III.8).

38. Finally, attention is devoted to the important matters of coordination in the field of application of *sanctions* and *legal protection* (Chapter III.9 and 10).

2. Principal recommendations

1. The most important conclusion from the study is that the shaping of medium-term macro-economic policy of the Member States must be harmonized overall and that Community coordination of this policy must be strengthened. This harmonization and reinforced coordination of medium-term economic policy form the necessary basis for an effective short-term economic policy and for the necessary cohesion between the various aspects of the economic policy of the Communities.

2. An effective Community short-term economic policy will, on the strength of the situation encountered in the Member States, have to make use in the main of overall and indirect instruments. Harmonization of mandatory regulations in this connection is not possible and not necessary with regard to control of wages and prices. Harmonization or coordination of legislation *is* necessary with respect to the powers of the central banks, the legislation on the credit system and the capital market in general, and it may also be necessary with respect to mandatory restrictive measures relating to the most important categories of expenditure of national income. Short-term economic policy will have to be aimed at ensuring the fundamental equilibria of Article 104 of the Treaty of Rome by measures of adjustment in such a way that attainment of the medium-term objectives is not endangered. The effectiveness of the measures to be taken should be guaranteed by comparing them with the forecasts of an independent Community planning office.

3. It emerges from the situation in most Member States that neither the necessary coordination of the medium-term economic policy nor an effective coordination of short-term economic policy has any chance of success without greater powers being granted to the European Parliament and without greater participation by management and labour. Greater co-responsibility of employers and workers for the economic policy of the Communities is also necessary because a mandatory short-term incomes policy does not form a real alternative, to judge by the situation encountered in most Member States.

4. In addition to overall instruments like budgetary policy, fiscal policy and monetary policy, measures of assistance and in some cases programme contracts form the most important instruments of national economic policy. The importance of these instruments has increased to such an extent that in Community policy a shift in emphasis from exclusively individual appraisal against the requirements of undistorted competition to coordination of measures of aid with objectives along the same lines is needed. At the same time greater transparency, system and rationality of national aid policy must be pursued. Within the framework of a partial extension of medium-term economic policy to regional objectives and a number of sectors, an aid policy for the Community itself should be further developed. By attaching conditions to Community aid measures, these can be made a highly effective instrument of coordination of regional policy and industrial policy. In certain cases conditions can best be attached under a programme contract. Similar conclusions apply with regard to the instrumental use that is sometimes made of the public sector of economic life.

5. As part of medium-term economic policy a better interrelation of regional policy, physical planning and protection of the environment should also be

pursued. However, in this connection harmonization of legislation is necessary to only a limited extent.

6. Harmonization of mandatory regulations of economic law is mainly necessary with respect to lasting regulations. Apart from what has been mentioned in the second and fifth recommendation, the principal aim of this is to guarantee the proper functioning of the common market. The most important areas of economic legislation that have to be harmonized for this reason are establishment legislation, the regulations with respect to the capital market and the legislation giving rise to the technical and administrative obstacles to trade. However, also of great importance is the preventive coordination of the application of the legislation existing in many Member States for extraordinary situations of shortage. In establishment legislation only qualitative requirements for carrying on a business qualify for harmonization for the time being and, on account of the fundamental differences of opinion in the Member States, this harmonization too will have to be aimed more at a broad coordination of the effects than at a detailed harmonization of the regulations themselves. In most other fields of economic legislation checking that mandatory provisions of Community law are being observed is more important than harmonization.

7. From a viewpoint of a rational division of work between the Communities and the Member States, it is advisable that Member States with a weak cartel legislation strengthen this and base it on principles similar to those on which Community law is based. As the necessary further reinforcement and extension of the common competition policy can also be achieved on the strength of the Community treaties themselves, mandatory harmonization of national cartel legislation is not necessary, however. The national legislation that binds the freedom of competition on certain aspects to rules does not contain any essential restrictions of the possibilities of competition on the common market. Consequently, harmonization of these rules on competition too is not very urgent, though it will be needed on a few points in due course.

8. Thus the Communities need both a strengthening of the above all macro-economic and indirect adjustment of the economic process and a further reinforcement of the integrating function of the common market itself. Conflicts between these two main aspects of Community policy must be avoided. Thus in principle measures of short-term economic policy may not impair the maintenance of free movement between the Member States.

9. The report contains no conclusions with regard to the common or harmonized legal instruments which the main protagonists on the common market may require. Instances of these instruments are company law, patent and trademark law, bankruptcy law and a Community legal basis for collective agreements. There seems to be no doubt that reinforcement of medium-term economic policy and completion of the establishment of a common market will cause the need for common regulations in these fields of law too to grow. On account of the fundamental legal views that play a role here, the necessary legal development in these fields too will often not be possible unless the powers of the European Parliament are strengthened and management and labour play a greater part. However, in many Member States these fields of law are not regarded as forming part of economic law and the reports therefore contain insufficient points of contact for concrete recommendations in these fields. The same applies to taxation legislation, which comes up for discussion only to the extent that it is made to serve economic policy more directly.

10. In view of the situation in the Member States, there seems at present to be no cause for mandatory regulations of sectoral policy outside the sectors of agriculture, transport and energy. For institutional reasons alone great reticence must be observed from the Community point of view with regard to the development of a sectoral policy outside the three sectors mentioned. Insofar as necessary, the instruments of forecasting, indicative planning, measures of assistance and programme contracts will have to be given priority over mandatory regulations.

11. Harmonization of legislation cannot be achieved without equivalent guarantees for legal enforcement and protection in the Member States.

12. The above recommendations have been confined to essentials. Numerous detailed suggestions from the preceding chapters have not been discussed. Moreover, the national situations summarized in these preceding chapters and the argumentation given there are more important than the content of the recommendations themselves. The reader is therefore recommended in conclusion to base his point of view primarily on the preceding chapters and the places referred to in the national reports.

3. Concluding remarks

At the conclusion of this report it is again stressed that the report relates only to the first and second stage of the economic and monetary union and even then more to the coordination of national economic and monetary policy than to the creation of a common economic and monetary policy. This restriction of the report is caused by the way in which the problem is envisaged. For it is a matter of the place

of the economic law of the Member States in the first and second stage of the economic and monetary union pursued. In these first two stages it will as a rule only be a question of coordination of the economic policy of the Member States. The absence of a specification of the objectives for the final phase made it premature to advise on the extent to which an autonomous Community policy (whether or not with decentralized implementation) should in the long run take the place of coordination of national policy.

This approach to the problem seems in accordance with the path followed by the Community so far. However, at the end of this report the rapporteur wishes to express his doubts whether, in the light experience since 1972, this path may be described as realistic in every respect. Coordination of economic (and social) policy is certainly necessary for the proper functioning of a monetary union. One need only think of the need for a coordinated control of inflation, of the need for a policy aimed at balanced development of employment in all parts of the Community and of other subjects dealt with in this report. Without such a coordination of economic policy a monetary union will not prove viable. However, the question is whether the desired parallelism between economic and monetary union cannot better be achieved if coordination of economic policy is coupled as a condition to immediate transfer of exchange rate policy to the Community institutions or at least to a clearer return to a common monetary discipline than was achieved up to mid. 1973. For this purpose changes in exchange rates could be subjected at the beginning of the second stage to the approval and not just the advice of the Council. The Council could attach binding conditions with regard to the economic policy to be followed to approval of a change in exchange rate and also to mutual assistance under Article 108 of the Treaty of Rome and in the framework of the European Fund for monetary cooperation. In the course of the second stage the Council ought to acquire the sole right, on the strength of proposals by the Commission and the Monetary Committee, to decide on changes of exchange rates without a proposal having been submitted to it to that effect by the Member States concerned. However, this right ought not to be granted to the Council (under Article 235 of the Treaty of Rome) without the permission of the European Parliament and without a decision being taken at the same time on a number of essential instruments of social and economic policy. These might include the founding of a European regional fund that allows of sufficiently large capital transfers within the Community to make the gradual attainment of a monetary union with invariable exchange rates acceptable.

The rapporteur became particularly convinced of the need for such a shift of emphasis in the simultaneous pursuit of an economic and monetary union during his participation in an interdisciplinary working party at Bielefeld University.

Although in that working party's report the need for coordination of economic policy was not stressed sufficiently in his opinion, he takes the liberty of referring to the Bielefeld report[1] for a further substantiation of the proposed shift in emphasis.

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[1] Ziele und Methoden der europäischen Integration, published by H. von der Groeben and E. J. Mestmaecker, Athenäumverlag 1972. See in particular p. 113 et seq. and for alternative solutions for irrevocable first decisions in the direction of a monetary union p. 124 et seq.

APPENDIX

Extract from the 'Point of view of the Federal Government with respect to the 1971 Annual Report of the Federal Cartels Office'

The increasing public criticism to which the market economy is exposed may be largely explained by the uncontrolled concentration process. As the cartel authorities still lack powers of intervention in this field, the false impression is created that the favouring of certain group interests is inherent in the system governing competition. In this sense the amended Cartels Law is a touchstone for the extent to which political forces is the Federal German Republic are prepared to maintain the market economy and competition for the future too.

Recently, increased efforts to replace competition in highly concentrated branches of industry by collective planning of investments, quantities supplied and prices have been observed. Corresponding cartel plans have been submitted both to the Commission of the European Communities and to the Federal Minister for Economics and Finance ('Ministerkartell', Article 8 of the Law Prohibiting Restraints of Competition). The reasons for this are certain difficulties that have arisen in a number of not unimportant branches of industry. Characteristic of these difficulties are falling prices as a result of overcapacity. The firms in question speak of a danger to their existence and thus to employment too. It is also said that it would be a 'waste of national assets' if existing production plants had to be shut down.

In such cases collective planning often merely has the appearance of rational problem-solving. It is true that the economic cycle and — in certain branches of industry — also the increasing size of production plants make considerable demands on planning the utilization of capacity. Nevertheless, decision-making with regard to investment, which is one of the most important means of competition, must remain under the control of the individual firms so as to prevent the market economy from degenerating into a system in which the individual markets are increasingly controlled not by competition but by groups of interests organized in cartels. Private enterprise would increasingly lose its function. The disadvantages of such a system of collective planning for efficiency, liberalism, readiness to progress and productivity or our economy are obvious.

Experience teaches that overcapacities are mostly not attributable to short-term economic and technological difficulties of independent investment planning, but in the final analysis are based on the oligopolistic structure of these branches of industry. Disproportionately large profits during a boom incite firms to invest heavily and moreover attract new investors. The next downward turn of the economy is then all the more difficult to endure. Even perfect market regulations cannot eliminate this harmful situation. Though the firms involved would secure their profits, at the same time the market control mechanism would be thrown completely out of gear. Consequently, caution is called for in the use of exceptions to cartel legislation like Article 8 of the Law Prohibiting Restraints of Competition. And even if the licensing authority has a say in the implementation of the cartel, e. g. via suitable conditions, this cannot replace control by competition.

Mistakes in planning would have even more serious effects, since they would affect all firms in the branch of industry concerned. The firms would no longer be obliged under

the pressure of competition to make cost-saving technical progress. Customers and consumers would have to bear the resultant disadvantages in the form of excessive cartel prices, while a few firms, by excluding competition, would aquire a 'guarantee of profit'. This would lead to a distribution of income favouring the firms in the cartel, with for instance additional competitive disadvantages for small firms which would be struggling hard enough without that.

Nor are such cartels a suitable means of maintaining employment, for they do not increase the volume of sales and so do not increase the utilization of capacity either. Experience shows that lay-offs need hardly be feared when the difficulties are based on temporary fluctuations in demand or when production is highly capital-intensive. It can happen that overcapacity is used as a reason for closing down older and unprofitable plants. But such closures, which are due anyway, should not be a ground for deciding to permit investment, quota-fixing or price cartels.

In exceptional cases, in which technological demands exceed the investment capacity of individual firms, there may be a national need for joint investment planning. To this extent clear and concrete guidelines must be developed by which departures from the principles of market economy are limited to the absolute minimum. In such exceptional cases it must also be ensured that the controlling function normally fulfilled by competition is temporarily exercised as far as possible by the authorities. The working party on competition policy in the Federal Ministry of Economics and Finance will soon be concerning itself with this set of problems; the results of its work will also be important to the German contribution to the development of an industrial policy in the EEC.

Apart from these closely defined exceptions, economic policy must counter tendencies towards collective planning with respect to investments, quantities supplied and prices. If the causes lie in the fact that certain branches of industry are already highly concentrated, they can hardly be eliminated again. This is all more reason for protecting any competition still existing or possible in these fields. The task of a forward-looking economic policy must moreover be to prevent as much as possible the creation and spread of uncompetitive industrial structures. If the reinforced process of concentration continues to have free play, the problems described will occur to an ever-greater extent and in ever-wider fields. The introduction of merger control is therefore an urgent necessity from this point of view too.

The OECD Council recently pointed out again in a recommendation of 26 January 1972 that an effective competition policy is an important factor for optimal growth and a stable price level; measures for strengthening competition exert pressure on costs, prices and profits and are therefore a weapon in the struggle against inflation. The Council has consequently advised all Member States to intensify their competition policy (Report of Activities, p. 36).

Likewise, the Board of Experts for Assessment of Overall Economic Trends devoted a large part of its last annual report to competition policy and commented that, the higher the degree of concentration of the economy, the more difficult it is to achieve stability of price levels without endangering full employment (Paper VI/2487, p. 123 ff.; Report of Activities, p. 10). In the Community diagnoses of 27 April 1972 drawn up by the Association of German Economic Research Institutes, it is stated that the result of every steering of the trade cycle depends not least on the functioning of competition. In particular merger control and stricter regulations regarding cartels are essential if the regulation of the market is not to be endangered (p. 13).

In its attitude towards the report of activities of the Federal Cartels Office for 1970 the Federal Government had already drawn attention to this connection and stressed that cyclical tendencies towards price increases continue more easily and quickly on monopolistic or oligopolistic markets than on markets with a competitive structure, which in turn could have a highly negative effect on the general cyclical climate (Paper VI/2380, p. 3).

Meanwhile experience also suggests that, the less the competitive structure of the markets, the less effective national short-term economic policy is. Comparisons between the position with respect to competition policy and the results of short-term economic policy in various countries lead to the conclusion that a series of short-term economic measures become

blunted when they encounter markets characterized by dominant positions or any other form of excessive economic power. Thus firms not actively engaging in competition can raise their prices even when pressure has been exerted on prices by a national policy aimed at limiting demand. If such firms are expecting a drop in sales, they increase their prices and thus their profit per item, so as not to have to accept any loss of overall profit. This price policy is the result of a market situation in which supply and demand are no longer subject to the control of competition.

Such structural obstacles to the efforts to limit price development were a partial reason for the fact that a number of Western countries recently made more frequent use of the means of direct price controls and price freeze. This is often regarded as a consequence of the ever-decreasing workability of the market economy concept. If in the Federal German Republic the aim of stable prices and full employment is to be further pursued without such 'dirigiste' intervention, the protection and encouragement of efficient competition will for this reason too become increasingly important tasks of economic policy.

STUDIES

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