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COMMENTS ON PAPERS DELIVERED BY PROFESSOR HERZOG AND MR. EBB

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It is often said that the European Communities are unique, that they cannot be fruitfully compared to other institutions, whether international or federal. Certainly, to a common law lawyer they appear to be uniquely civil law creations; their solutions to various problems appear novel to him. Despite differences in approach much is to be learned by comparing or at least contrasting the European approach with that of the common law. Professor Herzog has well illustrated some of the differences in his excellent paper on the Court of Justice.

I find three points in his paper particularly interesting. The first concerns a problem to which different approaches are taken in the common law countries themselves. Professor Herzog states that when a private litigant brings an action before the Court of Justice he must have an "interest" in a regulation or decision made by the community —that is, that there must be an actual case or controversy as in United States constitutional matters. I am not entirely convinced of the value of this principle except when applied to private litigants. In some of the newer federations and in Canada a method of "reference" to the court by the attorney-general of the federal government or of one of the provinces, is used to raise the validity of a statute or regulation. Canada has had problems with constitutional judicial review, and too often suffered from bad decisions, but the quality of the decisions does not appear to be related to whether the case began as a "controversy" or as a "reference." Besides, so many constitutional cases really start as "test cases" in which the "interest" in the particular cause is trivial that, in the end, they are hard to distinguish from references. The best example in the Common Market setting is the now famous *Costa* case, based on a three dollar electricity bill. It is worthwhile to note that under the Treaties of Paris and Rome the executives and the member states may make complaints without a specific controversy, and may refer contested acts of a Community organ or of a member state directly to the Court of Justice. Accordingly, while private litigants must demonstrate an interest, the same rule does not apply to the major institutions within the Community. They have rights similar to the reference provisions in Canada and other federations.

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Secondly, and more striking to a Canadian, is the use of economists as expert witnesses in the Court of Justice. Canada pioneered in cartel legislation; it passed its first anti-trust law a few years before the Sherman Act. The law was primitive. Unhappily, it has remained so to the present day, based as it is, on the criminal law jurisdiction of the federal government rather than on jurisdiction over trade and commerce. Expert evidence by economists has been ignored by Canadian courts, and as a result Canadian anti-trust legislation has been ineffective except in the most blatant cases. While the United States courts have gone much farther in listening to such evidence, they still have some way to go. It is difficult if not impossible to deny that evidence of economic experts is indispensable in assessing offences under legislation that deals solely with economic matters. Of course, the EEC is first and foremost what it says it is—an *economic* undertaking; for its Court to refuse full weight to economic evidence would amount to a denial of the Community's *raison d'etre*.

Thirdly, the Court of Justice is the Court for a community with limited purposes; as a result it is a Court of limited jurisdiction thus raising several interesting matters. First, a litigant must establish that his case comes within the jurisdiction of the Court—and to do so he must show among other things that the subject matter of the dispute should be so classified as to fall within the scope of one of the treaties. Yet despite the limited jurisdiction of the Court there is no superior court of appeal. Accordingly the Court must exercise self restraint in regulating its own jurisdiction. We might also note that its limited jurisdiction is also a specialized one, much more so than a court of general jurisdiction; it can develop more sophisticated procedures designed especially to deal with its particular problems.

Mr. Ebb's paper contains the happy combination of difficult subject matter discussed in language easily understood even by a novice in the field of cartel law. He raises an interesting question, discussed at some length by Leon J. DeKeyser in the December 1964 issue of the *Common Market Law Review*, whether the *Grundig* decision still leaves room for development of a rule of reason with respect to exclusive importer-distributor agreements, based on guarantee and post-sale service requirements. A distributor of complex and expensive machinery might well not find it worthwhile to set up a distribution and service system without the security of an exclusive sales area. Otherwise, he might find that after he has risked considerable capital and high

overhead to maintain adequate servicing, an interloper without these expenses is undercutting him and leaving him virtually as a serviceman. I shall not venture into the merits of this problem, except to say that Mr. DeKeyser does not believe all exclusive agreements will now be held to offend the treaty. He suggests that there is still some room to maneuver when a reasonable case can be made.

I should like to speculate upon the direction of EEC cartel law after the Community achieves a common trademark law. With a market roughly the size of the United States market, and with the possible development of a rule of reason in this area of law, there seems to be some probability that it may follow the United States in its attitude toward exclusive importer-distributor agreements via-à-vis the rest of the world.

Consten's cause of action against UNEF, unfair competition, seems quite odd to a Canadian lawyer and I believe also, to a United States or English lawyer. It appears to be repugnant to our legal theory that an agreement between *A* and *B* (in this case Grundig and Consten) can legally restrict the otherwise legal activity (selling electrical appliances) of *C* (UNEF)—unless, of course, there is specific statutory provision creating a right in *B* and imposing a corresponding duty upon *C*. Admitting ignorance on this aspect of French law, nevertheless I found the report of the decision in the French court virtually incomprehensible on the point. While it is true that a deliberate interference with a contractual relationship may amount to a tort in the common law, an incidental interference while carrying on an otherwise legal activity for one's own purposes is not a tort.

A fascinating question raised by the *Grundig* case is whether it has recognized a new tool for broadening the scope of Community review of national law of the member states. The *Grundig* case aside, no matter what approach one takes in examining the power of judicial review under article 177 of the EEC Treaty, he must inevitably conclude that national courts—at least at present—control the extent of Community review of municipal law. This state of affairs is best illustrated by the French courts' use of *acte claire* to cut off remitting a dispute on interpretation of the Treaty to the Court of Justice under article 177. True, that article places a duty upon the national court to remit a question of treaty interpretation to the Court in Luxembourg, and a party may persuade the national court to do so; but if the national court convinces itself that the meaning is clear and no interpre-

tation by the Court of Justice is required, it can cut off any appeal. The private litigant is helpless. We may agree that the national court has made up its mind in complete good faith and yet be convinced that it is wrong. But unless the Commission acts of its own accord and complains of a breach of the Treaty under article 169, the breach will go unremedied. The Commission is so busy that it is highly unlikely it would interfere of its own volition, except in an extremely important Community matter.

If, however, a private litigant can provide the motive force to get the Commission started, by applying for a ruling on the validity of a national law, and if in these circumstances a national court, that would otherwise be unfavorable toward remitting a case to Luxembourg under article 177, might now feel it had to await the Commission's decision on the very same issue, then we should find that the Community's role has to that extent been enlarged. Though the effect may be only peripheral, that is, if only in a few doubtful cases where a national court would be otherwise inclined it may now decide to await the decision of the Commission, the Community will to that extent be strengthened. Of course, this development is highly speculative, but even so, the very fact that the private litigant himself can in some manner appeal to a Community organ, as an alternative to passive acceptance of a national court ruling, is in itself significant.