SURVEY OF LITERATURE

General and Institutional

An important contribution by *Everling* on the problems caused by the application of European law in the national legal system is published in *Neue Juristische Wochenschrift* 1967, No. 11, pp. 465-473. The supremacy of Community law over national law does not provide a solution in all cases. So the second Lütticke case (No. 57/65, 4 C.M.L. Rev. 1966-7, pp. 327-330), declaring Article 95 directly applicable, has caused substantial difficulties in Germany. A great number (more than 300,000) actions against tax authorities are pending in the courts; they all concern the German compensatory turnover tax which might violate Article 95. Some courts of finance have even ordered a suspension of the assessments. Problems may also arise in the field of competition law where rules of national and European law may apply at the same time. The institutions of the Community should always be aware of the fact that the rules they lay down must be executed in six different legal systems. In order to take these differences into account preference should be given in many cases to rules that are not self-executing, but are binding only upon the member States.

C. F. Ophüls analyses the majority decisions in the Councils of the three European Communities in *Europarecht* 1966, No. 3, pp. 193-229. The article contains a long theoretical discussion of the need of majority decisions and of the Treaty provisions governing them, but a survey of the practice of the Council is also included. The fact that the Council does not vote often does not imply that the system of majority voting is ineffective. The very possibility is of great practical importance. The article concludes with a commentary on the Luxembourg agreement.

The former Advocate General of the Court, M. Lagrange, has published an article on the decision making process in the European Communities (*Revue Trimestrielle de droit européen* 1967, No. 1, pp. 1-29). He compares the theoretical process as laid down in the Treaties with the actual application of this set of provisions and concludes that no real gap has arisen between theory and practice. He considers that a certain evolution of the structure has to take place before long.

The directive is one of the instruments which enable the Community to reach its goals. The Dutch Association for European Law has reflected upon this instrument at its recent meeting while using as a starting-point the studies of *Kooijmans and Chevallier* published in Sociaal Economische Wetgeving, March 1967, pp. 122-160. According to Kooijmans the character of the Communities defines the scope of the directive. Its purpose is to change national legislations without depriving the member States completely of their freedom to act. It is directed to member States and thus cannot affect directly the legal position of private individuals. Unlike Kooijmans, Chevallier holds the view that directives can violate private interests. He points to the Van Gend en Loos case (case 26/62) to support his opinion. He concludes that if a provision in a directive happens to be self-executing, and infringes upon the rights of private parties, access to the Court should be made available.

The crisis in the Communities is the starting point of a contribution by *Nina Heathcote* in *Journal of Common Market Studies* vol. V, No. 2, pp. 140-171. The author deems it unsound to suppose that the political will of one of the member States may be set aside by a combination of procedural techniques and economic advantages. Decision-making against the will of one State is still impossible. Supranationality is not yet attainable, but the concept can play a role to put pressure on another party. The article includes an extensive discussion of factors which have contributed to the crisis.

The *American Journal of International Law*, vol. 61, No. 1, pp. 57-60 attention has been paid to the merger of the executives of the European Communities. The author, *Gordon L. Weil*, exposes the different aims of the merger and enumerates the changes of the Treaties which are brought about by the conclusion of the Merger Treaty.

Although the Committee of Permanent Representatives of the European Economic Community is not an institution of the Rome Treaty, its actual significance is enormous. In this year's March issue of the *Journal of Common Market Studies*, pp. 219-251, *Emile Noël* writes on the nature and the activities of this Committee. The members of the Committee play an important role in the national treatment and elaboration of Community affairs. On the other hand, they participate in Community work at the Community level, mainly by preparing Council decisions. At the same time the Committee of Permanent Representatives functions as a sort of clearing house for information and contact between national and community authorities. The author expresses as his opinion that this committee has proved to be a successful and indispensable extension of the institutional set-up of the Communities. In the *Europa Archiv*, No. 13, 1967, pp. 449-454, *Norbert Kohlhase* deals with the results of the Kennedy Round and applauds the fact that the Commission has been empowered to represent the Community stand. This precedent opens interesting prospects for future negotiations and should be an incentive to political integration. Another result of Community activities is to be found in the drawing up of a Convention on recognition of judgments which the member States will be called upon to sign soon. *Pierre Mercier* comments on this convention in *Cahiers de droit européen*, 1967, No. 4, pp. 367-387. The convention's purpose is to create a system of "free circulation of judicial decisions within the community." Thus, much attention has been paid to the recognition and execution of foreign judgments. This critical article ends with an explanation of consequences of the system embodied in this convention for nationals of third States.

The results of an investigation on European integration by a team of politicologists under the supervision of Karl Deutsch is commented upon by *Ronald Inglehart* in *American Political Science Review*, vol. LXI, No. 1, pp. 91-105. Deutsch concluded that integration had slowed down in about 1955 and had made no further progress in 1957-58. Ingelhart has also done research in the same field and has come to a quite different conclusion: in his opinion integration only started in 1958. Probably the differences between the definitions of "integration" have produced these conflicting results.

Ernst B. Haas has laid the basis for the present concept of dynamics of the integrational process in his book "The Uniting of Europe", published in 1958. In the *Journal of Common Market Studies*, vol. V, No. 4, pp. 315-343 he pays attention to the developments in Europe since that time and to the experiences in integration in Latin America. This leads him to a few amendments to his prior theory.

The same issue, pp. 426-453, includes a study of the powers of the Community institutions to deal with external relations by *F. A. M. Alting von Geusau*. He concludes that the integrational process in this field goes much slower than the internal integration.

Agenor is the name of a new and interesting periodical that has published recently its first issue. It is founded on the initiative of a group of alumni of the Europa College in Bruges and intends to become a mouthpiece for young Europeans. Agenor will not specialize in law, economics or politics, but will try to stimulate a discussion on all problems that may arise in relation to Europe and the European integration. The first issues contain contributions on such subjects as Europe after de Gaulle, the technological gap between the U.S. and Europe, the non-proliferation treaty and Euratom, and the coup d'état in Greece. In a regular section "Europe in the world" the crisis in the Middle East and the war in Vietnam are discussed. The periodical will appear every three months and will publish articles in English and in French. Editor-in-chief is John Lambert (P.O. Box 54, Brussels).

Council of Europe, Human Rights

The need for harmonisation of laws in Europe has brought the Council of Europe to prepare a convention including a uniform law on arbitration. *Arnold* writes on this convention in *Neue Juristische Wochenschrift* 1967, No. 4, pp. 142-146. The convention would cover a very broad field: even purely national arbitration would be governed by

it. Only if a great number of States would become a party to it could this disadvantage be compensated by the advantages of uniformity. The prospects for the convention are gloomy; till now no State has ratified it and only Belgium has signed.

In the Dutch periodical *R. M. Themis*, 1967, No. 3, pp. 269-290, Miss *A. C. de Vries* criticizes the functioning of the European Convention for the Protection of Human Rights. The fact that the Commission deals so extensively with the question of admissibility makes access to the Court very difficult. Consequently the interpretation of the Convention is to a large extent left to the national courts. In connection with a proposal made by the Court itself she advocates that the highest national courts should be obliged to submit preliminary questions on the interpretation of the Convention to the Court in Strasbourg.

Van Welkenhuyzen has dealt with the judgment of the European Court of Human Rights of 9 February 1967. (*Cahiers de droit européen*, 1967, No. 4, pp. 432-451). The proceedings before the Court bear on certain aspects of the laws on the use of languages in education in Belgium. The Court has now ruled the complaints admissible in accordance with the Commission's decision. The author perceives a growing tendency of the States to accept the European law within the national sphere and he concludes that the walls of national sovereignty are being overthrown.

Papadatos contributes on the European Social Charter in the *Journal of the International Commission of Jurists* 1966, Vol. VII, No. 2, pp. 214-242. He analyses the various parts of the convention systematically. When discussing part IV he mentions that it was the intention of the member States to introduce their regular reports as the exclusive means to safeguard the execution of the Charter. Germany especially insisted on this point.

Another contribution on the European Social Charter and in particular on its provisions governing the right to strike, can be found in *Cahiers de droit européen*, No. 4, pp. 388-412. The author, *Albert Bleckmann*, analyses the general system of the charter and discusses the scope of the right to strike and the problems concerning the applicability of the provisions in the member States. The effects of the Convention in this field are not great yet but the author expects the Convention to contribute to a better understanding of the problems and to stimulate national authorities to fill up the gaps in their legislation.

Competition

The three cartel cases decided by the Court in July 1966 are discussed by *Kirschstein* in *Wirtschaft und Wettbewerb* 1966, No. 10, pp. 777-791. He points to the independent function given by the Court to the term "may affect trade" in Article 85. Nevertheless the relationship between that criterion and the words "to prevent, restrict or distort competition" has not yet become clear. Especially important is the question whether the Commission has to prove both that trade between the member States is affected and that competition is restricted. Like other authors (e.g. *Würdinger* in *Europarecht* 1966, No. 3, pp. 283-285) Kirschstein disagrees with the conclusion of the Court that the relevant market in the Grundig-Consten case was restricted to Grundig products. But this factor was not decisive and in general he approves the judgment.

A commentary by *Le Tallec* on the same judgments is published in two periodicals: *Revue trimestrielle de droit européen* 1966, No. 4, pp. 611-623, and in *Aussenwirtschaftsdienst* 1966, No. 22, pp. 437-442. In general the consequences of the cases for sole agency agreements are explained. In his opinion the Court has indicated that these agreements are not presumed to be prohibited or permitted by Article 85; it depends on the special circumstances of the case. Prohibitions against export will be held to be illegal in almost all cases.

R. Kovar contributes in *Revue trimestrielle de droit européen* Vol. II, No. 2, pp. 288-306 on the legal and economic questions involved in the concentration of enterprises in the European Coal and Steel Community. Some tension exists between the static character

of legal rules and the very dynamic economic reality. This can be seen particularly when the oligopolistic structure of the coal and steel market is considered. Accordingly Article 66 E.C.S.C. Treaty must be seen more as an instrument of economic policy than as a strict legal rule. The two bases of the economic policy of the High Authority, *viz.* optimal size of enterprises and maintenance of workable competition have become clearer in its more recent decisions. The author discusses this policy in greater detail.

Harmonisation of Laws

The harmonisation of the legal rules prescribing the conditions that must be met before products may be sold is of outmost importance for the establishment of a single market in the E.E.C. *Dieter Eckert* notices in *Neue Juristische Wochenschrift* 1967, No. 11, pp. 473-480, that the results in this field are still rather poor. Only three directives are in force, and nine draft directives have been sent to the Council. The Commission deals with the problem in a very pragmatic way by focussing attention on the products for which common market organisations exist. This has, however, the disadvantage that no fundamental principle is worked out which could be used as a guide in all cases. The author discusses more in detail the legal basis of the directive on Greek meat and continues with a more general study of the powers of the Council and the Commission under Article 100. Delegation of certain powers to the Commission is only possible for the regulation of purely technical matters. Accordingly Eckert rejects the proposal of the Commission to establish Foodstuff-Committees analogous to the Management Committees known in the agricultural regulations. This proposal would violate Article 100 since it would no longer permit the veto of one member State, as does Article 100.

Peter Kalbe pays attention to the draft directive on the coordination of the legal and administrative rules on access to the insurance business in *Aussenwirtschaftsdienst* 1966, No. 19, pp. 377-380. In his opinion the draft starts from the principle of mutual recognition by the member States of national control of the insurance business. It may be doubted, however, whether this view is correct: the draft gives very precise rules restricting the freedom of national legislators to a large extent which shows on the contrary, not very much mutual confidence by the member States.

Yves Lenoir writes in *Revue trimestrielle de droit européen* 1966, No. 3, pp. 394-399 on the legal problems encountered by enterprises outside France that want to make use of the possibilities offered by the European Development Fund for public tenders in the French-speaking African States.

Social Policy

J. J. Ribas deals with the regional policy in the E.E.C., which is considered by him as a part of social policy (*Revue du marché commun* 1966, No. 95, pp. 734-750). Regional policy should aim at demographic equilibrium, at full employment, at adequate training and housing facilities, at a good infrastructure and at cooperation with the population. The author discusses the role played by the Social Fund, the European Investment Bank and the Commission in the development of a regional policy in the E.E.C.

In *Journal du droit international* 1967, No. 1, pp. 41-76, *Jeanne Ribettes-Tillhet* contributes on the European Social Fund and the French National Employment Fund. Both funds are suffering from the same imperfections. They have been established with a view to promote full employment but they lack the equipment to remove the causes of unemployment. The author favours the abolition of the limitations on the Fund's field of action and proposes a new policy adapted to present day social and economic realities.

A survey of the social aspects of the common transport policy can be found in the *Revue de droit international et de droit comparé* 1967, No. 1, pp. 9-23. *Jacques Jean Ribas* describes the actual situation in the social field and reminds the reader of the fact

that the Council had recognized in 1965 the need for harmonizing the national provisions regulating working conditions. The Commission has recently submitted a first draft regulation proposing social measures for workers in the field of road transport.

In *Internationale Spectator* of January 8, 1967, *A. Cool* pleads for a more European attitude of the national labour unions; at this moment they fail to exercise enough influence on the European level.

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

The Belgian Professor *Ganshof van der Meersch* has conducted research on the relations between community law and national law (*Revue Internationale de Droit Comparé*, 1966, No. 4, pp. 797-831). He criticizes the Dutch Constitution which accepts the priority of Community norms over national legislation only in so far as the Community law is self-executing. In Belgium statutory law does not recognize precedence of Community law over national law. No revision of the Constitution has as yet been made but Ganshof thinks that the doctrine and jurisprudence in this country seem to point to more realistic solutions to the problems posed by the European Integration. (The author's opinion has been confirmed by the recent judgment of the Tribunal of Brussels, which has yielded precedence to the European Convention on Human Rights over domestic law. The decision has been printed in Journal des Tribunaux No. 4551 of November 26, 1966).

A survey of the Jurisprudence of the Court of Justice of the European Communities in the years 1964 and 1965 has been published in *Juristische Blätter*, No. 1/2, 1967, pp.15-22. Author *Berthold Moser* concludes that the number of preliminary rulings under Article 177 and of actions brought by employees is increasing steadily.

The important question of the (insufficient) legal protection of private interests within the European Communities remains the center of interest. *Tomuschat* has written an important note on the subject in connection with the first Lütticke case (No. 48/65, Lütticke *v.* E.E.C. Commission, 4 C.M.L. Rev. 1966-7, pp. 327-330) in *Europarecht* 1966, No. 3, pp. 287-295. The plaintiffs, German importers, had requested the Commission to introduce an action against Germany for violation of the Treaty. After the Commission had informed the plaintiffs that it would not do so, they brought suit against the Commission (a) to annul the decision laid down in the letter (Article 173), or (b) to decree that the inaction of the Commission constituted an infringement of the Treaty (Article 175). The action was declared inadmissible. Tomuschat agrees with the judgment; otherwise than in the E.C.S.C., the E.E.C. Treaty does not admit the institution of an action by a private party against member States, and accordingly an indirect action, as was attempted in this case, should be inadmissible. The author emphasizes the subsidiary character of Article 175; an appeal on the basis of that article is only possible if the Community institution has failed to take any legally binding measure. But if the institution has taken a clear position, no appeal can be based on Article 175, even if no action can be brought against the measure taken. The author investigates also what situation which would have existed if the Commission had not answered to Lütticke, and concludes that Article 175 should be interpreted by analogy to Article 173, a direct and individual concern being a prerequisite also for the action based on Article 175.

Robert Lecourt, the French judge in the Luxembourg Court, writes in *Recueil Dalloz* of March 8, 1967, Chron. XIII, pp. 51-56 on the need for effective judicial control in the Communities. He agrees with the opinion, often expressed in Germany, that Article 173, para. 2, provides insufficient remedies for private parties. Articles 184 and 177 do not offer enough compensation. Lecourt would favour an extension of the right to appeal in the E.E.C.

In the *Monatschrift für Deutsches Recht*, 1967, No. 6, pp. 445-448, *Hans Paetow* has made a contribution on the general principles of the procedure of Article 177. Since no

comments have been made on judgments of courts other than German courts, the article is of somewhat limited interest to non-German lawyers.

Can an organ of arbitration validly be considered as a "court of law" in the sense of Article 177? The Court's judgment and reasoning in the case 61/65 (4 C.M.L.Rev. 1966-7, pp. 440-444) have induced *P.M. Storm* to write a case-note and to comment on this specific question. (*Cahiers de droit européen*, 1967, No. 3, pp. 311-320). After giving an analysis of the judgment he draws the conclusion that arbitrators are under no obligation to request a preliminary ruling. They may if they want to.

A very interesting and comprehensive article on the meaning of Article 177 § 2 has been written by *Constantinescu* in *Aussenwirtschaftsdienst*, May 1967, pp. 125-130. The decisions of December 12, 1966 of the Frankfurt Administrative Court (see 5 C.M.L. Rev. 1967-8, p. 75) have led to much doubt concerning the desirability of a too liberal interpretation of the second paragraph of this article. The Administrative Court had declared void a Commission regulation concerning export bonds, which it considered contrary to the Treaty. The Court considered Article 177(2) to leave to the discretion of the national Court whether or not to refer the case to the European Court for preliminary ruling. Constantinescu disagrees with this judgment and defends the view that the courts referred to in Article 177(2) are restricted in their freedom to decide on the interpretation or validity of Community norms. He describes several situations in which the purpose of the Article would be frustrated by a refusal of a national Court to refer.

Claude J. Berr contributes in *Juris Classeur Périodique*, (March 8, 1967, No. 10, 2060) on the functioning in France of the procedure of the preliminary reference created by European law. He deals with a great number of procedural questions. As far as actions on competition law are concerned the judge has to suspend the proceedings also if the case is pending before the Commission for an exemption under Article 85 para. 3. But a decision by the Commission is not binding upon the national courts in the same way as judgments of the European Court of Justice.

The *Revue belge de droit international* 1967, No. 1, pp. 127-153 contains a comprehensive article by *Marcel Slusny* on the provisional measures that may be ordered by the Court of Justice. A petition for such a measure is admissible only if an action in the principal matter is instituted; the petition must be reasoned and must be filed separately. The Court orders the measures only if the matter is urgent and the action in principle seems to have a good chance of success.

The judgment of the Italian Constitutional Court in the San Michele case (see 4 C.M.L. Rev. 1966-7, pp. 81-84; annotation Berri 4 C.M.L. Rev. 1966-7, pp. 238-242) is commented upon by *H.-J. Glaesner* in *Europarecht* 1966, No. 2, pp. 149-152. He writes that the Court has now decided implicitly that the statute ratifying the E.C.S.C. Treaty has another status than an ordinary statute. This decision, however, does not conclude that Community law prevails over national law: the Court took the position that Community law and national law are separate legal orders.

An article on the judgment of the Court of Justice in the Cement Works Case (see 5 C.M.L.Rev. 1967-8, pp. 71-73) has been published in *Juristische Wochenschrift* of June 22, 1967, pp. 1197-1999. *Mailänder*, the author of this contribution on the much applauded decision, feels that the difference between a decision and a non compulsory recommendation turns on the question of whether or not the plaintiff is directly concerned. The Court had held that the legal effects of the communication equalled the effects of a decision to such an extent that the communication was to be considered as a decision. Schermers in *Ars Aequi*, June 1967, pp. 226-228, expresses his satisfaction with the Court's decision in this same affair, since a negative decision of the Court would have meant a restriction of the right to appeal.

The binding force of the judgments of the European Court of Justice is the subject of a study by *Achim André* in *Europarecht* 1967, No. 2, pp. 97-116. In most cases a judgment is only binding upon the parties to the dispute; the author investigates what consequences it has for the parties. But where an act is annulled the judgment has a binding force *erga omnes*. For that reason André suggests an obligation to publish such a judgment.

Not binding *erga omnes* is a decision that rejects a request for annulment.

The Spanish periodical *Temis, Revista de Ciencia y Téchnico Jurídicas* 1966, No. 20, pp. 69-91 includes an article by *Pellicer Valero* on the Court of Justice of the European Communities. The article focusses on the settlement of disputes in which the member States are parties. In his opinion these disputes must be settled according to the classical rules of international law if a member State ignores Article 219 or does not comply with Article 171. In these cases the jurisdiction of the European Court of Justice might become the subject of a procedure before the International Court of Justice.

The second Lütticke case (No. 57/65, 4 C.M.L. Rev. 1966-7, pp. 327-330), declaring Article 95 self-executing, has led to a complicated situation in Germany. The German Ministry of Finance has taken the position that the judgment does not affect the *Umsatzausgleichsteuer*, since the rates are based on Article 97, which leaves a certain discretionary power to the member States and is, consequently, not self-executing. This opinion is disputed by *Gert Maier* in *Aussenwirtschaftsdienst* 1966, No. 21, pp. 420-422: since Article 97 is a supplement to Article 95 and that Article is declared self-executing, Article 97 cannot result in withdrawing this character. Moreover, if a system of compensatory turnover taxation based on Article 97 would not be subject to actions brought by private parties while a system based only on Article 95 is subject to such actions, an unequal legal protection in the various member States would be the result.

The Court's decision in the second Lütticke case, declaring that Article 95 is self-executing, has surprised more than one author. It provides *E. Vogel-Polsky* with a strong argument for the thesis that Article 119 is self-executing as well (*Journal des Tribunaux*, April 15, 1967, pp. 233-237). The wording of the prohibition laid down in Article 95 can be compared with the formulation of Article 119 forbidding practices which discriminate between the sexes with respect to remunerations. The author calls upon the women victimized by discrimination in this field to have recourse to judicial intervention as much as possible.

Taxation

Among the various periodicals published in Europe, the *Aussenwirtschaftsdienst des Betriebs Beraters* (A.W.D.) is distinguished as one of the few general legal periodicals which regularly include authoritative articles on taxation within the E.E.C.

In his article "Die Beseitigung der Steuergrenzen zwischen den Mitgliedstaaten der E.W.G." (A.W.D. July 30, 1966, No. 14, pp. 269-277) *Schulze-Brachmann* gives a thorough survey on the problem of the elimination of the tax frontiers in a broad and narrow sense. In a broad sense a tax frontier exists between two areas if there are various tariffs. In a narrow sense a tax frontier exists between two areas if for fiscal reasons frontier checks are required. In his article Schulze-Brachmann merely discusses the fiscal frontiers in then arrow sense. He states that there should be hardly any objections now to the elimination of tax frontiers. The Commission, the European Parliament, and the Economic and Social Committee, as well as the Neumark Committee, are in favour of elimination. The Council has also agreed in principle, even though there is little sign of any immediate prospect of it. With respect to turnover tax, elimination of tax frontiers will not be possible without preliminary harmonisation both of systems and of levy percentages. Complete harmonisation does not seem necessary.

Elimination of tax frontiers will have no direct influence on direct taxes levied according to the country of origin principle. Thus the levy of a turnover tax on consumer goods now exempted in the Netherlands may lead to a lowering of income tax. The interrelationship between direct and indirect taxes—after elimination of the tax frontiers—is bound to lead also to certain adjustments in the field of direct taxation. Many obstacles, especially with respect to turnover tax and duties, have yet to be overcome before the tax frontiers can be abolished. As regards direct taxation the main point must be sought in internationalising the participants' exemption (already applied in the

Netherlands). Finally, the author enters into some institutional problems which arise as soon as tax frontiers are eliminated.

In the article called "Das Verbot der steuerliche Diskriminierung von Einfuhrwaren in Artikel 95 des E.W.G.-Vertrages und seine Auswirkungen auf das nationale Abgabenrecht" (*A.W.D.* July 30, 1966, no. 14, pp. 277-282) *Ulmer* elaborately annotates judgment 57/65. In this judgment the Court deals with the preliminary question whether the prohibition contained in Article 95, para 1 is self-executing and whether the citizen may derive rights therefrom which have to be taken into account by the national judge. The question was submitted to the Court as a result of an appeal by a German importer against a decree of the German customs by virtue of which an "Umsatzausgleichsteuer" was levied for importing full milk-powder of Luxembourg origin, whereas full milk-powder as well as the base product milk in Germany were exempt from turnover tax. The Court deemed Article 95, para 1 self-executing. The principle that a provision is only self-executing if it imposes an obligation restraining a member-state from acting —a principle formerly applied by the Court—is, in Ulmer's opinion not clearly apparent from the judgment. For Article 95, para 1, in conjunction with Article 95, para 3 contains the obligation to act. Subsequently Ulmer discusses the relationship between the prohibition of fiscal discrimination contained in Article 95 and the prohibition regarding charges with an effect equivalent to custom duties contained in Articles 12 and 13 of the Treaty. Ulmer concludes that a charge levied on importation may always be regarded as an internal charge if, on the other hand, a comparable charge, and therefore factually connected with it, is levied on domestic goods. In the author's view it has not been clearly determined whether one and the same charge—depending on the kinds of goods on which it is levied—can be regarded in the one case as an internal charge and, in the other, as a charge having an effect equivalent to custom duties. Ulmer goes on to discuss a number of questions concerning the interpretation and application of Article 95 which have not been dealt with by the Court. He specifically raises the question as to the kind of indirect taxes that will have to be considered in determining the charges according to Article 95 and the question as to what the consequences of violating the prohibition of fiscal discrimination implied by Article 95 will be. The latter question raises a number of very complicated problems concerning the relationship between Community law and national law.

Judgment 57/65 has led to serious consequences in Germany. According to this judgment every person assessable is now entitled to call in question the validity or the percentage of the Umsatzausgleichsteuer before the national judge.

In a short article in *A.W.D.* of August 30, 1966, no. 16, p. 327, *Wendt* reviews an order (*Erlass*) of the German Bundesfinanzministerium which shows that the Ministry does not attach any general significance to this judgment. In the ministerial order a number of rules are laid down for the customs officers to act upon in handling any objections against the levy of the Umsatzausgleichsteuer on importation. Wendt notes that up to now customs authorities generally used to let objections of persons assessable rest when a similar test case was pending before a higher court. Deviation from this practice merely will have the effect of frightening importers with the prospects of costs and restraining them from taking legal measures. According to Wendt this shows to what extent the Bundesfinanzministerium in Germany fears the test case will be won by the importers. He adds that such an "Erlass" is not binding upon the Finanzgerichte.

Meier, in A.W.D. 1966, no. 19, pp. 384-386, also enters into the problem of the Umsatzausgleichsteuer in connection with Article 95 of the Treaty. There is a difference of opinion on the question as to which taxes on internal goods can be considered as indirect with respect to the level of the Umsatzausgleichsteuer-percentage. It specifically concerns the question whether or not taxation on half-products, raw materials, and auxiliary materials, and investment goods are taken into account. The present percentages for the Umsatzausgleichsteuer do not differentiate. The judgment of the Court in the cases 2 and 3/62 upholds that Article 95 implicitly permits levies on imported goods only insofar as similar charges are imposed in a similar way on similar domestic products

Similar charges are considered to be charges of the same level, whereas when levied in a similar way they only point to the "similar levies" thus emphasizing the principle laid down in Article 95, which prohibits the percentage of the Umsatzausgleichsteuer to be in excess of charges applied to domestic products.

There is no problem with regard to raw and auxiliary materials as long as this starting-point is upheld. There is some controversy as to whether the charges on half-products may be calculated in the levy on imports. Meier thinks this permissible, as semi-finished products are part of the products mentioned in Article 95 (1) and (2). In his opinion taxation on investment goods does not fall under this category. The charge does influence the final product, but it is not a charge on the products themselves. This taxation is therefore not to be calculated in a compensatory charge on import. He considers this to be an incentive to the legislator to carry the harmonisation of tax-systems to such lengths that imposition of an Umsatzausgleichsteuer can be undone.

Meyer-Arndt in an article "Die Bemessung der Ausgleichsteuer bei Passiver Veredlung in E.W.G. Mitgliedstaaten" (*A.W.D.*, 1966, no. 19, pp. 380-382) goes into more detail on the calculation of the Umsatzausgleichsteuer. According to the German customs law as to products processed in the E.E.C. member States, products to which the internal tariff has to be applied, the percentage applicable to processed products has to form the basis for the calculation of the deductable amount. By provision of August 2, 1966, the Bundesfinanzministerium, however, stipulated that this rule cannot be applied to the Umsatzausgleichsteuer.

The author thinks this contrary to the Stand-still agreement of July 21, 1960 and also to Article 95 of the Treaty, as after the provision on the processing traffic the Umsatzausgleichsteuer is levied on a higher basis than the internal tax, which merely pertains to the processing labour costs.