SURVEY OF LITERATURE

General and Institutional

D. Thompson has written on the development of the Communities after the Agreement of Luxemburg of January 1966 put an end to the paralysis produced by the crisis of June 1965 (*International and Comparative Law Quarterly,* January 1967, pp. 1-28). His stock-taking includes an evaluation of the progress achieved in the fields of agriculture, transport and approximation of laws, whereas particular attention is focussed on Regulation 67/67 on Group Exemptions and on the major Court decisions on competition in the period under consideration.

An important article on the merger of the Community institutions has been published by *J. V. Louis* in *Revue du Marché Commun,* 1966, no. 7, pp. 843-856 and was unfortunately not mentioned in previous surveys of literature. This contribution derives its value primarily from the author's research into the merger's effect and significance for the future of the Communities. The article deserves to be consulted for a better understanding of the history and origins of this Treaty.

Professor *H. Brugmans,* Director of the College of Europe in Bruges, has given much thought to the problems of public administration. An address delivered at a meeting of Belgian officials has been printed in *Revue du Marché Commun* 1967, no. 103, pp. 336-343 and contains smart remarks on the causes and nature of the new difficulties with which public officials of national and international administrations have to deal. Denouncing easy criticism regarding "Eurocrats", Brugmans suggests a possible new approach and appropriate working methods to cope with the increasing intricacy of modern administration.

S. Henig has offered a "modest proposal" for eventual British entry into the Common Market (*Journal of Common Market Studies,* Vol. VI, no. 2, 1967, pp. 211-215). He advocates a middle way, a transitional association between the U.K. and the E.E.C. and suggests the possible terms of a "Protocol of Association" which he believes would be reasonably acceptable to all involved. The aim of the association would be to facilitate ultimate British accession to the Community Treaties, whereupon associate status would be replaced by full membership. Under the Association agreement and within four years, free trade would be established for non-agricultural products and Britain would adjust her tariffs to the common external tariff; the institutions of the Association would make proposals for British harmonisation with the common agricultural policy and other Community policies.

Denmark and Norway have joined the United Kingdom in its renewed application for entry into the Common Market. *John Lyng,* Norway's former Minister of Foreign Affairs, gives a short account of his country's position with regard to the European Communities (*Revue du Marché Commun,* 1967, no. 105, pp. 437-438). Agriculture and fisheries are of great economic importance to Norway and these sectors are expected to raise delicate problems when it comes to negotiations. Catches of Norwegian fisheries amount to totals unequalled by the fishing industry of the entire Common Market.

N. Kjaergaard has written on Danish expectations regarding membership in *Revue du Marché Commun,* October 1967, no. 106, pp. 492-494. Denmark's allegiance to the Free Trade Area accounts for an important growth in its exports to EFTA countries, but this increase in trade is not compensated by the losses suffered on the EEC market by Danish agriculture in particular. The author finds that farmers in the EEC need not stand in fear of Danish competition in the agricultural sphere.

In *Common Market,* 1967, no. 12, pp. 290-294, *J. Waterman* considers the possible effect of the devaluation of the pound on the British bid for EEC member-

ship. Written before de Gaulle's press conference of November 27, 1967, and subsequent events, this article is somewhat out of date, but is still interesting in perspective.

Article 2 of the German Statute ratifying the Treaties of Rome obliges the Federal Government to keep the Bundestag (Federal Diet) and the Bundesrat (Federal Council) informed of the proceedings of the EEC Council. This information in some cases must be complete before the Council of Ministers adopts certain measures. *George Holch* gives an account of the opinions formulated by the Federal Council with regard to proposals for Community legislation in *Europarecht* 1967, no. 3, pp. 217-228. Its views indicate a tendency to interpret the Treaty restrictively. The author points to the Federal Council's disagreement with the practice of "auto-delegation" [1] and with the power of the Council of Ministers to take measures deviating from the Commission's decision in cases where a Management Committee has formulated objections against such decisions.[2] The Council should declare such a decision void and leave it to the Commission to take new action.

Italy's foreign policy is subjected to a very critical examination in an article by *A. Spinelli,* in *Europa Archiv,* no. 18, 1967, pp. 657-666. The author thinks that the current orientation of this policy does not contribute to the development of international cooperation within NATO and the European Communities. The goals pursued by Italy within the framework of international organizations seem to be of an exclusively national character. Spinelli points an accusing finger at inertia and the absence of a strong Italian opposition which are amongst elements jeopardizing European integration. He concludes that Italy's improvised initiatives to further the aims of the Communities turn out to be mere "gestures" which impress nobody and are no real evidence of political maturity with respect to integration.

J. F. Brown has contributed an interesting article on Eastern Europe's views of the present state of European Integration (*Europa Archiv,* 1967, no. 22, pp. 815-824). The author notes that the communist countries take a pragmatic attitude and adopt a wait-and-see policy which replaces the original hostile stand towards European Integration. All those countries now have admitted, though implicitly, that the Common Market is an economic reality and most of them seek to establish commercial relations with the EEC. The author, after having discussed the position of the individual communist countries, finds that the Soviet Union is the country which is most unyielding in its attitude to the EEC. This is caused by fear of German "revanchism" rather than by the economic importance of the EEC. It is remarkable that Italy's Communist Party has publicly endorsed efforts towards the establishment of the Common Market and strives to obtain a more substantial say of the workers in the process of integration.

Elena Bubba (*Europa Archiv,* no. 16, 1967, pp. 601-608), has written an article on the way in which the European Parliament has performed in the last ten years. It rarely occurs that great political debates take place in the Parliament, since reports of the Committees practically cover the whole range of Community activities, and discussions are strictly limited to the Treaties' contents. However the European Parliament is free to organize its activities and it appears unlikely that member States will interfere with debates which go beyond the domain of the Treaties. The author fears that if the Parliament does not carry out its functions with respect to the information of public opinion on great political issues, it will fail to remain a body different from the Economic and Social Committee.

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1. See, for example, Articles 4 (4), 5 (5) and 6 of Reg. No. 120/67 of the Council (O.J. 2269/67).
2. See Article 26 (3) of the same Reg.

Free movement of goods

Questions asked by Arved Deringer in the European Parliament concerning measures having an effect equivalent to quantitative restrictions are reported in a short note in *Aussenwirtschaftsdienst,* August 1967, no. 8, pp. 310-311. The author, *Dr. Claus Tessin,* reproduces the Commission's answers and adds some conclusions to the Commission's interpretation of Article 30 of the E.E.C. Treaty.

In *Common Market* 1967, no. 5, pp. 132-136 *William Diebold* has devoted attention to the preferential treatment which the EEC grants to tropical products from former colonial territories in Africa that have now acquired associate status. Instead of widening the circle of associated states on a selective basis the Community should seek to lower its common customs tariff for the benefit of tropical products from all developing countries. Diebold supports an agreement between the USA, the United Kingdom and the EEC for the purpose of attaining non-discriminatory arrangements on a world-wide scale with respect to tropical products from the states concerned.

Free movement of persons, services and capital

C. Tomuschat has written a comprehensive article on the proviso "the exercise of public authority" in Article 55 of the EEC Treaty and its effects on the legal profession (*Zeitschrift für Ausländisches Offentliches Recht und Völkerrecht,* Bd. 2, July 1967, pp. 53-93). According to the author the need for legal security prohibits establishing distinctions between practitioners of one and the same profession according to their tasks. The notion of "public authority" must have a community content and one must not confuse certain public aspects of the legal profession with the exercise of public authority. Consequently every national of a member State must have access to the profession but in practice freedom of establishment and freedom to supply services in the field are bound to depend on the preliminary requirement of Article 57 providing for mutual recognition of diplomas, certificates and other qualifications.

F. Terré has also commented on Article 55 (*Journal du droit international,* 1967, no. 2, pp. 265-289). In his opinion the origins of this Article preclude the application of the freedom of establishment to all juridical professions. According to the Commission, the activities of notaries and registrars include the exercise of public authority, but with respect to the profession of auctioneers, bailiffs or lawyers the question is still to be answered. Several working groups of experts have considered the lawyer's position but the cautious proposals made by such groups induce Terré to put numerous question marks behind them. He is inclined to seek a solution bypassing the EEC framework such as the adoption of an intergovernmental Convention which would elaborate the freedom of establishment and would also regulate matters like access to the bar, the administration of disciplinary justice, etc.

The first draft directive on insurance business as submitted to the Council of Ministers in October 1966, has been discussed in *Sociaal-Economische Wetgeving,* 1967, no. 2, pp. 76-92 by *F. Salomonson.* (See also Mr. Salomonson's contribution on the application of the Treaty of Rome to the insurance industry, published in 4 C.M.L.Rev. 1966-67, pp. 289-307). The proposed directive is based on Article 57 paragraph 2. This article provides for the issuance of directives for the coordination of the provisions imposed by law, regulation or administrative action in member States concerning access to and pursuit of self-employed occupations. However, the author notes that Article 100 would constitute a more convenient instrument for harmonising insurance laws since the Community should not render policyholders' interests subordinate to those of the insurers. Moreover, Salomonson contends that this draft directive will result in unification rather than in harmoni-

sation of insurance laws. He rejects the centralizing tendencies in the Commission's proposal and finds that rules on conflicts of laws and mutual recognition of member States' agencies of supervision in this field would provide better solutions than those advocated by the draft directive.

Competition

A general survey of the competition law of the E.E.C. has been given by *P. J. G. Kapteyn* in *Ars Aequi* 1966, pp. 386-391. The article is meant as an introduction to the Grundig-Consten case of the Court of Justice (4 C.M.L.Rev. 1966-7, pp. 209-220). The judgment itself has been published in a later issue of the same periodical. In his annotation the same author gives a clear insight into the juridical and economic problems which were involved (*Ars Aequi* 1967, pp. 67-76).

A. Gleiss and *W. Kleinmann* discuss in *Neue Juristische Wochenschrift,* 1967, pp. 2097-2699 Article 15 of Regulation No. 17 which declares the Commission competent to impose fines, *inter alia,* for violation of the Articles 85 (1) and 86 of the E.E.C. Treaty. This article does not foresee a statute of limitation. Nevertheless they are of the opinion that such limitation has to be accepted in view of certain principles of law common to all member States. Neither the periods of limitation foreseen in the national laws of the member States nor an average thereof can, however, be applied. For this reason they argue that the Commission, which is not obliged to impose such a fine, shall take into account by its decision, amongst other things, the moment on which the contravention has been committed.

Regulation No. 67/76 of the Commission on group exemptions has been summarized and shortly commented upon by *P. de Vroede* in *Rechtskundig Weekblad* of September 24, 1967, pp. 181-186. The author says that the regulation will have little practical effect. Adjustment of contracts to the regulation will be necessary mostly on account of the (forbidden) clause on absolute territorial protection. However, in these cases one can wait for a final decision of the Commission on the applicability of Article 85 (3) of the E.E.C. Treaty as well. The illegality which then will be pronounced, will be related only to this clause.

K. Markert wrote in *Wirtschaft und Wettbewerb* 1967, no. 5, four notes on judgments of national courts regarding the compatibility of certain sole agency agreements with Article 85 (1) of the E.E.C. Treaty. First he deals with a decision of the President of the Tribunal at *Turnhout* (Belgium) of September 6, 1965. (*loc. cit.*, pp. 354-355). In this case a sole agent for Grundig-products succeeded in his action against a "parallel importer", notwithstanding the fact that a decision of the Commission was pending. For this reason the decision compared, according to Markert, unfavourably with that of the Court of Appeal at Brussels of June 25, 1964 (3 C.M.L.Rev. 1965-6, pp. 245-246). Provisional measures ought not to be admitted on such unsteady grounds.

The second note (*loc. cit,* pp. 360-361) concerns a judgment of the Court of Appeal at *Liège* of June 8, 1966 (5 C.M.L.Rev. 1967-8, pp. 325-326). In this case the Court refused *inter alia* to suspend proceedings, as the agreement had not been notified to the Commission. Does this suggest that a suspension would have been possible in the opposite case? Thirdly Markert discusses (*loc. cit.,* pp. 363-364) a decision of the Commercial Tribunal at Brussels of September 6, 1966. Attention is paid to the fact that the Tribunal, which dismissed a claim for damages on account of the violation by the agreement of Article 85 of the E.E.C. Treaty, brought on to one level the provisions of the agreement in regard of damages and absolute territorial protection. The last note (*loc. cit.*, pp. 369-370) deals with the decision of the Court of Appeal at Paris of February 22, 1967 (final decision in the case L.T.M. vs. M.B.U.). The same decision has been commented upon by *F. C. Jeantet* in *Cahiers de droit européen* 1967, no. 6, pp. 686-696.

Markert again writes in *Aussenwirtschaftsdienst* 1967, no. 10, pp. 394-395, on

the judgment of the Belgian *Cour de Cassation* of June 8, 1967 ("Cement-Convention Case, 5 C.M.L.Rev. 1967-8, pp. 323-324). He notes that the *Cour* considered the Commission as having sole competence to apply Article 85 (3) of the E.E.C.-Treaty and, unlike the Court of Appeal, left unanswered the question whether civil judges are "national authorities" within the sense of Article 9 (3) of Regulation No. 17.

The same author wrote in *Revue trimestrielle de droit européen* 1967, no. 3, pp. 676-679, on a decision of the Commercial Court at *Liège* of May 8, 1967 (5 C.M.L.Rev. 1967-8, pp. 324-325). He discusses Anglo-American law concerning similar questions as those put by the Liège Court. It appears that within the U.S., when such contracts as brewers contracts, *e.g.* concerning the supply of petrol, are tested by Article 3 of the Clayton Act, the influence of the whole system of contracts concluded by the producer on competition is taken into account. Within the U.K. certain measures have been taken to weaken the exclusive effect of contracts on the supply of petrol; investigations have been instituted regarding brewery contracts.

According to Markert the question posed ought to be answered positively. It is, however, very difficult to overlook the effects of the whole system of brewery contracts. For this reason he argues that proceedings should be suspended and the case referred to the Commission, provided such a reference is permitted under national law.

The preliminary ruling which was requested was given on December 12, 1967 (case 23/67).

W. Alexander deals in *Cahiers de droit européen* 1967, no. 6, pp. 699-710, with the judgment of the Court of The Hague of 30 June 1967 in the Parke Davis Case (5 C.M.L.Rev. 1967-8, pp. 322-323). Because the case was at that time still *sub judice,* he limits himself to a general treatment of the problems raised by the territorial effect of patents. A useful summary is given of the Dutch case law in respect of the law of patents.

H. W. Wertheimer has published an article on the principle of territoriality in trade-mark Law (*International and Comparative Law Quarterly,* July 1967, pp. 630-662). Legislation in all EEC countries recognizes this principle but statutes do not mention possible exceptions to it. (See also Mr. Wertheimers' contribution in 4 C.M.L.Rev., 1966-67, no. 3, pp. 308-325). Such an exception could be envisaged in a case where one enterprise, holding identical trade-marks in different countries, might wish to oppose the importation of his own branded goods which he himself has put into circulation abroad. Another hypothesis is the importation of branded goods put into circulation by a trade-mark owner abroad who has a certain legal or economic relationship with the owner of the same trade-mark in the importing country. The author discusses the different schools of thought which lead to the rejection or the upholding of the territoriality principle in the circumstances set out above. The answer to this question depends to a great extent on the functions one is prepared to attribute to a trade-mark. Wertheimer thinks a trade-mark is not vested with an independent guarantee function in addition to its identification-of-origin-function. Differentiation in quality of imported goods cannot justify a claim to have the territoriality principle upheld on behalf of a trade-mark owner in different countries. This well conceived study provides useful insights into these complicated problems.

Taxation

The question whether the German *Umsatzausgleichsteuer* is consistent with the EEC Treaty has given much concern to the authorities in that country. Therefore it is not surprising that numerous judicial bodies in the Federal Republic have turned to the Court of Justice of the European Communities to obtain clarification

on this matter. The Finanzgericht of Munich has referred three questions in succession for preliminary decision to the Court, those of February 15, April 26 and May 17, 1967. These requests were registered with the Court as cases 7/67 (O.J. 739/67), 13/67 (O.J. 2009/67), and 20/67 (O.J. 2510/67). *Aussenwirtschaftsdienst* has printed the questions in its 1967 issues no. 4 (pp. 157-158), no. 6 (pp. 236-237) and no. 7 (pp. 278-280) adding short editorial explanations of the cases, which are interesting enough but cannot be summarized under this heading.

A commentary on decisions of the European Court of Justice concerning Articles 95 and 96 EEC has been written by *W. F. C. Stevens* in *Sociaal Economische Wetgeving,* February 1967, pp. 62-76. Focussing special attention on the judgment in case 45/64 (EEC Commission *v.* Italy) Stevens wonders whether this decision establishes a distinction between direct and indirect taxes applying specifically to this Treaty. Article 96 provides for drawbacks of internal taxation on products exported to member States, which drawbacks cannot be in excess of the internal taxation imposed directly or indirectly on them. The author thinks that the Court's interpretation of the word "indirectly" implies that turnover taxes imposed on the investment goods necessary for the manufacturing of the exported products, cannot be taken into account for the calculation of the drawback. He explains that this interpretation, in connection with the future Community system of taxation on value added, would give rise to a serious conflict between the Court's views and those of the Dutch Fiscal Administration. As this situation might entail discrepancies between internal charges and charges imposed on imported products, thus jeopardizing harmonisation of turnover taxes, Stevens urges the Commission to seize the Court, under Article 40 of the Statute of the Court, and request further interpretation of this judgment. (Meanwhile in its Decision of April 3, 1968 in case 28/67 the Court gave once more an interpretation of the term "indirectly". This ruling removes the difficulties with respect to investment goods, discussed by Stevens.)

The introduction on April 11, 1967, of the new system of taxation on added value has been commented upon by *I. C. Bouuaert* in *Cahiers de droit européen,* 1967, no. 6, pp. 653-679. He describes the different national systems of turnover taxation and faces them with the legal and practical consequence of the two directives adopted in this field.

In *Fiscalité du Marché Commun* (December 1967, no. 25, pp. 591-600) *Müller* examines the new German Act on *"Mehrwertsteuer,"* which was passed shortly after the adoption of the two directives of April 11, 1967. This new law is compared with the second directive in a systematical and critical way. Müller considers the German Act in principle to be a correct implementation of the second directive, but concludes that more thought should have been devoted to ironing out minor differences between this Act and the two directives.

Vandamme writes on the necessity of harmonising excise duties in the Common Market (*Revue du Marché Commun,* 1967, pp. 624-635). The author makes an investigation into the current situation in Member States with respect to these duties and points to the exceptional importance of excise duties for the Italian Treasury. The goal of the elimination of tax frontiers cannot be achieved unless harmonisation of the structures of excise duties is realised. Another objective of harmonisation is to prevent disturbance of competitive conditions, because excise duties constitute a complement to turnover taxes. Moreover common policies in fields of agriculture, energy and transport cannot exist without a uniform approach towards excise duties. The author reviews the programme concerning harmonisation of excise duties which the Commission submitted to the Council of Ministers on February 8, 1967, and insists on quick decisionmaking so as not to impair integration in other fields.

Approximation of laws

In *Neue Juristische Wochenschrift,* 14 September 1967, pp. 1694-1697, *Ulrich Schatz* has published an article on the directive as an instrument for approximating laws. The question of whether and to what extent directives can enter into details cannot be answered by way of an interpretation of Article 189 para 3, because in the opinion of Schatz this article is concerned not with the contents but with the binding force of the instruments it sets forth. The purpose of paragraphs 2, 4 and 5 of Article 189 is similarly to give rules on the binding force of the measures enumerated in paragraph 1 of this article. It thus becomes clear that Article 189, para 3, is restricted in its application to member States only. In approximating laws the Council is not required to take this Article into account; the directive's content depends exclusively on the special provision providing for the adoption of such a measure. It then is up to the member States to evaluate their freedom of choice regarding forms and means to implement the directive.

I*n Revue Trimestrielle de droit européen,* no. 2, 1967, pp. 230-268, *Ivo E. Schwarz* has published a French translation of his contribution to the *Festschrift* for Walter Hallstein, dealing with the concept of approximation of laws in the E.E.C. According to Schwarz one must interpret Articles 100 and 101 extensively and not hesitate in using them when the EEC-Treaty provides insufficient means to achieve free circulation of goods, persons, services and capital. Article 101 applies not only to special disparities in a specific branch of industry. It also covers general disparities as constituted by fiscal and social charges. Next, the author offers an analysis of legal instruments available for the process of approximating laws and concludes this interesting study with a commentary on the problems encountered in the member States concerning the implementation of community norms adopted with a view to the adaptation of legislation.

Progress with respect to approximation of laws in member States is slow. *Martin Seidel* observes in *Europarecht* 1967, Heft 3, pp. 262-216 that most of the existing directives are concerned with the law relating to food-stuffs. In this field problems are relatively smaller than in other areas, such as for instance the regulation of safety measures in industry. The author rejects the idea of overcoming difficulties by promoting member Statets' willingness to recognize each other's legislations in fields where harmonisation of laws is necessary. This would be a time-consuming, complicated and probably unsuccessful line of action. Therefore Seidel advocates a thorough effort to approximate laws in order to ensure effective free circulation of merchandise. With respect to member States' different attitudes towards requirements for goods imported from or exported to third countries, no uniform treatment has been realised as yet. For the time being it seems better not to charge the Community with the latter task.

The organisation of a Common Market for pharmaceuticals is dealt with in *Aussenwirtschaftsdienst,* 1967, no. 8 pp. 293-297 by *W. P. van Wartburg.* Proposed E.E.C. rules meet numerous obstacles in public health legislation varying from country to country. The author discusses the problems of unification in this field and takes stock of the directives and draft directives drawn up so far. He sounds a warning note about solutions ignoring the special significance of pharmaceuticals with regard to public health. Otherwise member States may feel inclined, as France does, to invoke the escape clause of Article 36 with respect to drugs. Pursuant to this Article the protection of human life or health may justify prohibitions or restrictions of importation or transits of goods, *i.e.* a deviation from Articles 30 to 40 inclusive.

Social policy

A critical discussion of the social programmes of the ECSC and the EEC, which has appeared in *Polish Western Affairs,* Vol. VII, 1966, no. 1, pp. 48-73, demon-

strates that developments inside the European Communities are watched closely by Eastern European commentators. *Janusz Rachocki* in this periodical censures the insufficiency of the Treaties' social chapters and proves himself equally displeased with the degree to which objectives of social justice and progress are subordinated to the economic expansion of the Communities.

In *Europa Archiv,* no. 18, 1967, pp. 667-674, *Norbert Welter* has written an article on the still pending problems regarding the implementation of Article 118. Although in 1966 the Council adopted a memorandum to recommence cooperation on social matters between member States, this does not mean that social harmonisation has made important steps forward. There was no agreement within the Council in June 1967 on the issue of the participation of social partners in the Commission's activities. The author notes that the Commission has recently developed more realistic views of the possibilities of state cooperation in this field and that it is more prepared to consider member States' feelings than in the past. A new working programme is now being prepared by the Permanent Representatives in cooperation with the Commission. This document will constitute a basis for talks within the Council and might ultimately lead to a "relance" of social integration.

Ph. van Praag has contributed in *Sociaal Maandblad Arbeid,* no. 9, 1967, pp. 606-613, an article on harmonisation and equalisation of the systems of social security effective in the Common Market countries. In conformity with the Commission, the author dissociates himself from the view that social harmonisation exclusively seeks to create normal conditions of competition and to remove economic disparities. It has a social objective in the first place and must aim at the abolition of unjust social treatment and unfair distribution of prosperity. The author thinks equalisation is only possible when there are no objective grounds for differentiation and when varying laws entail discrimination between insured persons. In his opinion prospects for absolute equalisation are not bright.

In the same periodical (pp. 614-628) *J. A. V. M. van Grevenstein* discusses the inadequacy of the European Social Fund. The Commission proposals aiming at a modification of the operation of the Fund have all been shelved due to most member States' unwillingness to allot complementary tasks to the Fund by way of Article 235. Therefore current projects to reform the Fund will receive further elaboration after expiry of the transitional period. The author concludes this article with a detailed survey of necessary improvements of the Fund's functioning. *Van Grevenstein* broaches the same subject in *Common Market,* no. 12, 1967, pp. 302-305. Drawing attention to existing defects in the operations of the Fund, he recommends a new approach, which would place special priority upon occupational retraining in the under-developed regions of the Community and upon advanced training to develop the skills needed in order to move forward in community technology.

The Commission has recently made a proposal for a new Regulation on the social security of migrant workers, which will replace the existing Regulations Nos. 3 and 4. *Mrs. W. M. Levelt-Overmars* has writen on this proposal as far as it deals with the fixing of the applicable legislation, a subject which at the moment is regulated by Articles 12 to 15 inclusive of Regulation No. 3. These articles are meant to give rules on applicable legislation excluding relevancy of other systems of workers insurance. The Court, however, has ruled (case 92/63, Nonnenmacher *v.* S. V. B., *Recueil* X) that Article 12 of Regulation No. 3 does not designate one system of social security excluding all other legislation. The author goes into the problems which this judgment has created and finds that unilateral amendments to national laws will not provide adequate solutions. If the Court sticks to its interpretation of Articles 48-61 of the EEC Treaty, the proposed change in the text of Article 12 will be of little use (see *Sociaal Maandblad Arbeid,* 1967, no. 11, pp. 689-701).

Case Law of the Court of Justice and the National Courts

The consultative function of the Court of Justice is the subject of an article by *Rachid Kheitmi,* published in *Revue trimestrielle de droit européen,* 1967, no. 3, pp. 553-594, and no. 4, pp. 759-798. It is divided into three chapters. The first one deals with cases in which the Court has been charged with a consultative task; Articles 95 (4) of the ECSC Treaty, 228 of the EEC Treaty and 13 (2) of the Statute of the Court attached to the ECSC Treaty. In the second chapter the author discusses the three opinions given by the Court up to now. They were all related to amendments of the ECSC Treaty.

The final chapter deals with the interpretation and the application of the Treaties and the possibility of consulting the Court. The author limits himself to problems on the execution of the competences of the Communities with regard to relations with third countries and on the internal competences of the Communities. He is of the opinion that an extension of the consultative function of the Court is necessary for the solution of these problems. In cases which are analogous to Article 95 (4) of the ECSC Treaty, notably those foreseen by Articles 95 (1) of the ECSC Treaty, 235 of the EEC Treaty and 203 of the Euratom Treaty, a concurring opinion by the Court should be prescribed. Furthermore a general possibility should be created which would allow the Council and the Commission together or, in certain circumstances a member State, to ask for an opinion of the Court.

Yves Weber writes in *Revue trimestrielle de droit européen,* 1967, no. 3, pp. 507-552, on the problems connected with the demonstration of "détournement de pouvoir" (abuse of powers). This notion fulfils different functions in the law of the European Communities, depending on whether it is pleaded as a condition of admissibility, a condition for an extension of the Court's competence (Article 33 (1) of the ECSC Treaty), a ground for annulment, or as a "moyen" in case of recourse to the Court's plenary jurisdiction. However, in proving a "détournement de pouvoir" one meets the difficulty that this notion has a subjective character, *sc.* that the internal reasons of the administration have to be shown. One has to prove that the goal aimed at is other than the goal laid down in the Treaty. The author discusses the object of the proof, the apportionment of the burden of proof and the means of proof.

A thorough description of the Rules of Procedure of the Court of Justice is given by *Gilbert Knaub* in the same review, 1967, no. 2, pp. 269-318.

A. S. Fransen van de Putte writes in *Arbitrale Rechtspraak,* 1967, nos. 556-8, pp. 193-197, 225-234 and 257-267 respectively, on the vexed question as to whether arbitrators constitute a tribunal of a member State in the sense of Article 177 of the EEC Treaty. For a positive answer he argues that the solution of disputes by competent arbitrators has to be considered essentially as jurisdiction by virtue of the relevant provisions of national law. When the case is referred to the Court of Justice it is, however, not established that the arbitrator is competent as his competence depends on the validity of the agreement at stake. The author's conclusion is that the question mentioned above has to be answered negatively. A possibility for arbitrators to ask for a preliminary ruling of the Court would only exist, when Article 177 (1) granted the Court a general competence in these matters (*cf.* hereto the note of M.R. Mok in this issue).

The text of the second Lütticke case (no. 57/67, 4 C.M.L. Rev. 1966-7, pp. 327-330) has given rise to misunderstanding, as it was not clear whether the Court in its consideration of Article 97 of the EEC Treaty gave its own opinion or reproduced the opinion of the three member States which intervened. The authentic German text of the judgment pointed in the latter direction. The printed German text as well as the text in the other three languages suggested, however, that the Court gave its own interpretation, *sc.* that Article 97 could not have direct affects. The problem has been treated by *U. Everling* in *Aussenwirtschaftsdienst,* 1967,

no. 5, pp. 182-184. Basing himself on the French text of the judgment—French is the current language in chambers—he argues that the authentic text of the judgment is incorrect. In fact only this text contained the true text of the judgment. In an annexe to the Index on the twelfth volume of the Court's case law a correction has been published which adapts the printed text to the authentic. It is a pity that the text in the other three languages has not been changed.

The judgment itself is commented upon by *H. P. Ipsen* in *Europarecht* 1966, no. 4, pp. 356-359. The author pays attention to the general significance the judgment has for the effects of community law. Without any intervention of the national legislator a rule of material law has been added to national law. Consequently the Court has engaged the national judge when the national legislator failed in its task to give rules. This "gemeinschaftrechtliche Alternativ-Normierung" shows all those characteristics, which in theory are indicated by the term direct and generally binding effect."

The same author noted in the same review on pages 352-354 the judgment in consolidated Cases 52 and 55/65 (4 C.M.L.Rev. 1966-7, pp. 326-327). It is noted that the Commission will now have to occupy itself with certain practices within other member States, which it tolerated till now, but which, according to Advocate-General Roemer, have a similar character to the levies *in casu*.

E. W. Fuss and *F. Burkhard* wrote in *Europarecht* 1967, no. 3, pp. 229-239, on the judgment in the consolidated Cases 8-11/16 ("Cement Works", 5 C.M.L.Rev. 1967-8, pp. 71-73). The judgment is compared with that of June 16, 1966 (Case 54/65, *Rec.* XII, pp. 266 *et seq.*) in which the decision in general is defined. *In casu* the question was mainly whether the communication of the Commission had a direct judicial effect and embodied a final utterance of the Commission. According to the authors the Court rightly decided that both requirements were fulfilled.

The relationship between Community law and national law was at stake in a number of decisions of the highest German Courts (*cf.* Editorial Comments, 5 C.M.L.Rev. 1967-8, pp. 243-244, and the summary given *ibidem*, pp. 211-212 as well as in this issue). The judgment of the German Constitutional Court of July 5, 1967, is commented upon by *Gert Meier* in *Neue Juristische Wochenschrift* 1967, pp. 2109-2110. In his opinion the Court agreed with the referring judge (the *Finanzgericht* Rheinland-Pfalz, judgment of November 14, 1963, 2 C.M.L.Rev. 1963-4, p. 463) that a conflict between Community law and national law has to be solved by the national judge and that in such a case the first prevails. It is, however, astonishing that the Court, which did not consider the *Umsatzausgleichsteuer* to be a tax having equivalent effects on customs duties but as an internal taxation, nevertheless dealt with Article 1 of the ratifying law, the constitutionality of Article 95 of the EEC Treaty not being under discussion. Unlike the Court, the author supposes that the nullity of the ratifying law with regard to the ratification of Article 189 of the EEC Treaty, would lead to the nullification of the ratification of the whole Treaty.

H. P. Ipsen gives a comment on the same judgment in *Europarecht* 1967, no. 4, pp. 358-360. He sketches the background of the judgment and the circumstances in which it was given.

The final decision of the *Giudice Conciliatore* at Milan of May 4, 1966, in the case Costa/ENEL (*Cf.* for the judgment of the Court of Justice: 2 C.M.L.Rev. 1964-5, pp. 197-201) was commented upon by *C. Sasse* in *Europarecht* 1966, no. 4, pp. 360-366. The judge declared invalid Law no. 1643, which granted a monopoly regarding the supply of electricity to ENEL. In accordance with the preliminary ruling of the Court of Justice mentioned above, the judge based this illegality on the direct effect of Article 37 (2) of the EEC Treaty, which contained a "stand-still" in respect of monopolies. A further ground was, however, derived from Articles 102 and 93 of the EEC Treaty. In this manner the judge went further than

the Court of Justice, which did not give a self-executing character to these articles.

According to Sasse it is permissible that the national judge derives more stringent rules from Community law. *In casu* this derivation was, however, not sufficiently reasoned. Apart from that, the author is very pleased with this judgment in which for the first time a national law was declared inapplicable on account of its incompatibility with the EEC Treaty.

In the request for a preliminary ruling submitted on the *Finanzgericht* Düsseldorf of September 6, 1967 (*Aussenwirtschaftsdienst* 1967, no. 11, pp. 444-446; see also *O.J.* 1967, no. 250, p. 2) it is *inter alia* asked whether national law that deviates from a self-executing provision of Community law, as *e.g.* Article 95 of the EEC Treaty, has to be abolished or—in view of Article 95, para 3—is null and void since January 1, 1962. This question is discussed by *Gert Meier* in the same review on pp. 413-415. He says that an obligation to change or to abolish national law exists only when Community law does not prevail. For this reason the tribunal submits once more the guestion whether Community law prevails to the Court. According to Meier, the precedence of Community law has two consequences: the deviating national law cannot be applied, and, with the same validity and effect, is replaced by the provision of Community law involved.

The preliminary ruling which was requested was given on April 4, 1968 (Case 34/67).

European Coal and Steel Community

Gérard Olivier has written on the legel aspects of an adaption of the E.C.S.C. Treaty to difficulties regarding the possibilities of selling Community coal. This contribution was published in two instalments in *Cahiers de droit européen*, 1967, no. 1, pp. 3-19, and in no. 2, 1967, pp. 163-179. The author traces the use made of Article 95 of the Treaty in the past years and analyses the initiatives taken to amend Articles 56 and 65 E.C.S.C. The latter attempt, as one knows, has proved to be vain. The negative conclusion reached by the Court in its advice on the proposal to modify Article 65 seems to point to rather considerable resistence with respect to farreaching Treaty amendments. Olivier wonders whether member States have not been too optimistic when introducing the revision procedure of Article 95 without prescribing unanimity for decision making in the Council. He concludes that the body of difficulties caused by the profoundly changed economic conditions of the coal industry, can only be solved on the occasion of the merger of the Communities.

In *Droit Social*, on. 6, June 1967, pp. 341-350, *Jean Vergès* has written on measures which need to be taken in order to cope with the crisis in the E.C.S.C. He discusses the structural defects of the Community's action and makes suggestions to future policies of member States and of the merged Commission. Prerequisite to a revival of the E.C.S.C. is a demonstration of the political will of member States to promote integration in the coal and steel industry.

Council of Europe, Human Rights

A. Kiss has paid attention to the prospects of the Council of Europe. This organization has undertaken to carry out a programme outlining its activities for years to come (*Revue trimestrielle de droit européen* 1967, no. 1, pp. 76-86). On the initiative of the Secretary-General, the Committee of Ministers has adopted an intergovernmental working programme which aims at the achievement of a coordinated and well structured piece of European Legislation. The programme takes into account the efforts of other international organizations in the field of approximation of laws. The author observes that with respect to the drafting of this programme, the Consultative Assembly did not exercise its usual rights of

initiative and deliberation. Only when the programme had been drawn up was the Assembly consulted. This means a shift of the initiative as laid down in the Council's Statute. Nevertheless the author expects the Assembly to play an important role when it comes to implementation of this working programme.

The Belgian Linguistic Case now pending before the European Court of Human Rights is discussed by *J. J. A. Salmon* in *Journal des Tribunaux,* May 27, 1967, no. 4576, pp. 341-348). The author provides a clear survey of the proceedings and analyses the Commission's decision with respect to the applicants' complaints. The Commission in effect, considered that the Belgian measures complained of are incompatible with Article 2 of the Protocol ("no one shall be denied the right to education. . .") read in conjunction with Article 12 (protection against discriminatory treatment). In Court the Belgian Government raised a preliminary objection of incompetence submitting in short that the Convention and the Protocol are not applicable to the matters with which the case was concerned. The disputed provisions formed a part of the States' "reserved domain". The Court held, on the basis of Articles 45 and 48, that it may decline jurisdiction only if the complaints of the applicants are clearly outside the provisions of the Convention and the Protocol. Thus, the Court has competence when there is need for interpretation, which need in the case was manifest. The plea of the "reserved domain" was joined to the merits. Salmon concludes succinctly that this judgment will considerably restrict future use of the plea of incompetence.

A second commentary on this case was written by *Salmon* in cooperation with *E. Suy,* They come to similar conclusions as are reached in the preceding article. Besides this commentary, the integral text of the Court's judgement on the preliminary objection is printed in *Revue belge de droit international,* 1967, no. 2, pp. 611-618. The Court, as is pointed out in this contribution, rejecting the Belgian contention of incompetence and affirming its jurisdiction, added that this decision did in no way prejudge the merits of the dispute. The Belgian Government is free to take up again on the merits its thesis that its linguistic regime is not affected by the Convention and the Protocol. The authors infer from this judgment that the Belgian Government has wrongly presented its views in the form of an objection of incompetence.

The International and Comparative Law Quarterly, 1967, Vol. 16, part 1, pp. 206-217, contains an article by *Ralph Beddard* who attempts to demonstrate that the Convention of Rome has no direct effect on nationals of States parties to the Convention. He derives his arguments in part from the Convention's genesis and from a statement made by the British Government in Parliament in 1958. According to Beddard, Article 13 of the Convention (providing for an effective remedy against violation of rights and freedoms) as protected by the convention does not prove that the Convention is self-executing. On the contrary, a Commission request that States pass legislation with a view to adapting municipal law to the Convention, proves the existence of a margin between national law and the Convention. The author's argumentation does not carry conviction and one would welcome an opportunity for the Court to render an authoritative opinion on this matter.

Another study on the problem of the self-executing character of the Convention's Section I, written by *Thomas Buergenthal* in *Journal of the International Commission of Jurists,* 1966, Vol. VII, no. 1, pp. 55-96, admits that the fundamental rights and freedoms as set forth in the Convention have become national law in the States which have ratified the Convention. Even so, the author acknowledges that in practice things happen to be different. He then examines the actual situation in different countries. In one category of States (Scandinavian countries, Great-Britain and Ireland) the Convention is not considered to form part of national law. The judiciary has no power to pronounce on the conformity of national law with the Convention. In Mediterreanean States the Convention ranks as national law but its application cannot be checked by the Commission or the Court.

Belgium, Holland, Austria and Germany have accepted both the internal effect of the Convention and the competence of the Strasbourg organs. The developments which have led to full-fledged acceptance of the Convention's purposes in Austria are particularly interesting. After Austrian Courts had refused to hold Articles 5 and 6 of the Convention directly applicable, the Parliament in this country passed legislation, so as to give the Convention the status of a "constitutional" Law.

In *Nederlands Juristenblad* (Sept. 2, 1967, pp. 753-761), *P. J. G. Kapteyn* and *O. C. de Vries* go into the Greek political situation which in their opinion, has led to serious violations of citizens' rights protected by the Convention. They investigate whether the Commission will be competent to examine a case brought against Greece. The Royal Decree, suspending a number of fundamental rights in Greece, should be confronted with the requirements of Article 15. In previous cases involving application of Article 15, the Commission has declared itself competent. The authors advocate that this breach of the provisions of the Convention be brought before the Commission. In the meantime, as one knows, Denmark, Norway, Sweden and the Netherlands have lodged a complaint in Strasbourg.

In another Dutch periodical (*Tijdschrift voor Strafrecht,* 1967, no. 5, pp. 233-250), *W. C. Binsbergen* en *E. Brongersma* compare Article 6, paragraphs 3(a) and (b) of the Convention with Dutch criminal procedure regarding the imputation of offences. According to Article 261 of the Code of criminal procedure the summons must state the charge, *i.e.* a detailed description of the actual misdemeanour of the accused person. In this phase of the procedure, the accused does not yet know the legal qualification of his offence. Since this situation does not facilitate the preparation of his defense, the authors think it would be desirable to include the legal qualification in the citation. This conclusion is based on a few decisions of the Commission and on the legal methods in operation in neighbouring countries.

M. Moller contends that in virtue of Article 50 of the Convention of Rome, national authorities of a State are liable for damages caused by deficient or unlawful legislation passed in that State (*Neue Juristische Wochenschrift,* 1967, no. 5, pp. 2338-2347). German jurisprudence accepts such liability when statutes are found to infringe upon the Constitution but has not yet affirmed this principle with respect to fundamental rights in general. Moller's interpretation of Article 50 logically leads to the conclusion that conflicts between internal legislation affecting fundamental rights and the Convention should result in indemnification for the plaintiff. He regrets that state liability thus only applies to violation of rights as set out in the Convention and advocates that it should extend to the whole domain of fundamental rights.

Article 1 of the Protocol to the Convention is intended to secure the right of property. It provides that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. *K. H. Böckstiegel* (*Neue Juristische Wochenschrift,* 1967, no. 20, pp. 905-909) asks the question of who can avail himself of the general principles of international law. He answers this question by pointing to the origins of Article 1 of the Protocol. It becomes clear that only foreigners can invoke the general principles of international law. The records of the discussion of the Committee of Ministers, when engaged in drafting the Protocol, throw light on this issue and prove the correctness of this interpretation. For the rest the Commission has not hesitated in using the restrictive interpretation, thus providing better protection for non-nationals than for nationals of a state.

Can the European Commission of Human Rights interfere with the system of legal protection of the European Communities? *T. Koopmans* (*Sociaal Economische Wetgeving,* October 1967, pp. 557-559) gives an account of the European Commission's decision in a case brought before it concerning refusal of a national court of

last instance to apply Article 177 of the EEC Treaty. The plaintiff considered that the principle of "fair hearing" had been disregarded by the judge refusing to request a preliminary ruling from the Court of Justice of the European Community. Koopsmans argues that a political organ such as the Committee of Ministers of the Council of Europe is not an appropriate body to settle disputes concerning compliance with Article 177 EEC and he concludes that he insiuions se up by the Convention should respect the provisions of other Treaties to the extent the latter have created rights exceeding the scope of those the Convention aims to secure.

A very useful and practical guide for those who wish to seek justice in Strasbourg has been published by *Andreas Khol* (*Juristische Blätter,* 1967, Heft 1/2, pp. 47-52 and Heft 3/4, pp. 99-107). Following Articles 1 to 18 of the Convention and 1 to 3 of the first Protocol, the author sets out systematically the Court's jurisprudence and the Commission's reports and decisions. In addition the commentary on the Articles is arranged according to subjects.