STATES AS SUCCESSFUL LITIGANTS BEFORE THE EUROPEAN COURT OF JUSTICE: LESSONS FROM THE 'REPEAT PLAYERS' OF EUROPEAN LITIGATION[1]

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Summary: Despite the importance of the role of the European Court of Justice (ECJ) in European integration, its decision-making process is little studied. In particular, the interactions between the political and the legal arena deserve greater attention. Member States' governments and the ECJ are usually presented as two separate and competing entities, whilst in fact there is a great deal of interaction between these two institutional actors. This article, based on extensive comparative empirical research, uses US sociolegal scholarship on litigation to analyse governments' litigation in a way which contributes to current theoretical understandings of judicial decision-making, European integration and Europeanisation. It identifies, describes, compares and analyses governments' EU litigation strategies, in order to assess whether and how governments influence European legal developments through litigation. It also stresses the need for governments of the new Member States and candidate countries to understand the importance of adopting a strong and consistent EU litigation strategy, so as to play their part in the development of EU law.

'The Court is a political organ, which and within which we must fight.'[3]

Introduction

The European Court of Justice (hereinafter the ECJ or the Court) has been, at least until the mid-1980s, the engine of European integra-

[1] This article is based on a paper prepared for the Workshop Advanced Issues of European Law - European Law in Pre-accession Period: Implementation, Effectiveness and Legal Culture - 4th session: 26 February - 5 March 2006. It builds upon a previous article by the author, 'When governments go to Luxembourg…: the influence of governments on the Court of Justice' (2004) 29 ELR 3, updating it, extending the analysis to new Member States, adding a perspective on candidate countries, and integrating wider theoretical debates.

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[3] Table Ronde, 'L'administration francaise face aux nouvelles échéances européenes' (1992) 63 Revue Francaise d'Administration Publique, 459, translated by the author.

tion, in particular in the legal domain, where progress was much faster than in the lethargic political sphere.[4]

To give but a few examples, the Court has famously constitutionalised the Community legal order,[5] positioning European Community (EC) law at the apex of European legal orders,[6] removing the monopoly of EC law enforcement from Member States or EC institutions to place it in the hands of private actors and national courts,[7] and introducing the protection of fundamental rights as an essential element of this *sui generis* supranational constitutional order.[8]

It has also fostered economic and political integration through its revolutionary *Cassis de Dijon* ruling, which introduced the principle of mutual recognition,[9] thereby boosting the free movement of goods in the European territory and forcing the political process into adopting more efficient and supranational decision-making rules.[10]

Moreover, the Court, before even the introduction of citizenship provisions in the European Union Treaty adopted at Maastricht in 1992, had already begun to develop its own understanding of Union citizenship and of its consequences.[11] It has now taken the concept further than envisaged by many, including the Masters of the Treaty, i.e. the Member States' government.[12]

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[4] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale L. J. 2403

[5] GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev, 595.

[6] The ECJ established the doctrine of supremacy of EC law, including secondary EU legislation, even over national constitutional provisions. See cases 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585, case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, and C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

[7] The ECJ granted direct effect to clear and unambiguous provisions of EC law. See cases 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1. Vertical direct effect was even given to clear and unambiguous provisions of directives. See cases 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337 and case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* (1986) ECR 723.

[8] Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419, case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* [1977] ECR 1; and case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727. For a recent case which reconsiders the balance between free movement and fundamental rights in favour of the latter, see C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.

[9] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[10] KJ Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community. European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comparative Political Studies 535.

[11] Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999.

[12] In 2001, the ECJ declared that Union citizenship would be the "fundamental status of nationals of Member States" (case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale*

In brief, the ECJ has created *its* Constitution for Europe, and this much before Mr Valery Giscard d'Estaing inaugurated what was to become the European Convention,[13] much before the Member States painfully agreed on the curiously named "Treaty establishing a Constitution for Europe",[14] and much before the awakenings of the French and Dutch peoples to the "harsh reality" of European integration.[15]

At the time of writing, the adoption of the constitutional treaty is on stand-by, following national ratification problems sparked by the French and Dutch voters, and causing the disarray of many political actors or observers. Lawyers, for their part, are not so distraught. Of course, most supported the constitutional treaty, if not so much for its substance, at least for the increased democratic nature and legitimacy it brought into the European integration process.[16] However, they are not so upset about the failure of "the Constitution," because as far as they are concerned, the European "constitutional charter"[17] already exists and is permanently moulded and consolidated by the Court.

With the initial euphoria that surrounded the drafting, adoption and ratification of the constitutional treaty, many (including the author of this article) predicted and noted the adoption by the Court of a low profile, in particular in relation to issues discussed in the Convention or the following Intergovernmental Conference.[18] However, the failure of the political constitutional process has brought the Court back under the spotlight, and back on stage. Some of its recent judgments show that the Court will not hesitate to pick up some issues where the politicians left them, and develop them according to its own *certaine idée de l'Europe*,[19] which is not always the one favoured by national governments or electorates!

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d'Ottignes-Louvain-la-Neuve [2001] ECR I-6193, para 31). Recently, the Court extended the exercise of the citizenship right, such as the right of residence, to the situation where there had been no movement from one Member State to the other. E.g. C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9923.

[13] See the website of the European Convention, at http://european-convention.eu.int/bienvenue.asp?lang=EN.

[14] Treaty establishing a Constitution for Europe**,** OJ C 310 of December 16, 2004.

[15] See interactive map on the state of ratification of the constitutional treaty by the Member States, available at http://www.eu.int/constitution/ratification_en.htm.

[16] For example, K Lenaerts and M Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27 ELR 377.

[17] Case 294/83 *Parti écologiste «Les Verts» v. European Parliament* [1986] ECR 1339, para 23.

[18] See M-P Granger, 'The Future of Europe: judicial preferences and interference' (2005) 3 Comparative European Politics 155.

[19] Expression developed by analogy to General de Gaulle's *certaine idée de la France,*

This pre-eminent role of the ECJ in the integration process,[20] which certainly holds comparison with that of the US Supreme Court, is, surprisingly, not matched by a great deal of attention on the part of political actors and academics alike.[21] This is particularly shocking if one looks at research carried out on the other side of the Atlantic and on judicial decision-making, in particular that of the US Supreme Court. More specifically, socio-legal research on litigation *outre-Atlantique* has shown that actors with active litigation strategies, important human and financial resources, familiarity with judicial processes and links with institutions (i.e. "Repeat Players") are more likely to impact on legal change in the long term than reactive, isolated, and inexperienced actors endowed with limited resources and contacts (i.e. "One-Shotters").[22] The application and testing of this hypothesis in the EU context are limited.[23]

Lawyers and legal scholars do pay attention to ECJ decision-making, but they are far more interested in the substance than in the process. Judicial decision-making in the ECJ is still largely neglected,[24] and this despite repeated calls for more academic interest.[25] If at all touched upon, it is in relation to the constitutional dialogue taking place between national courts and the ECJ and its normative dimensions.[26]

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[20] On the impact of the Court on European legal and political Integration, see for legal studies Mancini (n 5) \ Weiler (n 4), H Rasmussen, *On Law and Policy in the European Court of Justice - A comparative study in judicial politics* (Dordrecht, Boston and Hingham, USA 1986); M Nijhoff and for political sciences AW Green, *Political integration by jurisprudence: the work of the Court of Justice of the European Communities in European political integration* (AW Sijthoff ,Leyden 1969); S Scheingold, *The Rule of law in European Integration: the path of the Schuman Plan* (Yale University Press,Yale 1965) and ML Volcansek, 'The European Court of Justice: Supranational policy-Making' (1992) 15 West European Politics 109.

[21] For the exceptions, see below.

[22] For a seminal article on the subject, see M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95.

[23] However, for some reference to the concept of Repeat Players and use of it in the EU judicial process, in relation essentially to private actors and EU institutions, see C Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 Yearbook of European Law 213 and HW Micklitz and N Reich (eds), *Public Interest Litigation Before the European Courts* (Nomos Verlagsgesellschaft, Baden-Baden 1996); C Harding, 'Who Goes to Court in Europe - An Analysis of litigation against the European Community' (1992) 17 ELR 128 and with A Gibbs, 'Why go to court in Europe? An analysis of cartels appeals 1995-2004' (2005) 30 ELR 349.

[24] But for significant exceptions, see J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon, Oxford 1993) and MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing ,Oxford 1998).

[25] See T Koopmans, 'Judicial Decision-Making' in: Dr Campbell and Dr Voyatsi (eds), *Legal reasoning and Judicial Interpretation of European Law, Essays in Honour of Lord Mackenzie-Stuart* (Treuton Publishing 1996)103-104 and Harlow (n 23).

[26] See the literature on constitutional pluralism in Europe, e.g. M Kumm, 'Who is the final arbiter of constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of

More particularly, European Union (EU) litigation, as one dimension of European judicial decision-making, is a subject-matter which deserves more attention from both academics and practitioners, following in the footpath of US political and sociolegal scholarship. Most of the scarce legal literature on EU litigation concentrates on the activities of interests or corporate groups, or that of some EU institutions, and neglects that of Member States' governments.[27] The few works that address governments' representation before the ECJ are either outdated, country-specific, or lacking theoretical foundations or outcomes.[28]

As to political scientists, whilst many have written on the roles and powers of governments within the EU legislative and Treaty reform processes, few have tackled the question of their influence on decision-making in the European Court of Justice. And amongst those, none gives significant attention to governmental litigation as a significant means of influence. European integration (EI) theorists, however, did pay some attention to the process of integration by judicial fiat.[29] Analysing the relationship between the ECJ and Member States, these scholars' conclusions vary depending on their theoretical allegiances. Neofunctionalists consider that, although governments are the official 'Masters of the Treaty' and creators of the Court, they are unable to control the Court's integrative activities. The reasons advanced for this lack of control are: (a) the law acting as 'a mask and shield' for politics, (b) the support of the Commission, national courts and private - in particular corporate - players, all pursuing their own interests in a way which serves the purpose of

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the European Market Order for Bananas' (1998) Jean Monnet Working Paper No 98/10, available at http://www.jeanmonnetprogram.org/papers/98/98-10-.html, N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 CML Rev. 65 (2002) 317 and chapters in: N Walker (ed), *Sovereignty in Transition* (Hart Publishing, Oxford 2003).

[27] See Harlow and Harding (n 23). See also H Cullen and A Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (1999) 36 CML Rev 1243, which deals with government litigation, but only within the context of annulment actions. On litigation by corporate actors in the field of EU competition law and policy, see Rawlings and Gibbs (n 23).

[28] For example *La Cour de Justice des Communautés européennes et les Etats membres* (Editions de l'Université de Bruxelles11, Brussels 1981); K Mortelmans, 'Observations in the cases governed by Article 177 of the EEC Treaty: Procedure and Practice' (1979) 16 CML Rev 577 and U Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 ELR 215; HG Schermers et al., *Article 177 EEC: Experiences and Problems* (TMC Asser Instituut, The Hague 1987).

[29] For an overview of the application on EI theories to legal integration, see KA Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 Journal of Common Market Studies 155 and 'New Institutionalism and European Union Legal Studies' in: P Craig and C Harlow (eds), *Law-Making in the EU* (Kluwer Law International 89 1998); B Rosamond, 'Mapping the European Condition: The Theory of Integration and the Integration of Theory' (1995) 13 European Journal of International Politics 391 and *Theories of European Integration* (Palgrave: The European Union Series ,Basingstoke and New York 2000).

further integration, and (c) governments' lack of efficient means of control over judicial activism.[30]

Intergovernmentalists, for their part, take the opposite view. They consider that, overall, the Court acts consistently with (powerful) Member States' preferences, within the limits allowed by legal reasoning. This is so because governments have sufficient means of control over the Court (e.g. technique of political appointment, imposition of budgetary restrictions, curtailment or limitations of the Court's powers or jurisdictions, reversal of adverse judicial decisions through Treaty or legislative amendments, limitation of judicial discretion through more restrictive drafting of legal instruments, etc.).[31]

The turn to new institutionalism in EI studies has brought into the picture more informal means of influence, such as non-compliance with judicial decisions, precedents as path-dependencies or normative pressures.[32] Some recent Rational Choice Institutionalist studies even suggest

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[30] For neofunctionalist approaches of the relationship between the Member States and the Court see A-M Slaughter et al. (eds), *The European Court and the National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Press, Oxford, UK 1997) 365; A-M Burley and W Mattli, 'Europe before the Court - A Political Theory of Legal Integration' (1993) 47 International Organization 41; W Mattli and A-M Slaughter, 'Law and politics in the European Union: a reply to Garrett' (1995) 49 International Organization 183; 'Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts' (1996) Robert Schuman Centre, European University Institute Working Paper No 96/56; 'Revisiting the European Court of Justice' (1998) 52 International Organization 177; A Stone Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 American Political Science Review, 63; A Stone Sweet, 'Constitutional politics: the reciprocal impact of lawmaking and constitutional adjudication' in P Craig and C Harlow (eds), *Law-Making in the European Union* (Volume 2, Kluwer Law International 111, 1998); K Alter, 'The European Court's Political Power' (1996) 19 West European Politics 458; 'Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice' (1998) 52 International Organization, 121; 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 International Organization, 489 and *Establishing the Supremacy of European Union Law - The Making of an International Rule of Law in Europe* (Oxford University Press, Oxford, New York 2001); Alter and Meunier-Aitsahalia (n 10); K Alter and J Vargas, 'Explaining Variation in the case of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 Comparative Political Studies, 452; J Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice' (1996) 19 West European Politics 360.

[31] G Garrett, 'The Politics of legal integration in the European Union' (1995) 49 International Organization 171.

[32] On the move towards new institutionalist approaches, see D Wincott, 'Institutional Interaction and European Integration: Towards an Everyday Critic of Liberal Intergovernmentalism' (1995) 33 Journal of Common Market Studies; W Sandholtz, 'Membership Matters: Limits of the Functional Approach to European Institutions' (1996) 34 Journal of Common Market Studies 403; P Pierson, 'The Path to European Integration - A Historical Institutional Analysis' (1996) 29 Comparative Political Studies 123; G Tsebelis and G Garrett, 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the Eu-

that governments - the "principals"- may have "weak" informal means of control, such as litigation or participation in judicial proceedings, over the Court - their "agent".[33] However, they do not develop this thesis further. Despite the recent trend in new institutionalist studies towards constructivist approaches, focusing on the power of ideas, discourse, and social learning on European integration, no thorough research has yet been carried out on how governments or, for that matter, other actors, may use litigation as a discursive tool to influence EU judicial developments, and therefore law and policy-making in the EU.[34]

Studies of the process of Europeanisation do analyse the way Member States react to European integration.[35] Although litigation must be seen as constituting one aspect of governments' EU strategy, research on Europeanisation still focuses on the political process and neglects the relevance of the judicial one. Thus, these studies deal with the executive or administrative adaptation of Member States or the coordination of governments' EU policies, in relation only to Council work or Treaty reform, and not to governments' involvement in EU litigation. One can nevertheless learn from these studies, in particular the literature which examines the degree of domestic coordination, to the extent that it considers the quality of such coordination as determinant of governments' ability to influence EU policy-making.[36]

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ropean Union' (2001) 55 International Organization 357; MA Pollack, 'Control mechanism or Deliberative Democracy' (2003) 36 Comparative Political Studies 125 and *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press, Oxford 2003). On new institutionalist approaches to the relationship between Member States and the ECJ, see D Beach, *Between Law and Politics - The relationship between the European Court of Justice and EU member States* (DJØF Publishing, Copenhagen 2001) and G Garrett et al., 'The European Court of Justice, National Governments and Legal Integration in the European Union' (1998) 52 International Organization 121; U Sverdrup, 'Precedents and Present Events in the European Union: An institutional perspective on Treaty Reform' in: K Neunreither and A Wiener (eds), *European Integration After Amsterdam - Institutional Dynamics and Prospects of Democracy* (Oxford University Press, Oxford 2000); J Tallberg, 'The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence' (2000) 38 Journal of Common Market Studies 843.

[33] Ibid. Tallberg.

[34] Regarding calls from constructivist approaches, see JT Checkel and A Moravcsik, 'A Constructivist Research program in EU Studies' (2001) 2 European Union Politics 219. On the difference between rational choice, historical and sociological new institutionalism, see P Hall and RCR Taylor, 'Political Science and the Three New Institutionalisms' (1996) MPIFG Discussion Paper No 96/6.

[35] See *inter alia*, H Wallace, *National Governments and the European Communities* (PEP, European Series, London 1976); H Kassim and S Wright (eds), *The National Co-ordination of EU Policy - The Domestic Level* (Oxford University Press, Oxford 2000); S Bulmer and C Lequesne (eds), *The Member States of the European Union* (Oxford University Press : the New European Union Series, Oxford 2005).

[36] Kassim, et al., "Introduction" in: ibid. Kassim and Wright (eds).

This article, based on an extensive comparative empirical research,[37] combining both qualitative and quantitative methods, and adopting a resolutely interdisciplinary approach to judicial decision-making, makes use of the findings of US sociolegal scholarship on litigation to analyse governments' litigation in a way which contributes to current theoretical understandings of judicial decision-making in the European Union, and more widely the phenomena of European Integration (EI) and Europeanisation. It identifies, describes, compares and analyses governments' EU litigation strategies, in order to develop an understanding of whether and how governments can influence EU case law developments through litigation. In doing so, it throws some light onto an unknown area of governments' EU policy neglected by Europeanisation studies, and contributes to existing new institutionalist debates in EI studies, by offering a sociological institutionalist explanation of integration by judicial fiat. Finally, this article, although not aiming at making a normative contribution, will nevertheless end with an evaluation of the desirability of governmental participation in ECJ proceedings, in the light of democracy, legitimacy and effective decision-making concerns, and in the context of a pluralist European legal order..

This article adopts a wide understanding of litigation, comprising not only the bringing of direct actions against other Member States (Articles 227-228 EC) or EU institutions (Articles 230, 232 or 288.2 EC) or defence against such actions (Articles 226 and 228 EC), but also participation in judicial proceedings by means of "interventions" (Article 40 ECJ Statute)[38] in direct actions involving other parties or by means of "observations" (Article 23 ECJ Statute)[39] in preliminary reference procedures (Articles 234 EC and 35.1 EU). It focuses nevertheless on one particular aspect of this litigation, which consists of governments' observations in preliminary reference proceedings, and this for various reasons. This procedure, which enables national courts to suspend domestic proceedings to request from the ECJ a ruling on the interpretation of EC or EU law or concerning the legality of EC secondary legislation, has developed into a significant means for individuals, with the support of national courts, to

[37] The findings presented in this paper regarding governments' participation strategies are the result of empirical research, based on interviews with governments' agents and questionnaires filled in by these agents, supplemented by information gathered from reports, journal articles and book chapters written by agents. The paper also analyses the result of a statistical study of governments' participation in preliminary rulings proceedings (1995-1999 and 2005).

[38] Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community, as last amended by Council Decision of 3 October 2005 (OJ L 266 of October 11 2005 p 60).

[39] Ibid.

challenge domestic legislation incompatible with EC (and even now EU law). It also offers the possibility to challenge EU legislation for incompatibility with the treaties, general principles of EU law, or international law. As such, it is an important instrument of both integration and disintegration.[40] Moreover, such proceedings constitute the bulk of the ECJ caseload and results in most of its landmark decisions. It therefore deserves particular attention.

Governments' litigation strategy: from neglect to governmental activism

For many years, Member States' governments largely ignored participation in ECJ proceedings as a tool for influence. Their litigation activity was essentially limited to their defense in direct actions and, possibly, participation in preliminary reference procedures emanating from their own courts. Stein, in his early landmark article on integration by judicial means, emphasised the lack of governmental mobilisation around what were to become landmark Community cases.[41] This attitude has now changed, and many governments, although not all of them, have engaged in active litigation strategies before the ECJ.

This initial lack of governments' interest is surprising. Indeed, one would have thought that powerful and resourceful Member States would want to use this additional means to put their print on the process of European integration. Moreover, less powerful Member States would have been expected to turn to the Court as a most favoured arena, since the Court is the only EU law-making institution[42] where the principle of equality between states applies. This state of affairs is even more puzzling when one realises that governments had secured for themselves a privileged position in judicial proceedings before the Court.[43]

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[40] Alter 2000 (n 30).

[41] E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 AJIL 1; for statistics on governments' observations, see Everling and Mortelmans (n 28).

[42] Few nowadays contest that the Court, in its activity of judicial interpretation provided for by Article 220 EC, *de facto* creates law.

[43] Governments share with the Commission the possibility to bring a Member State before the Court for failure to comply with Community law (Article 227 EC). Also, like some Community institutions such as the Commission and the Council (but not yet the European Parliament), governments are 'privileged applicants' with automatic standing, dispensed from having to show a particular interest in judicial review (Article 230 EC) or failure to act (Article 232 EC) proceedings. Moreover, governments, like EU institutions, are 'privileged participants'; they have the right to intervene in all direct actions (Article 40 ECJ Statute) and to participate in all preliminary references proceedings (Article 23 ECJ Statute) brought before the Court, alongside the parties in the case. This situation has been criticised by some, for it imposes a strong governmental and institutional influence over EU judicial proceedings, which is only counterbalanced by that of important corporate interests (Harlow,

There may be various explanations for this initial neglect. It may be the result of an overall lack of governments' understanding of the nature of the ECJ decision-making process.[44] This itself could be the consequence of a - still persistent - continental belief in Montesquieu's myth portraying the judge as the "mouth of the law,"[45] and therefore incapable of influencing its formation. It may also be related to the lesser importance granted to case law in continental legal systems (as compared to common law ones), or the lack of familiarity of European governmental organs with using litigation as a means for pressure. In addition, it must be noted that, for decades, governments largely controlled the legislative procedure (due to unanimity voting in the Council following the 1966 Luxembourg Agreement and the lack of European Parliament involvement), as well as the Treaty reform procedure (through Intergovernmental Conferences). This meant that, not only did they not feel the need to invest in the "alternative" judicial arena, but also they did not care so much about potential adverse judgments, for they probably felt that, should they arise, they could always reverse these judicial decisions by legislative or Treaty amendments. Finally, governments may have been under the impression that they could always ignore adverse ECJ decisions. Indeed, until recently, there were no serious sanctions provided for non-respect of ECJ rulings at EC level (Articles 226-228 EC before the Maastricht Treaty). Furthermore, some domestic courts did not always take it upon themselves to enforce EC law and ECJ decisions against their own legislative or executive authorities (e.g. the French Council of State until the *Nicolo* case of October, 20, 1989).[46]

Nevertheless, with the extension of the competencies of the EU at the expense of those of the Member States, the pressure for EU coordination at intergovernmental level is mounting to enable governments, if they so wish, to keep a grasp on policy-making in a wide range of areas. Furthermore, the rising national salience of EU policy increases the pressure on governments to be seen to be "doing something" to protect important national values or interests at EU level. Moreover, with governments' diminishing influence both over the Treaty reform process (due to a more inclusive and less state dominated Treaty reform procedure),[47]

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n 23) This privileged position of governments and EU institutions is also amplified by their entitlement to be represented in court by both an agent *and* an adviser *or* lawyer, while private parties must rely on a qualified lawyer (Article 19 ECJ Statute, n 38).

[44] H Rasmussen, *European Court of Justice* (1st ed., Gadjura Publishers, Copenhagen 1998).

[45] Montesquieu, *De l'esprit des lois* (1748), Book XI Chapter VI.

[46] CMLR (1990) 173.

[47] See T Christiansen, 'The role of supranational actors in EU treaty reform' (2002) 9 Journal of European Public Policy 33 and T Christiansen et al.,'Theorizing EU treaty reform: beyond diplomacy and bargaining' (2002) 9 Journal of European Public Policy 12.

and over the legislative process (resulting from a greater involvement of the European Parliament and the rise of qualified majority voting in the Council since the 1986 Single European Act), governments have now greater incentives to turn to the Court, which becomes an increasingly attractive alternative forum to bear influence on law-making in the EU. In addition, with national courts increasingly enforcing ECJ decisions, and the introduction in 1992 (new Article 228 EC), and enforcement since July 2000,[48] of the possibility for the Court to impose fines on Member States disobeying its rulings, it is now crucial for governments to avoid adverse judgments in the first place. Finally, another determinant factor of governments' participation is their acknowledgment of the transformation of the preliminary references procedure into an important means to challenge incompatible national laws, policies and practices. They also understand that it provides the framework for creative interpretations of Community law or for the identification of constitutional general principles, which tend to further European integration. All these reasons, and probably others, have incited more governments to engage in more active, and even activist, participation strategies.

Member States' governments' participation strategies can be evaluated on the basis of the statistical patterns of observations, the existence - or lack thereof - and the nature of the criteria used for deciding to submit observations, and the general governmental procedure available to organise participation in ECJ proceedings.

It is useful to examine statistical patterns to first identify potential Repeat Players (RPs), through the frequency or themes of their observations, and then look for more qualitative elements that explain the findings. The statistics regarding observations in Article 234 EC proceedings reveal that some governments are definitely more active that others, as they submit a much greater number of observations. In the mid to late 1990s, these governments were those of *France (1), the United-Kingdom (2), Germany (3*), Italy (4), the Netherlands (5), Spain (6) Greece (7), and Austria (8). This order has changed since. Nowadays, the biggest providers of observations are *the Netherlands (1), Germany (2), the United Kingdom (3),* France (4), Austria (5), Greece (6), Italy (7) and Belgium (8).[49] One must note the improved performance of the Netherlands and Austria, and, on the contrary, a loss of speed in the French participation.

However, the simple fact that these Member States submit many observations does not necessarily mean that all of them have a pro-active

[48] In July 2000, the ECJ fined Greece a daily penalty of 20000 euros for violation of EU environmental legislation (case C-387/97 *Commission of the European Communities v Hellenic Republic* [2000] ECR I-5047).

[49] See Table 1 in Appendices.

litigation strategy. In fact, some governments, such as those of Germany, the Netherlands, and Belgium (and in the past Italy) are, to some extent, simply reacting to their domestic courts initiating many preliminary proceedings,[50] in which they feel obliged to participate.[51] Besides, frequent observations do not systematically equal greater influence, for observations, to be influential in a decision-making process such as the judicial one, must also be convincing, opportune and consistent. As an illustration, it has been alleged by French authorities themselves that the past French policy of "having something to say on every question" undermined the visibility of French priorities and may not be the most cost-efficient use of litigation resources.[52] It seems that France has since acted upon this criticism by becoming more selective in its participation.

An interesting indicator of an active litigation strategy is the proportion of observations submitted in references from domestic courts. The combination of a relatively high number of observations with a relatively low number of these being submitted in "national" cases can signal an active yet selective, and therefore more effective, litigation strategy. This combination of factors places *Finland, Greece, France,* Italy and Austria in the leading pack.[53] One must note a policy change in Italy, which used to submit most of its observations in national cases. Nowadays, the Italian government is much more selective in its participation, and does not take part in all Italian cases.

Another interesting statistical pattern relates to the subject matter of the preliminary reference procedure in which Member States submit observations. The statistics reveal that some Member States have thematic priorities in their participation strategy. For example, Scandinavian countries and Austria tend to be very active in environmental matters. It has also been noted that Scandinavian states have launched a litigation campaign for the promotion of transparency in EU political life.[54] The southern countries, such as Greece, Portugal, Spain and Italy, as well as France, put a great focus on agricultural issues. France is also very active in the fields of public services ("services of general interest" in EU

[50] For statistics on requests for preliminary rulings send by Member States to the Court, see the Annual Court Report, Statistic of the Judicial Activity of the European Court of Justice, available at http://curia.eu.int/en/instit/presentationfr/index.htm. For 2005, see Table 3 in Appendices.

[51] This is not always the case though. The German government, for example, has now moved away from systematic participation in national cases and participates on the basis of the merits of each case and not on its national origin.

[52] Commissariat Général du Plan, 'Organiser la politique européenne et internationale de la France' (2002) La Documentation Française, Paris 37.

[53] See Table 2 in Appendices.

[54] Granger (n 1) .

jargon) and in cases dealing with the development of general principles of Community law. Finally, all Member States are particularly active in taxation cases, in particular direct taxation. This is easily understandable when one realises that taxation is one of the last bastions of state sovereignty, and a significant policy tool. Recently, Member States have mobilised significantly around the issue of criminal law, and in particular the "creeping" EU competence in the field, to which development most Member States are strongly opposed.

It is now useful to investigate governments' alleged participation policies, to check to what extent they corroborate the findings above and provide explanations for them. Here one must distinguish between countries which have truly selective participation strategies based only on the merits of the case, and not influenced by the national origin of the cases, and those which have selective strategies, but still would almost always participate when the preliminary reference comes from their own courts. In fact, only Germany belongs to the first category, and this can be easily explained by the sheer volume of German references to the Court. This means that the German government has neither the will nor the resources to participate in all these national cases, in addition to foreign ones of interest. Most countries (i.e. Austria, Denmark, Finland, France, Germany, Greece, Spain, the United Kingdom, the Netherlands since the mid-1990s, and Belgium in recent years)[55] belong to the second category. Only Luxembourg seems to remain an essentially reactive player. Yet, here again, one must be careful of drawing too hasty conclusions. What could at first sight look like a highly selective participation strategy may simply reflect a lack of resources, which deprives the governments concerned of the possibility to submit more observations. This is definitely a reason behind the selective nature of the German, Dutch and Portuguese strategies, for example. As to the statistical patterns on thematic priorities, they are confirmed by the priorities identified by the governments' agents involved in EU litigation activities.

Further refining can be achieved by looking at the human, material, and organisational resources that governments allocate to EU litigation. This assists in detecting those who really take litigation seriously, as opposed to merely pretending to.

Human, material and organisational resources: real mobilisation or a mere flash in the pan?

One would expect governments which have opted for active EU litigation policies to allocate sufficient resources to achieve their aims. Thus,

[55] No information was provided for Ireland and Italy.

we can suspect that countries with small litigation agencies, in particular if these have been granted both the tasks to coordinate the internal decision-making procedure and to draft and present observations, do not mobilise resources up to the level of their ambitions.[56] For example, while most Member States, even the small and medium-sized ones (such as Finland, Austria, Greece, or Sweden) have medium or even large litigation agencies, Germany or Belgian, for instance, have relatively small agencies in comparison to the large workload. This under-endowment leads them to outsource some of the litigation activity to external lawyers (still in only 10-15% of the affairs). Of course, one could argue that the United Kingdom and Ireland outsource most of their EU litigation activity. However, in their case, it is not the result of human or financial resources shortages, but of a deliberate policy of using private barristers for their participation in EU litigation. The outsourcing is to some extent based on the willingness to use the best lawyers to present their case to the Court. Some of the barristers hired to represent the United Kingdom before the ECJ are amongst the top barristers in the country.

Despite their ambitions and the mobilisation of significant human and material resources, some governments may not be able to act as RPs, simply because their internal decision-making and coordination structures are not suited or efficient enough for the purpose of participation in EU litigation. And vice versa, some Member States may compensate for a lack of resources by efficient coordination. Differences in administrative organisation are not as such signs of strengths or weaknesses, and may result from historical evolution, administrative traditions, state structure (e.g. a federal system), domestic perceptions of EU matters, political balances, state size, and so on. Yet, both Europeanisation and litigation studies suggest that efficient decision-making, fast and informed position determination, and strong coordination are likely to produce a greater impact on decision-making processes. Countries endowed with these attributes therefore start in pole position.

In most countries, the litigation agency is also the coordinating body, although some have entrusted the task of coordinating EU litigation to the organ dealing with the national coordination of general EU policies (e.g. France) or EU law (e.g. the Netherlands). Some countries, however, do not have in place a proper coordinating body or even any formal coordination mechanism (e.g. Germany, Belgium, Portugal, Luxembourg, and Italy). The existence of an efficient coordinating structure is thought to improve the consistency of submissions, and overall of the "national" EU position, as well as the technical and legal quality of observations,

[56] Of course, not only size matters, but also training and experience, which is difficult to assess within the context of this research.

and therefore their potential impact. As to the choice of the ministerial location of both the coordination and litigation agencies, this can reveal something about the level and nature of the cooperation achieved. Most countries place their litigation agency under the Ministry of Foreign Affairs (except Ireland and the UK which systematically resort to external lawyers acting under instruction from the Governments' in-house Legal Services; Austria, which grants it to the Federal Chancellery, and Germany, which puts it under the responsibility of the Finance Ministry). Europeanisation literature suggests that endowing a special inter-ministerial organ, a specific and powerful ministry, or the Cabinet Office with the responsibility for litigation is likely to produce stronger positive coordination than when the task in left to the MFA.[57]

In terms of the persuasiveness of observations, one can safely assume that observations drafted and presented by lawyers with extensive EU law knowledge (in addition to knowledge of the national law) and versed in EU litigation are more likely to "make a good impression" on the Court. This is more likely to be the case where a well-staffed litigation agency drafts the observations and prepares the pleadings in strong collaboration with experts from the technical ministries concerned or/and the coordinating organ (e.g. Austria, Denmark, Finland, France, Greece, Ireland, the Netherlands, Spain, Sweden, the United Kingdom, and, more recently, Belgium). Still, in some Member States (e.g. Luxembourg, and to some extent Portugal), observations are drafted by agents in the ministry "most concerned", or by an external lawyer contracted on an *ad hoc* basis, with sometimes too little additional in-put. As the departmental lawyer may not be very familiar with the peculiarities of the EU judicial process (except where the department is often exposed to EU litigation, i.e. Competition or Agriculture), this is likely to undermine the impact of the observations on the Court. In addition, governments' interests may not always be properly presented by external lawyers. Overall, this could lead to the national position lacking coherence in the longer term. Finally, amongst governments relying on a litigation agency, the more the activity of the agency is focused on EU litigation (e.g. in Finland, Germany, Greece, the Netherlands, Portugal, the United Kingdom, and Spain to some extent), the more it is expected that its agents will be able to argue effectively before the Court.

Although various other aspects of governments' litigation strategies could be examined, this preliminary inquiry already provides us with clues as to which governments are RPs in EU litigation.[58] The leading pack now consists of the governments of the United Kingdom, Finland, Germany,

[57] Kassim et al. (n 35).

[58] For further analysis, see Granger (n 1). More empirical research and sophisticated statistical analysis would be needed to further refine the analysis.

Austria, the Netherlands, France, and Greece. The middle group brings together Belgium, Denmark, Ireland, Sweden, Spain, Portugal and Italy. And behind lies Luxembourg. There has been some evolution over time, and some countries have significantly improved their position. Italy, for example, has moved from a weak participant to a more active and more strategic one. The French government, whose allocation of resources to EU litigation was considered as insufficient in the past, has reacted and set up a more - perhaps too?- active policy.[59] It has redressed the balance in recent years around a sounder and more selective participation strategy. Similarly, in the mid-1990s, the Dutch government completely reorganised its litigation strategy and operation following an unexpected and damaging 1996 ECJ ruling. The growing yet selective participation of this government over the following years is very noticeable in the statistics, despite limited human resources. Recently, the Belgium government has also pulled itself together and has improved its internal procedure and resources for litigation, and has therefore moved up from the bottom to the middle category. The call of J.-V. Louis in the late 1980s for more resources and better organisation for EU litigation has finally been heard by this government.[60] Finally, Austria has confirmed its good start in participation in ECJ procedures.

It is now time to turn to the new Member States. Based on the information provided in January 2006 by the Court, Poland appears to have made a head start, with already 31 written observations to its credit, followed by the Czech Republic (13), Slovakia (9), Hungary (8), Lithuania (6), Cyprus (6), Latvia (2) and Slovenia (2). Malta and Estonia have not yet submitted any written observations. It is difficult to draw conclusions at this early stage, but some observations may be made on these results. First of all, a slow start was to be expected, due to the fact that it would take some time for the new Member States' preliminary references to reach the Court and trigger reservations from the governments of these newcomers. The number of Polish observations does not come as such a surprise, considering the size and political importance of the country. The performance of Slovakia and Cyprus, however, is remarkable in the light of their smaller size. The activity of the Hungarian government, however, with only eight observations, is more puzzling, considering that Hungarian courts have been extremely active in dialoguing with the ECJ by sending five out of the seven preliminary references send by new Member States' courts.[61]

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[59] A Carnellutti, 'The role of governments' representatives in Article 177 references: the experience of France' in: Schermers et al. (n 28).

[60] J-V Louis, 'The Role of Governments' representatives in Article 177 EEC proceedings: some comments on the case of Belgium' in: Schermers et al. (n 28).

[61] See appendix, list.

Additional enquiry into the new Member States' intra-governmental organisation and EU litigation strategies are thus necessary to complement the analysis. Two new Member States have, so far, provided information on their EU litigation strategy: Hungary and Latvia.

As noted, Hungary has only submitted a disappointing number of eight observations since its accession to the EU on 1 May 2004. However, whether by coincidence or by learning, Hungary seems to have adopted most of the attributes of an RP. It has a specialised agency, the "Unit for the Court of Justice Affairs," located within a powerful Ministry, the Ministry of Justice, which deals with general EU coordination through its "Department for the EU" in collaboration with the newly created inter-ministerial organ, the "Interdepartmental Committee for European Coordination" (ICEC). What may be holding it back is the lack of human resources (although this is not mentioned as a problem by the Hungarian agent). Indeed, for the moment, the Unit has only one lawyer working full time on litigation, which is very limited considering the daunting workload (but other - higher-ranking - personalities may be called to participate, depending on the importance of the case).

The second new Member State which participated in the study is Latvia, which has submitted only two observations. First of all, one must note that the Latvian government, whilst setting up its internal procedure and policy for participation in EU judicial proceedings, looks for inspiration to other Member States. As in many new Member States, the agency responsible for participation in ECJ proceedings, the Department for the European Court of Justice, is located within the Ministry of Justice. This seems to result from the fact that in the pre-accession period, this Ministry was in charge of the implementation of the *acquis communautaire* and that this coordination role in EU legal matters remained after accession to the EU. At the moment, the office has a limited staff (three legal agents and a coordinator). However, the government is discussing increasing the legal staffing of the agency or introducing the possibility to hire external lawyers for specific cases, to improve the quantity and quality of Latvia's representation in the Court. The importance of the litigation activity is thus taken seriously. One of the main problems with the current internal procedure is the fact that the decision to submit observations must be made at high political level, which is lengthy and reduces the amount of time available to lawyers to prepare the observations. Indeed, it is the ministry competent for the subject matter that first makes a proposal to submit observations. This proposal is passed on to the agency for advice. Following this, the proposal and the agency advice are transmitted to the Minister of Justice who makes a decision as to whether to participate or not. However, this decision must still be approved by the Cabinet, to which it is presented by the Senior Official on EU Questions. All this

takes about a month, which leaves the agency, in collaboration with the competent ministry, less than one month to prepare the observations. In most cases, it would nevertheless start working earlier, before having received the go-ahead, in order to save time. This unnecessary lengthy procedure is perceived as problematic, and discussions are under way to simplify and shorten it. Latvia does not have a specific litigation policy. Decisions on participation are made on a case-by-case basis, depending on the importance of the national (legal, economic and political) interests at stake, and where very important issues of EU policy are involved. Participation is necessarily selective, due to still limited resources. Latvia therefore seems to take EU litigation seriously, but, as it is still in a trial and observation stage, its participation does not appear to have kicked off ... yet.

It would be interesting to have access to further qualitative information on the more active new Member States, such as Poland, the Czech Republic or Slovakia. In the meanwhile, we are forced to consider that overall, apart from these three countries, the new Member States are not yet versed in using litigation as a means to influence the development of EU case law. One can only urge them to react and to set up adequate governmental procedure and strategies to make the most of their new membership, and to ensure a balanced representation of perspectives in the Court, which at the moment is dominated by the old Repeat Players identified above.

This inertia in the field of litigation on the part of a number of new Member States should be noted by current candidate countries. Internal organisation and resources should be made available so as to be operational on the date of accession to enable these new Member States to make full use of their membership. Not only does the political arena matter, but also legal and judicial affairs, as the old Member States have learnt in the past, often to their cost ...

Conclusions

From a practical perspective, this article sheds light on an aspect of EU law- and policy-making processes which is largely unexplored, i.e. ECJ adjudication. In particular, this article should inform the governments' agents involved in litigation or in administrative reform to design or reform governmental agencies, mechanisms and strategies so as to improve governmental input in the development of the EU case law. It should also assist many governmental or non-governmental actors who seek to influence EU policy and legal developments by helping them identify the opportunity structures to influence judicial decision-making, either through "knowing their enemy," where these are governments with

conflicting interests, or through mobilising their government to support their preferences in Court (few governments at this stage consult or are influenced by interest groups or NGOs when they participate in EU judicial proceedings).

From a theoretical perspective, this paper, informed by a constructivist view, suggests that informal means of control or, more appropriately, means of influence, should not be neglected. Indeed, they are likely to be far more effective than the traditional "political" means of control, in particular when one considers the specific nature of EU judicial decision-making (i.e. a strongly institutionalised and routinised, essentially norm-based, persuasive, and argumentative process, to which access is limited to a small number of privileged participants, all members of the same epistemic - i.e. legal - community). This incidentally supports the intergovernmentalist view that Member States keep some control over the Court, but backs up new institutionalist (sociological branch) views as to how this influence operates.

In relation to Europeanisation studies, this paper confirms the already detected trends of both convergence and divergence in the adaptation of national executives, with similar explanations for them. Pressure for convergence comes from the existence of similar challenges and an institutional environment (including a common legal system), mimicry and learning, and socialisation and optimisation. Pressure for divergence results from the variety of policy styles, the different conception of coordination, and political and administrative opportunity structures. Overall, countries identified as Repeat Players in this study are also the ones who tend to have stronger domestic policy coordination with regard to general EU policy, although the Scandinavian countries seem to be more pro-active in litigation than they tend to be regarding general EU policy. This may be linked to the fact that these countries have some of the highest litigation rates in the world.[62] New Member States overall appear to take EU litigation seriously, but have not necessarily set up appropriate internal coordination structures and policies, and mobilised resources, to tackle it effectively.

Finally, although this article pursues an explanatory rather than a normative aim, it is worth stressing the importance of all Member States' participation in the harmonious development of European Union law through their contribution in EU judicial proceedings.[63] This is particularly the case for ECJ proceedings, since its docket is largely monopolised

[62] C Wollschlager, 'Litigation rates around the world - 1998 Exploring global landscape of litigation rates' in: J Brand and D Strempel (eds), *Soziologie des Rechts: Festschrift für Ehrard Blankenburg zum 60 Geburstag* (Nomos, Baden-Baden 1998) 587.

[63] Everling (n 28).

by powerful and organised interest groups, which are not representative of society at large.[64] The participation of governments may provide, at times, an effective counterweight to these very specific interests.[65] It may well be that the current re-balancing by the ECJ of economic and fundamental rights,[66] or its re-assessment of the lawfulness of national provisions constituting barriers to trade if they pursue recognised public interest objectives, may be connected to the increase in governmental activism, in favour of the values previously neglected by the EU legal order. In fact, Scandinavian governments have launched a strong litigation campaign to obtain recognition by the EU legal order of the principles of transparency and openness, and the practical implication, the right of access to documents, as fundamental constitutional principles of the EU (unsuccessful so far, though…!). To those who like to argue that the Court should stay away from political influence and that governments should not intervene in the judicial process, I would respond that constitutional decision-making, which constitutes the bulk of the ECJ activity, is political by nature, and that governments, like other important political actors, should have a role to play, if only to inform the Court about the domestic impact of potential outcomes. In many ways, to the extent that governments are domestically accountable, governments act as a "democratic transmission belt" between the European peoples and their Court. Therefore, until further access to the Court is organised for a wider range of representatives of various European public and private interests, perhaps through a proper system of *amicus curiae*,[67] it is argued that governmental participation in ECJ proceedings should be preserved and even encouraged, by both the Court (which it sometimes does by calling on governments to submit briefs), and the governments themselves. Finally, in a context where legal pluralism is a growing value for the construction of the European legal order,[68] the contribution of governments to the making of European law by the ECJ is certainly a means through which pluralism can be better promoted and guaranteed.

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[64] Harding (n 23).

[65] Harlow (n 23).

[66] Case C-112/00 *Schmidberger* (n 8).

[67] For a similar argument, see Harlow (n 23).

[68] Kumm and Maduro (n 26).

Appendices

Table 1: Observations Submitted by the Member States' Governments in Article 234 EC Proceedings, per year.[69]

Member States Submitting Observations	1995	1996	1997	1998	1999	1995-1999	2005
AUSTRIA	15	20	30	48	36	149	26
BELGIUM	24	14	31	30	17	116	19
DENMARK	10	3	12	6	14	45	11
FINLAND	8	8	25	14	22	77	16
FRANCE	95	80	80	65	53	373	30
GERMANY	50	65	52	56	44	267	39
GREECE	45	16	20	57	13	151	25
IRELAND	3	4	6	7	9	29	5
ITALY	59	43	52	32	35	221	22
LUXEMBOURG	5	2	2	1	3	13	1
THE NETHERLANDS	29	16	32	52	50	179	44
PORTUGAL	8	9	4	9	23	53	9
SPAIN	48	20	15	63	17	163	13
SWEDEN	13	16	26	8	17	80	16
THE UNITED KINGDOM	51	66	69	42	92	290	31
CYPRUS							6
CZECH REPUBLIC							13
ESTONIA							0
HUNGARY							8
LATVIA							2
LITHUANIA							6
MALTA							0
POLAND							31
SLOVAKIA							9
SLOVENIA							2
TOTAL	463	382	456	490	415	2206	414

[69] From 1 January 1995 to 31 December 1999: based on the date of observations; for 2005, based on the date of judgment and a different calculation method for the Old Member States and on the date of submission of observations for the New Member States for 2005 (for the period May 2004-December 2005).

Table 2: Percentage of Observations by Member States' Governments Submitted in 'national' preliminary references (1995-1999 and 2005)

Member States' Governments	Percentage of Government's Observations in national PR (1995-1999)	Percentage of Governments Observations in national PR (2005)
AUSTRIA	35%	38%
BELGIUM	48 %	58%
DENMARK	24 %	27%
FINLAND	13 %	12%
FRANCE	27 %	23%
GERMANY	53%	51%
GREECE	28%	20%
IRELAND	7%	20%
ITALY	65%	36%
LUXEMBOURG	54%	100%
THE NETHERLANDS	43%	55%
PORTUGAL	37%	11%
SPAIN	45%	46%
SWEDEN	24%	23%
THE UNITED KINGDOM	34%	42%

Table 3: Origin of Preliminary references for cases decided in 2005

Germany	38
The Netherlands	28
Belgium	18
The United Kingdom	14
Italy	13
Austria	11
France	8
Spain	8
Greece	6
Denmark	4
Sweden	3
Finland	2
Portugal	2
Luxembourg	1
Ireland	1
Channel Islands	1
TOTAL	158

Table 4: Observations submitted by Member States' governments in Article 234 EC, by policy fields, from 1993 until September 1999.

Policy Fields	Number of Observations
Agriculture and Fisheries	359
State Aids	12
ECSC	6
Brussels Convention	69
Competition	71
Environment	28
Taxation	171
Freedom of establishment & Freedom to provide services	126
Free movement of capital	9
Free movement of goods	196
Free movement of workers	87
Commercial policy	34
Principles, objectives and function of the Treaties	10
Privileges and immunities of Communities/Civil servants	14
Approximation of laws	76
External relations	6
Own resources	18
Social security of migrant workers/social provisions	340
Common custom tariff and Custom union	162
Transports	37
Others	7
TOTAL	1,838