

When governments go to Luxembourg . . . : the influence of governments on the Court of Justice

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The influence of Member States' governments on EU legal developments through mobilisation of the Court is an issue which tends to be neglected by both legal and political scholars. Yet, analysing governments' participation in judicial proceedings, in particular in preliminary reference proceedings (Article 234 EC), reveals that it has become governments' preferred means to influence the direction of case law. However, due to significant differences in the nature of policies and in the availability of governmental human, material and organisational resources, all governments do not start with the same handicap in this race for influence, with the result that some of them are far more influential in the Court than others. Provided that some "representativity" issues are addressed by participation policies at both EU and national level, increased governmental participation in proceedings is a welcome development to the extent that it contributes to the quality and legitimacy of decision-making by the Court, aspect which becomes even more important now that the Court is called to perform mainly a constitutional role.

Introduction

While the contribution of national courts and litigants to legal integration in the EU through mobilisation of the Court of Justice has been rather extensively explored in both the fields of political sciences and law,¹ the role played by national governments in that process has not been subject such close scrutiny. There are a few legal pieces tackling governments' participation in the Court's proceedings, but they are either outdated or limited in scope.² Some integration theorists deal with the relationship between Member States and the Court. However, they tend to undermine participation in judicial

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¹ e.g. Slaughter, Stone Sweet and Weiler (eds), *The European Court and National Courts: Legal Change in its Social Context* (1998); A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000) and A. Stone Sweet and W. Sandholtz, "European integration and supranational governance" (1997) 4 *Journal of European Public Policy* 297 for political science, and C. Harlow, "Towards a theory of access for the European Court of Justice" (1992) 12 *Y.E.L.* 213; C. Harding, "Who goes to court in Europe. An analysis of litigation against the European Community" (1992) 17 *E.L.Rev.* 103; T. de la Mare, "Article 177 EC in social and political context: perspective on the key procedure for EC legal integration" in Craig and De Búrca (eds), *The Evolution of EU Law* (1999), p. 215; and H. Schepel and E. Blankenburg, "Mobilising the European Court of Justice" in De Búrca and Weiler (eds), *The European Court of Justice* (2001), p.9, for socio-legal studies.

² See E. Stein "Lawyers, judges, and the making of a transnational constitution" (1981) 75 *A.J.I.L.* 1; Schermers, Timmermans, Kellerman and Watson (eds), *Article 177 EEC: Experiences and Problems* (1987); U. Everling, *La Cour de Justice des Communautés Européennes et les Etats membres* (1981); "The Member States of the European Community before their Court of Justice" (1984) 9 *E.L.Rev.* 215; and K. Mortelmans, "Observations in cases governed by Article 177 of the EEC Treaty: procedure and practice" (1979) 16 *C.M.L.Rev.* 557; and *ibid.*, T. De la Mare, and H. Schepel and E. Blankenburg.

proceedings as a means of influence relying on argumentation and persuasion within a discursive context, as they focus on the strategic use by governments of means of control, preventive or punitive in nature (e.g. political appointments of Court's members, budgetary restrictions, curtailment or limitation of the judiciary's powers or jurisdiction, "political review" of judgments by means of Treaty revision or legislative amendments, limitation of judicial discretion by tightening up the "stitches" of legislation, non-compliance with judicial decisions, open criticisms of rulings, etc.).³ As to public administration and Europeanisation specialists, they usually dedicate little space, if any at all, to litigation strategies in the examination of governments' EU policy and of their influence in EU decision-making processes.⁴ Yet, an analysis of governments' participation in proceedings before the European Court of Justice reveals a great deal about the dynamics of the Court's decision-making and of the process of legal integration itself. As this article based on an empirical research⁵ aims at demonstrating, governments have become increasingly aware and make an increased use of the opportunities provided by participation in judicial proceedings to influence in a subtle and efficient manner the Court's decision-making. They resort more and more to such participation in complement or even replacement of traditional external political means of "controlling" the Court, as they wish to keep a grasp on legal integration by judicial fiat. In the process, they also appear to experience role and identity changes, gradually moving from the arms of the nation-States towards that of the Member States. They increasingly engage in active participation policies, as opposed to previous rather defensive participation activities. This

³ e.g. G. Garrett, "The politics of legal integration" (1995) 49 *International Organizations* 171; G. Garrett, R.D. Kelemen and H. Schultz "The European Court of Justice, national governments and legal integration in the European Union" (1998) 52 *International Organizations* 149; K. Alter "The European Court's political power" (1996) 19 *West European Politics* 458; and "Who are the 'Masters of the Treaty'? European governments and the European Court of Justice" (1998) 52 *International Organizations* 121; P. Pierson, "The path to European integration: a historical institutional analysis" (1996) 29 *Comparative Political Studies* 123; M.A. Pollack, "Delegation, agency and agenda setting in the European Community" (1997) 51 *International Organizations* 99; and "The engines of integration? Supranational autonomy and influence in the European Union" in Sandholtz and Stone Sweet (eds), *European Integration and Supranational Governance* (1998), p.217; J. Tallberg, "The anatomy of autonomy: an institutional account of variation in supranational influence" (2000) 38 *J.C.M.S.* 843; and "Delegations to supranational institutions: why, how and with what consequences" (2002) 25 *West European Politics* 23; and D. Beach, *Between Law and Politics: The Relationship between the European Court of Justice and the EU Member States* (2001).

⁴ e.g. H. Wallace, *National Governments and the European Communities* (1973); Kassim, Peters and Wright (eds), *The National Co-ordination of EU policy: The Domestic Level* (2000); and S. Bulmer and M. Buch, "Organising for Europe: Whitehall, the British State and the European Union" (1998) 76 *Public Administration* 601.

⁵ The framework chosen for the analyses of governments' participation policies is the preliminary preference procedure (Art.234 EC) which enables national courts and imposes on national higher courts to refer to the Court of Justice questions regarding the interpretation of EU law and the validity of EU secondary legislation, where such questions are necessary for the resolution of the cases pending before them. Such procedural framework was chosen for the following reasons. This procedure represents the bulk of the case law before the Court of Justice. It is through this procedure that the Court has developed the fundamental principles of EU law. Due to its dual nature as an interpretative tool and as a means of judicial review of both national and EU secondary law, Art.234 EC is the backbone of the EU legal order and an important instrument of legal and political (dis)integration. Finally, it emphasises the Court's role as a constitutional and supreme court, which is to become its exclusive function in the years to come. Due to a lack of recent and comprehensive publications on governments' participation (see *supra* n.2), an empirical research was carried out to collect more up-to-date and comprehensive data. It includes a statistical analysis of Member States' observations covering a five-year period (1995-99) and an analysis of 10 governments' participation strategies, based on governmental documents, interviews, questionnaires, and reports by governments' agents involved in EU litigation. The governments covered by the inquiry are that of Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Portugal, Sweden and the United Kingdom.

transforms them into influential Repeat Players, alongside the Commission and some powerful corporate and interests groups, capable of impacting on the direction of the case law. However, differences in policies and in human, material and organisational resources lead to the various governments having unequal influence potentials. In a concluding part, this article suggests that increased governmental participation in the judicial decision-making process is desirable, provided that some conditions are fulfilled, to the extent that it may contribute to the participatory and deliberative nature of law and policy-making processes in the EU, aiming at making these processes more efficient and democratic.

A participatory framework favourable to governments

Governments positioned themselves in a privileged situation in the preliminary reference procedural framework. They were able to do so through their exercising significant control over the organisational, procedural and jurisdictional rules regulating judicial decision-making at the Court, *i.e.* relevant Treaty provisions, the Court's Statute and Rules of Procedure.⁶ Article 23 of the Statute⁷ grants Member States and EU institutions the right to submit observations in all the preliminary reference proceedings,⁸ whilst the only "individuals" entitled to submit observations are the parties in the main (national) proceeding giving rise to the reference.⁹ Member States and EU institutions are represented by an agent appointed for each case, assisted by an adviser or lawyer, while private parties can only be represented by a qualified lawyer authorised to practice in a Member State.¹⁰ This rule seems to favour the former by providing them with the ability to rely on a more wide-ranging expertise (*e.g.* technical, scientific, policy or legal), depending on the case at hand.

Member States (and EU institutions) receive notification of each preliminary reference case.¹¹ Participation in preliminary reference proceedings takes two forms, *i.e.* the submission of "written observations" (or "statement of cases") and/or participation in the

⁶ The fundamental rules regarding composition, powers and jurisdiction of the courts, judicial procedures and general judicial architecture are contained in the Treaties (mainly the EC Treaty). Governments, within the context of an intergovernmental conference convened in order to decide by common accord amendments to the Treaties (Art.48 TEU), are the official "masters of the Treaty". However, this does not mean that they have complete control over Treaty reform. See T. Christiansen and K.E. Jørgensen, "The Amsterdam process: a structurationist perspective on EU Treaty reform" (1999) 3 *European Integration Online Papers* (at www.eiop.org.at/eiop/texte/1999-005.htm). Governments' control over changes to the Court's Statute (formerly the EAEC and EC Statutes, now replaced by the Court of Justice's Statute (see Art.7 of the Treaty of Nice [2001] O.J. C80/1) is maintained although the procedure has been made less cumbersome (*i.e.* amendments by the Council acting unanimously instead of the Treaty revision process, as provided by Art.245 EC). As to the Rules of Procedures [2001] O.J. C34, with amendments in [2001] O.J. L119, [2002] O.J. L272 and [2002] O.J. L281 [corrigendum]), which ensure the smooth running of the procedures before the Court, governments have loosened their grip on them, by accepting they these could be amended by qualified majority voting within the Council (new Arts 223(6) and 224(5) EC).

⁷ [2002] O.J. C325/167. The new numbering is in force since January 1, 2003.

⁸ The Court may also request governments to provide specific information necessary for making a decision (Art.24 of the Court's Statute).

⁹ Interested third parties may manage to submit observations in preliminary referencing by convincing the national court to join them as intervening parties in the national proceedings giving rise to the reference.

¹⁰ Art.29 of the Court's Statute.

¹¹ See Art.23 of the Court's Statute. The Commission is notified systematically, while the Council, the European Parliament and the European Central Bank are notified only where the reference concerns the validity or interpretation of one of their acts.

oral hearing.¹² Because of civil law influences and the constraints of simultaneous translation, the written stage is the most important. It is meant to provide “an exhaustive account of the facts, pleas and arguments of the parties and the form of order sought,”¹³ summarised in the report of the *Juge Rapporteur* (Reporting Judge) and circulated to interested parties, judges and Advocate General before the hearing.¹⁴ The hearing is merely for the interested parties to supplement the files, by answering questions put by the judges, replying to other parties’ written observations, summarily recalling the parties’ positions, emphasising the main points, submitting new arguments prompted by recent events or further developing complex and difficult issues. Pleadings must be brief (30 minutes). This could have disadvantaged lawyers from common law countries, who tend to rely greatly on oral pleading skills. However, the analysis does not confirm such hypothesis. Surely, tendencies in these same countries to move away from long oral presentations of evidence and greater reliance of written arguments must have helped.

While parties in the case can recover the cost of observations, Member States or EU institutions must bear the costs of observations. Governments therefore follow the habit of letting their administrations or agencies parties in cases represent the national position before the Court.¹⁵ After the oral hearing, the Advocate General, “acting with complete impartiality and independence,” will usually deliver a “reasoned submissions . . . in order to assist the Court in the performance of [its] task.”¹⁶ His Opinion, reviewing and assessing parties’ arguments, analysing the relevant law, examining doctrinal views and comparative or international law, and suggesting a solution to the Court, is very influential.¹⁷ Getting the Advocate General on one’s side is therefore a first important step in attempting to influence EU case law. Then, the judges deliberate secretly and make a collegial decision on a consensual basis.¹⁸

From a procedural perspective, the participatory framework is thus favourable to governments. The timeframe can nonetheless be problematic. Interested parties have only two months from notification to submit written observations, a deadline which can be hard to meet for large collective bodies such as governments. Other features of the Court’s process are also constraining for governments. Their views must be presented in acceptable argumentative forms. Indeed, if governments want to be “heard” by the Court,

¹² Art.20 of the Court’s Statute.

¹³ “Note for the Guidance of Counsel in Written and Oral Proceedings before the Court of Justice of the European Communities” (1998) at www.curia.eu.int.

¹⁴ Since 1993, this report is no longer published with the text of the judgment, which can make it difficult to ascertain all the arguments submitted by the parties.

¹⁵ See K.J.M. Mortelmans, “The role of governments representatives in the proceedings: statistical data on observations of the MS in preliminary proceedings in Schermers, Timmermans, Kellerman and Watson (eds), *supra* n.2 at p.283. However, some governments, such as that of the United Kingdom, follow a policy of having the government’s legal service present observations in place of the department party to the case, even if that entails additional costs. In some cases of paramount significance, governments may prefer to submit observations in their capacity as both a Member State and a party (e.g. Case C-186/01 *Dory v Germany* [2003] E.C.R. I-2479; [2003] 2 C.M.L.R. 26 and Case C-112/00 *Eugen Schmidberger Internationale Transporte Planzuge v Austria* [2003] 2 C.M.L.R. 34 *t*).

¹⁶ The Opinion may now be omitted if the case raise no new points of law, following the Treaty of Nice amendments to Art.222 EC and Art.20 of the Statute.

¹⁷ See T. Tridimas, “The role of the Advocate General in the development of Community law: some reflections” (1997) 34 C.M.L.Rev. 1349 and A. Dashwood, “The Advocate General in the Court of Justice of the European Communities” (1982) 2 *Legal Studies* 202.

¹⁸ Art.35 of the Court’s Statute.

they need to speak its language, which means that they must use EU legal reasoning (*i.e.* reliance on EU precedent and interpretative methods),¹⁹ refer to recognised EU sources of law (*i.e.* Treaties, EC secondary legislation, general principles of EU law, international agreements, EU case law, etc.) and speak EU “legalese.” Social, political, economic or cultural arguments can be used, but only in support of a particular applications or interpretations of legal norms. These substantive and normative features, which evolve over time,²⁰ constitute a challenge for governments and other participants in proceedings, in particular in terms of staff recruitment and training. Yet, the opportunities are there for governments to put their prints on the EU case law in a way furthering their interests, and this at a relatively small cost in terms of resources and legitimacy. However, do governments really take full advantage of the opportunities?

Governments’ strategies

The “Repeat Player” theory developed by M. Galanter has been used in order to demonstrate the ability of societal actors to produce legal change through litigious activities.²¹ This analysis can be transposed to governments’ participation in EU proceedings. It provides for the starting hypothesis that where governments behave like Repeat Players, they are more likely to impact on legal developments. Investigating governments’ motivations, policies, strategies and resources, as far as participation to preliminary rulings is concerned, can thus provide clues as to governments’ ability to influence the elaboration of the EU case law.

Governments’ participation policies

Policies, the means by which actors pursue their perceived interests, are defined by the role(s) they intend to play and therefore by whom they feel they are (*i.e.* their identities). These perceptions are assumed to be constructed not only through strategic choice, but also through processes of persuasion and social learning, reflecting the material and social

¹⁹ On the specificities of the Court of Justice’s legal reasoning, see A. Arnall, “Owing up to fallibility: precedent and the Court of Justice” (1993) 30 C.M.L.Rev. 247; A. Bredimas, *Methods of Community Law and Community Methods* (1978); and J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (1993).

²⁰ For example, the development of a doctrine of precedent by the Court may have been prompted by common law practitioners appearing before the Court, in addition to common law judges becoming members of the EU judiciary, thereby counteracting the original domination of the French civil law tradition.

²¹ See M. Galanter, “Why the ‘haves’ always come out ahead: speculations on the limits of legal change?” (1974) *Law and Society* 95. He distinguished between two categories of litigants: One Shotters, who occasionally resort to courts, and Repeat Players, who are repeatedly engaged in similar litigation over time. Repeat Players seek long-term rule change. For that, they engage in active litigation policies, mobilise important resources and develop links with institutions and a familiarity with legal processes, which enable them to “come out ahead” and provoke favourable legal developments. For confirmations of the theory, see K.T. McGuire, “Repeat Players in the Supreme Court: the role of experienced lawyers in litigation success” (1995) 57 *Journal of Politics* 187; and “Explaining executive success in the US Supreme Court” (1998) 51 *Political Research Quarterly* 505; and P. George and B. Klein, “The selection of disputes for litigation” (1984) 13 J.L.S. 1. On the application of this analysis to EU litigation, see C. Harlow and C. Harding, *supra* n.1.

structures with and within which agents interact.²² Interests, roles and identities, and therefore policies, are not fixed and predetermined, but subject to evolution.²³

To start with, governments neglected “Luxembourg”.²⁴ Their participation in EU proceedings appeared by and large restricted to their defence in enforcement actions brought against them by the Commission, thereby signalling defensive One Shotters’ attitude. However, since the late 1970s and early 1980s, governments have become more active. The figures resulting from the empirical research, when compared with older ones,²⁵ show a significant increase in governments’ participation, proportionately faster than the growth in the number of preliminary references. While in the 1970s-80s, the yearly number of governmental observations was lower than that of references,²⁶ it is nowadays more than the double of that number (*circa* 200).²⁷

Observations by:	1995	1996	1997	1998	1999	Total
AUSTRIA (A)	15	20	30	48	36	149
BELGIUM (B)	24	14	31	30	17	116
DENMARK (DK)	10	3	12	6	14	45
FINLAND (FIN)	8	8	25	14	22	77
FRANCE (F)	98	80	80	65	53	373
GERMANY (D)	50	65	52	56	44	267
GREECE (EL)	45	16	20	57	13	151
IRELAND (IRL)	3	4	6	7	9	29
ITALY (I)	59	43	52	32	35	221
LUXEMBOURG (L)	5	2	2	1	3	13
THE NETHERLANDS (NL)	29	16	32	52	50	179

²² Reliance on a moderate constructivist vision of the ways agents’ role, interests and identities are constructed through interaction with social structures. See J. Jupille, J.A. Caporaso and J.T. Checkel, “Integrating institutions—rationalist, constructivism, and the study of the European Union” (2003) 36 *Comparative Political Studies* 7, 15.

²³ Governmental policies are not always clearly defined or acknowledged by governmental agents. The identification of a government’s participation policy, provided it has one, implies not only asking politicians or public servants about that government’s policies or analysing official guidelines or reports, but also cross-checking or supplementing this information with the analysis of other connected features, such as the governmental interests pursued, agents’ understanding of the government’s role in judicial proceedings, or the frequency and subject-matter of that government’s observations. One should also look at the wider context of European integration, as general developments at EU level and their perception by governmental actors may influence their appraisal of their roles, identities and interests in judicial proceedings before the Court more specifically. This has been the approach followed for this article.

²⁴ See H. Rasmussen, *European Court of Justice* (1998), p.291

²⁵ See U. Everling and K. Mortelmans, *supra* n.2.

²⁶ See *ibid.* U. Everling, App.5, p.241.

²⁷ For statistical information on preliminary references, see the Court of Justice’s statistics, available at www.curia.eu.int/en/instit/presentationfr/index.htm, Table 16.

Observations by:	1995	1996	1997	1998	1999	Total
PORTUGAL (P)	8	9	4	9	23	53
SPAIN (E)	48	20	15	63	17	163
SWEDEN (S)	13	16	26	8	17	80
THE UNITED KINGDOM (UK)	51	66	69	42	92	290
TOTAL	463	382	456	490	415	2206

Table 1: Observations submitted by the Member States' governments in Article 234 EC Proceedings (1995-99)

A series of reasons have been put forward by governments' agents to justify such a burst of activity. First, there has been a greater acknowledgement of the Court's integrative role and law-making powers, together with a better understanding of the nature of judicial decision-making, *i.e.* that case law is not "the inevitable consequence of EU law and legal rules,"²⁸ and can be influenced through the submission of quality arguments.²⁹ Secondly, there has been an increased awareness of Article 234 EC being used as a means of challenging national laws, policies and practices, thereby calling for governments' participation to defend them.³⁰ Thirdly, governments may well have realised that by submitted observations, they could obtain the invalidity of an EU act, the adoption of which a government unsuccessfully opposed (*e.g.* where qualified majority voting applies in the Council). Such use of observations, although not mentioned by governments' agents, nevertheless appears to be common.³¹ Fourthly, it is also likely that governments have realised that as "exit doors" are closing (*i.e.* non-compliance becoming more difficult due to national courts' enforcement of EU law),³² they could use participation in judicial proceedings to try to obtain favourable decisions in the first place, thereby avoiding the need for disobedience in order to protect national interests.³³ Finally, another "non-official" but likely reason for governmental participatory activism is the diminution of governments' influence over EU treaty-making³⁴ and legislation,³⁵ which may incite governments to expand their activities to the alternative judicial arena.

²⁸ See H. Rasmussen, *supra* n.24, p.291.

²⁹ See J. Collins, "Representation of a Member State before the Court of Justice of the European Communities: practice in the United Kingdom" (2002) 27 E.L.Rev. 359.

³⁰ See A. Carnellutti, "The role of governments' representatives in Article 177 references: the experience of France" in Schermers, Timmermans, Kellerman and Watson (eds), *supra* n.2.

³¹ *e.g.* observations of German, Luxembourg and Greek Governments in Case C-491/01 *R. and Secretary of State for Health Ex p. British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* of December 10, 2002.

³² See Slaughter, Stone Sweet and Weiler (eds), *supra* n.1 and K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001).

³³ On "reduced exit—enhanced voice", see J.H.H. Weiler, "The transformation of Europe" (1991) 100 *Yale Law Journal* 2403.

³⁴ For up until the Treaty of Amsterdam, see Christiansen and Jørgensen (1998), *supra* n.6. The multipartite convention method reduces even further the influence of governments on treaty/constitutional reform. On the European Convention, see <http://european-convention.eu.int>.

³⁵ Due to the increased involvement of the Parliament, since the introduction and extension of the co-decision procedure by the successive waves of Treaty revision (*i.e.* Maastricht, Amsterdam and Nice) and the greater use of qualified majority voting within the Council since the SEA.

Environmental changes and evolution in governments' understanding of this environment, whether acknowledged or not, appear to have prompted them into trying harder in terms of influencing judgments. Governments must nevertheless be cautious, as they also need to preserve the independence and powers of the Court, which renders them invaluable services. It provides them with fair dispute resolution mechanisms, fills gaps in governments' commitments at EC/EU level thereby guaranteeing their viability, enforces laws agreed by governments, and may even serve as a scapegoat for unpopular policies! Besides, as judicial independence is a respected value in Europe, too visible interference by politicians with the judiciary could undermine the popular legitimacy governments, the Court and the EU itself.

Governments may use various means to influence judicial decision-making. They can act from the "outside," using means of control or pressure, such as the ones analysed by political scientists. However, these "external" means of pressure either require at least a minimum of consensus between a majority of Member States (*e.g.* political review or jurisdictions and powers limitations), or appear to have little effect on judicial decision-making (*e.g.* political appointments or non-compliance). Some (*e.g.* budget restrictions, reductions of powers or jurisdiction and political appointments) can even be dangerous to the extent that they may the Court's ability to carry out its tasks or undermine the legitimacy of the Court and the Union itself. Therefore, after various fruitless and at times disruptive attempts to "control" the Court by preventive or punitive means, governments now appear to concentrate their efforts on a more subtle, less damaging and allegedly more efficient technique, *i.e.* persuasion by means of observations. Such shift is well reflected in the following statement: "It is the policy of the United Kingdom to take an active part in proceedings. It is thought that the direction of case law can be *best* influenced by good quality arguments presented by Member States."³⁶ The complementarity of both internal and external means of influence is emphasised by the declaration of a French civil servant: "The Court is a political organ, *which and within which* we have to fight."³⁷

One can distinguish between three types of motivations for governmental policies in preliminary reference proceedings: the defence of domestic or national interests, the promotion of national visions of Europe and the furthering of EU interests. The defence of national interests is always cited by national agents. The primacy of this incentive is confirmed by the common governmental practice of submitting observations in cases originating in "national" courts and in those coming from courts of countries which have similar features (*i.e.* legal system, legislation, policies, cultural, social or economic features), as these usually involve the defence of domestic laws or policies, directly or indirectly challenged.³⁸ It is also reflected by the practice followed by some governments to take part in proceedings where the economic interests of domestic actors, either public or private, are at stake.³⁹ These policy statements are overall corroborated by the statistics. Governments whose policies focus on the defence of domestic interests tend to be those

³⁶ Report by J. Collins, agent of the Treasury Solicitor's Department (May 16, 1996). Italics added.

³⁷ Table Ronde, "L'administration française face aux nouvelles échéances européennes" (1992) 63 *Revue Française d'Administration Publique* 459.

³⁸ This is the case in Germany, Portugal, Denmark, Finland, the Netherlands, Sweden and to a lesser extent France and Belgium.

³⁹ *i.e.* in Luxembourg, the United Kingdom, Portugal, Finland, Sweden, Germany, France and Belgium.

submitting most of their observations in cases coming from national courts (*e.g.* Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain). However, one must acknowledge the fact that the courts of some of these Member States (*e.g.* Germany, Italy, and Austria) make so many references that “their” governments are left with few opportunities to deal with “foreign” references.

Member States’ governments	Number of governments’ observations submitted in references from “national” courts	Total number of government’s observations	Percentage of government’s observations submitted in references from “national” courts
AUSTRIA	53	149	35.5
BELGIUM	56	116	48.3
DENMARK	11	45	24.4
FINLAND	10	77	13.0
FRANCE	101	373	27.0
GERMANY	144	267	53.9
GREECE	22	151	28.5
IRELAND	2	29	6.9
ITALY	144	221	65.1
LUXEMBOURG	7	13	53.8
NETHERLANDS	77	179	43.0
PORTUGAL	20	53	37
SPAIN	73	163	44.8
SWEDEN	19	80	23.7
UNITED KINGDOM	98	290	33.8

Table 2: Observations by governments in preliminary reference proceedings originating in “national” courts (1995–99)

A	b	A	B	D	Fin	F	G	El	Irl	I	L	ND	P	E	S	UK
A		53	3	3	4	14	14	4	0	5	0	6	5	4	4	11
B		9	56	1	6	25	21	8	1	10	3	10	3	2	7	17
DK		3	1	11	4	10	3	1	2	2	0	7	1	1	2	13
FIN		1	2	0	10	4	1	1	0	1	0	2	1	1	1	3
F		4	3	2	3	101	11	12	1	13	0	5	2	35	1	12
D		35	23	6	18	66	144	21	2	17	3	36	5	25	25	51
EL		1	0	1	1	4	2	22	0	1	0	1	0	0	0	3
IRL		1	0	1	0	1	2	0	2	2	0	1	0	0	1	5
I		24	5	4	4	48	14	16	0	144	0	13	7	5	3	35
L		2	1	1	1	3	2	1	0	1	7	1	1	3	0	5
ND		8	7	8	7	38	24	8	8	10	0	77	5	7	8	30
P		2	1	0	2	4	3	0	0	1	0	1	20	2	0	0
E		0	2	0	2	10	3	43	1	0	0	2	0	73	0	7
S		1	5	2	9	7	1	0	1	1	0	2	0	0	19	0
UK		5	8	5	6	38	22	14	11	13	0	15	3	5	9	98
Tot		149	116	45	77	373	267	151	29	221	13	179	53	163	80	290

a=Nationality of the court sending the reference. b=Nationality of the government submitting the observations.

Table 3: National origin of the court making a preliminary reference in which governmental observations have been made (1995–99)

Governmental agents submit that observations do not only serve defensive purposes but are also used to influence EU law and practices (*e.g.* in France⁴⁰ and Sweden) or to promote a particular vision of EU law (*e.g.* in the United Kingdom, France,⁴¹ Denmark, and Portugal). Such motivations suggest more Repeat Players-like behaviour. This appears to be confirmed by the fact that, in case of conflict between the occasional defence of domestic interests and long-term influence on legal developments, these governments tend to favour the latter.⁴² Some governments pursue active policies in particular policy fields (“sectoral” Repeat Players). For example, the governments of Denmark, the Netherlands,

⁴⁰ The French Government follows a policy aimed at influencing EU law “with the great principles of French law”. Source: *Sous-directeur*, from *Direction des Affaires Juridiques* at the French Foreign Affairs Ministry.

⁴¹ French participation policy aims at “promoting a long term vision of the Community development.” (A. Carnellutti, *supra* n.30).

⁴² *i.e.* the United Kingdom, France, Denmark, Finland, Netherlands. Exception: Luxembourg, and to a lesser extent Portugal and Belgium.

Sweden and Finland have tried (so far unsuccessfully) to put pressure on the Court to upgrade the right of access to documents to the status of EU general principle.⁴³

Finally, governmental agents claim that observations also serve more “altruistic” purposes, such as assisting the Court in clarifying important questions of EU law, *i.e.* acting as *amicus curiae*. French, German and Portuguese agents for example consider their role as being Court advisers rather than lawyers defending their client government, while representatives of the United Kingdom, Belgium and the Netherlands feel that they fulfil a dual role, both of adviser and defence lawyer. These role perceptions can be related to the cohesive strength of the legal community. However, they could also reflect a shift in governments’ allegiance from the national towards the supranational level, an evolution in governments’ roles, identity and interests as a result of integration, which is not only driven by material incentives, but also produced by socialisation processes.⁴⁴ Indeed, governments are as much the executive arm of the EU Member States, than that of their nation-States. Moreover, from a legislative point of view, governments have more powers at EU than at national level. Finally, as national civil servants and legal advisers have more “European” backgrounds and get to socialise more at EU level, they develop an increased sensitivity to supranational concerns.

Governments’ participation policies vary over time, responding to governments’ awareness of opportunities available to pursue their evolving interests. For example, in the early 1990s, the French administration deliberately moved towards a more active litigious policy to “defend the French interests and visions of Europe.”⁴⁵ A similar attitude is noticeable in the mid-1990s within the Dutch administration, as reflected in the guidelines for the submissions of observations.⁴⁶ Changes in policies are confirmed by the statistics. The French Government multiplied by five the number of its observations between 1990 and 1995 and the Dutch Government more than doubled its submissions between the early and late 1990s.⁴⁷

Governments’ ability to influence judicial outcomes is, however, not only a matter of frequency. Less frequent but consistent and persuasive interventions will in fact be more influential than frequent, inconsistent, or inopportune observations. The point is thus not to be present in court as often as possible, but to be there where adequate opportunities for

⁴³ See Case T-194/94, *Carvel v Council of the European Union* [1995] E.C.R. II-2765; [1995] 3 C.M.L.R. 359, where Carvel, a British national seeking access to Council documents, was supported by Denmark and the Netherlands. See also Cases T-105/95, *World Wide Fund for Nature v Commission* [1997] E.C.R. II-313; [1997] 2 C.M.L.R. 55, where WWF UK asking for access to Commission documents was supported by Sweden, T-188/87, *Rothmans International BV v Commission of the European Communities*, [1999] E.C.R. II-2463; [1999] 3 C.M.L.R. 66, where Rothmans, a Dutch company seeking access to Commission’s document was supported by the Swedish Government, and C-353/99, *Council v Hautala* [2001] E.C.R. I-9565; [2002] 1 C.M.L.R. 15, where Mrs Hautala seeking access to Council documents was supported by the governments of Denmark, Finland, Sweden and (surprisingly) the United Kingdom and France!

⁴⁴ See literature on attitudes and values towards integration, *e.g.* J. Beyers, “Where does supranationalism comes from? Ideas floating through the working groups of the Council of the European Union” (1999) 2 *European Integration Online Papers* at www.wu-wien.ac.at/eiop/pdf/1998-009.pdf.

⁴⁵ Table Ronde, *supra* n.37.

⁴⁶ “Handleiding criteria en procedures Hof van Justitie EG” (1999), *Interdepartementale Commission Europees Recht* (ICER).

⁴⁷ Compare Table 1 with statistical tables in Everling, Mortelmans and Schermers *et al.* (1987), *supra* n.2; G.P. Manzella, “L’intervento e le osservazioni degli Stati Membri davanti alla Corte di Giustizia delle comunità europee: profili statistici” (1996) VI *Rivista Italiana di Diritto Pubblico Comunitario* 906; and T. De la Mare, *supra* n.1.

case law development exist. This notwithstanding, the frequency of observations can still tell something about governments' interests towards Luxembourg. As mentioned before, statistics⁴⁸ reveal a steady relative increase of governmental observations in preliminary reference proceedings, with a period of strong governmental participation in the early to mid-1990s. This period was also marked by famous governmental "attacks" against the Court on other fronts,⁴⁹ thereby revealing some coherence in governments' use of various strategies to influence judicial decision-making at EU level.⁵⁰

Levels of participation vary over time and there are huge disparities between the Member States. Until the 1990s, the governments of Germany, Italy and the United Kingdom were the most active.⁵¹ Concerning the first two, their participation must be related to high quantity of references sent by their courts. Regarding the third one, neither the number of references, nor the litigation culture, can explain the British Government's activism. The most plausible explanation is therefore that it was the result of a deliberate policy of influence through litigation, participation and other means, driven by the importance granted to British interests being strongly represented in EU decision-making processes, as documented by various official and academic sources.⁵² More recently (between 1995 and 2000), it was the French Government which submitted most observations (16.8 per cent of all governments' observations), while the British provided 14.2 per cent, the German 12.9 per cent, the Italian 9.4 per cent, the Netherlands 8.5 per cent, Spain 7.1 per cent, Austria 6.9 per cent and Greece 6.9 per cent. The recent French burst of activity is the translation into practice of a strong policy decision to be more influential in European decision-making fora, to be achieved by taking position on every issue.⁵³ The "new" Member States—Finland, Sweden and Austria—have been very active since their accession. Finnish and Swedish good participation rates may be partially explained by their previous experience of EU judicial proceedings as EFTA States, or before the EFTA Court. Moreover, these three countries have some of the strongest litigation rates in the world.⁵⁴ It could therefore be that for the governments of these countries, litigation, and

⁴⁸ See Table 1, *supra*.

⁴⁹ See the Barber protocol limiting the Court's interpretative discretion regarding a Treaty provision (Protocol No.2 concerning [ex] Article 119 of the Treaty establishing the EC, annexed to the EC Treaty). For comments, see G.F. Mancini and D.T. Keeling, "Language, culture and politics in the life of the European Court of Justice" (1995) 1 *Columbia Journal of European Law* 397 at pp.409–410; and A. Arnulf, *The European Union and its Court of Justice* (1999), p.475. See also, the Spanish, British and German proposals to the 1995–96 IGC aimed at limiting the Court's powers and jurisdiction: Spain's "Starting points for discussion" of March 2, 1995 and "The 1996 Intergovernmental Conference: Basis for discussion" of March 6, 1995 (at <http://europa.eu.int/en/agenda/igc-home/ms-doc/state-es/pos.htm>), the "Memorandum by the United Kingdom on the European Court of Justice" of July 25, 1996 (CONF/3883/96), Germany's "Note de transmission. Object: Création de la possibilité de transférer au tribunal de première instance les procédures relatives aux questions préjudicielles" of October 22, 1996 (CONF/3862/96).

⁵⁰ Similar patterns of combination or alternative use of various strategies (*i.e.* lobbying, litigation and protest) by interests groups have been observed by social movement scholars. See C. Hilson, "New social movements: the role of legal opportunity" (2002) 9 *Journal of European Public Policy* 238.

⁵¹ See G.P. Manzella, *supra* n.47, Tables 4, 9 and 10.

⁵² See J. Collins, *supra* n.29, G.P. Manzella, *supra* n.47 and T. Pratt, "Chapter 6: View from the Member State" in Andenas (ed.), *Article 177 References to the European Court* (1994). On Britain's European policy, see S. Bulmer and M. Buch and K. Hussein, *supra* n.4.

⁵³ "Organiser la politique européenne et internationale de la France," (*Commissariat Général du Plan*, 2003), p.37.

⁵⁴ See C. Wollschlager, "Litigation rates around the world—1998 Exploring global landscapes of litigation rates" in Brand and Stempel (eds), *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60 Geburtstag*, p.587.

therefore participation in proceedings, is a “natural” move. Besides, for Austria, the high participation rate is likely to be connected to the number of cases sent by Austrian courts (from two in 1995 to 56 in 1999).⁵⁵ Observations numbers must indeed be examined in the light of the amount of references sent by domestic courts. As seen above,⁵⁶ although governments tend to submit observations in cases originating in their “national” courts, increasingly (some) governments devote a great share of their observations in “foreign” cases.⁵⁷ For example, from 1995 to 1999, Ireland submitted only 6.9 per cent of its observations in “national” cases, Finland 15 per cent, Denmark 24.4 per cent, Sweden 23.75 per cent, France 27 per cent and Greece 28.5 per cent, while Luxembourg, Germany and Italy, provided more than half of their observations (respectively 53.8, 53.9 and 65.1 per cent) in such cases. It is worth noting that governments more active in “foreign” cases are also those which have explicitly adopted a strong influence strategy. However, these are also governments of states where domestic courts make relatively few references. If these governments were to “wait” for national references to participate in proceedings, they would have few opportunities for contribution.

Looking at policy areas reveals interesting patterns,⁵⁸ as the judicial discourse in some fields appear “dominated” by some governments.⁵⁹ On social policy, for example, 50 governmental observations were British and 30 German (out of the 161 observations). France submitted almost a quarter of all the observations concerning the free movement of goods, while Spain and Germany provided together one-third of all observations concerning the free movement of persons and Germany and Austria more than a quarter of all observations regarding the free movement of services. France delivered more than a third of observations in affairs dealing with principles of EU law and is very active in competition cases. Five governments, those of France, Italy, Germany, Greece and the United Kingdom, submitted more than three-quarters of all observations relating to agriculture. The Netherlands has an unusually high rate of observations in consumer protection and environmental matters.

These figures are difficult to interpret without connecting them with patterns of references by national courts or infringement actions, and examining the position taken by governments in each case. First, one notices a parallelism between the repartition of infringement actions, preliminary reference by national courts and observations by governments.⁶⁰ For example, the activism of the British Government in social policy cases is linked to the important number of references sent by British courts, under the continuous pressure of the Equal Opportunity Commission.⁶¹ A similar remark can be made concerning French observations in competition cases. French, Spanish, German and Austrian observations regarding free movement can be linked with implementation deficits. The French Government’s observations in agricultural matters have to be

⁵⁵ See the Court’s statistics at www.curia.eu.int/en/instit/txtdocfr/index.htm, Tables 16 and 17.

⁵⁶ See Table 2.

⁵⁷ *cf.* tables in U. Everling, K. Mortelmans, and Schermers *et al.*, *supra* n.2, G.P. Manzella, *supra* n.47, and T. De la Mare, *supra* n.1.

⁵⁸ See Table 3.

⁵⁹ For similar findings, see De la Mare, *supra* n.1.

⁶⁰ *cf.* H. Schepel and E. Blankenburg, *supra* n.1, Tables 2.3 and 2.4.

⁶¹ See *ibid.*, and C. Barnard, “A European litigation strategy: the case of the Equal Opportunity Commission” in Shaw and More (eds), *New Legal Dynamics of the European Union* (1995).

connected with the strength of the French agricultural lobby.⁶² Moreover, some of these patterns are consistent with agents' explicit acknowledgement of governments' policy orientations (*e.g.* the French Government's concern for developing principles of EU law, the Dutch interest towards improving environment standards, etc.).

Member State of the Government Submitting Observations	Free Movement of Goods	Free Movement of Persons	Freedom to Provide Services	Taxation	Agriculture	Approximation of Laws
AUSTRIA	18	18	27	12	4	12
BELGIUM	9	19	24	16	2	11
DENMARK	8	3	2	5	3	7
FINLAND	12	10	10	6	7	6
FRANCE	44	27	24	35	25	35
GERMANY	18	41	30	40	18	12
GREECE	13	10	16	67	16	3
IRELAND	2	3	3	3	2	5
ITALY	27	27	13	26	19	11
LUXEMBOURG	2	6	4	1	0	0
THE NETHERLANDS	12	25	22	20	7	21
PORTUGAL	11	7	10	10	1	2
SPAIN	3	40	4	50	9	2
SWEDEN	10	15	10	10	7	7
UNITED KINGDOM	17	34	11	34	17	34
TOTAL	206	285	210	335	137	168

⁶² *ibid.*, H. Schepel and E. Blankenburg, pp.14–15 and 32.

Member State of the Government Submitting Observations	Social Policy	Environment & Consumer Protection	Competition	Principles of EC Law	Company Law	External Relations
AUSTRIA	10	9	4	1	17	5
BELGIUM	14	3	1	1	3	6
DENMARK	0	7	4	0	2	1
FINLAND	8	7	4	0	2	0
FRANCE	16	28	29	52	4	30
GERMANY	30	10	8	0	6	23
GREECE	1	1	9	1	3	6
IRELAND	6	0	0	0	1	2
ITALY	5	9	14	27	11	5
LUXEMBOURG	0	0	0	0	0	0
THE NETHERLANDS	10	20	17	1	7	12
PORTUGAL	3	0	1	27	0	3
SPAIN	5	7	0	0	3	6
SWEDEN	3	1	7	3	2	1
UNITED KINGDOM	50	12	7	25	4	17
TOTAL	161	112	105	140	65	117

Table 4: Observations by Member State's Governments by policy areas (1995–99)

In order to refine the picture of governments' efforts, it is worth examining governments' participation in the light of their population and gross domestic income,⁶³ which roughly reflect governments' resources. Coming out ahead are Austria, Belgium, Finland, Greece, the Netherlands, Sweden, Ireland and Portugal, while Germany, Italy, Spain and the United Kingdom are lagging far behind. The cases of Finland and Austria in particular are worth noting, as examples of new, smaller and comparatively less wealthy States, which

⁶³ Tables 5 and 6.

have nevertheless engaged in active participation policies to defend their interests and visions in the EU judicial arena.

Member States' Governments Submitting Observation	Number of Observations	Population (in Millions) ⁶⁴	Ratio Number of Observations/Population
AUSTRIA	149	8.1	18.4
BELGIUM	116	10.2	12.2
DENMARK	45	5.2	8.6
FINLAND	77	5.1	15.1
FRANCE	373	58.3	6.4
GERMANY	267	81.9	3.3
GREECE	151	10.5	14.1
IRELAND	29	3.6	8
ITALY	221	57.2	3.8
LUXEMBOURG	13	0.4	32.5
THE NETHERLANDS	179	15.6	11.1
PORTUGAL	53	9.8	5.4
SPAIN	163	39.7	4.1
SWEDEN	80	8.8	9
THE UNITED KINGDOM	290	58.1	4.9

Table 5: Number of Observations Submitted by Member States' Governments and population of Member States (Period: 01/01/1995 to 31/12/1999)

⁶⁴ Source: *The Economist* (2000).

Member States' Governments Submitting Observation	Number of Observations	Gross Domestic Product GDP (in Billions)	Ratio Number of Observations GDP
AUSTRIA	149	227	0.65
BELGIUM	116	269	0.43
DENMARK	45	169	0.27
FINLAND	77	119	0.65
FRANCE	373	1,500	0.25
GERMANY	267	2,365	0.11
GREECE	151	120	1.26
IRELAND	29	62	0.47
ITALY	221	1,142	0.19
LUXEMBOURG	13	—	—
THE NETHERLANDS	179	403	0.44
PORTUGAL	53	101	0.52
SPAIN	163	563	0.29
SWEDEN	80	227	0.35
THE UNITED KINGDOM	290	1,152	0.25

Table 6: Comparison between the Number of Observations submitted by the Governments of each Member State and the Resources of these States (GDP)

As already stated, for observations to be influential, they need to be opportune and consistent and to “fit” within the EU judicial process. For example, the French policy of having “something to say on every question” has been criticised by French administrators themselves for undermining the visibility of French priorities and limiting the government’s ability to invest on issues that really matter for the national interest.⁶⁵ The lack of

⁶⁵ *Commissariat Général au Plan, supra* n.53, p.37.

long-term strategic planning of the French administration is an endemic problem.⁶⁶ However, its problem with case selection may reflect the lack of exposure of French administrators to the use of litigation as a political tool and some misunderstanding regarding the dynamics of successful litigation.⁶⁷

Governments face a difficult selection task and are placed in a situation comparable to that of interests groups or lawyers looking for “test-cases.” If a government follows a policy of quasi-systematically submitting observations in cases where domestic interests are threatened, it may undermine the potential long-term adverse effects of participation. This appears to be understood by governments which, unlike the Commission, have selective participation policies. They make decisions on the opportunity and substance of observations after having considered the variety of interests at stake, the need for explanation or justification of national laws, policies or practices, the existence or absence of established case law, the importance or sensitive nature of the issues, the political or legal opportunity, the “creativity” potential of the reference or the likely positions of other parties.⁶⁸ Official guidelines or checklists may be available, which facilitate administrators’ selection task and aim at securing opportunity, consistency and effectiveness in participation. All requests for preliminary references must be carefully examined by the national administrations in order to identify cases in which governmental participation would improve the chances of gaining favourable outcomes or long-term influence on legal developments. Should be set aside cases where chances of success are low⁶⁹ or where participation is unlikely to make any difference, or would even be damaging for the government’s image and credibility amongst the judges or other actors. To avoid wasting resources, governments tend not to submit observations when there is a settled body of case law and little likelihood of a reversal. Governments may also rely on the written submissions presented by other governments more directly concerned, while keeping open the option of participating in the oral hearing if needs be (*e.g.* in United Kingdom, Denmark, Portugal, Finland⁷⁰ and the Netherlands⁷¹). Other (*e.g.* in France, Luxembourg, Belgium and the Netherlands⁷²) prefer to submit their own observations, allegedly to preserve argumentative diversity, but more probably to put some “pressure” on the Court, which may not be the most efficient way of obtaining favourable outcomes in the judicial arena, in particular where the Court asks for more intergovernmental co-ordination of observations.

Governments will make a better “impression” on the Court if their observations fit well into the preliminary reference participatory framework. First, they must use various stages of the procedures adequately. The aversion of the Luxembourg judges for boring oral pleadings, only repeating written observations, is well known. This is why many governments (*e.g.* in the United Kingdom, the Netherlands, Denmark and Finland) participate in the oral hearing only when they wish to further elaborate, to answer other parties’ comments, or if they feel that something new may come up. Others (*e.g.* France

⁶⁶ *ibid.*

⁶⁷ H. Schepel and E. Blankenburg, *supra* n.1, p.42.

⁶⁸ Source: questionnaires, interviews and official guidelines.

⁶⁹ Except at times or the purpose of being seen to be doing something by some interested sections of the domestic audience.

⁷⁰ *e.g.* Finland in Case C-112/00 *Schmidberger*, *supra*, n.17.

⁷¹ Where technical matters are involved.

⁷² Where more political matters are at stake.

or Sweden) prefer to attend quasi-systematically the oral hearing in cases where they have submitted written observations. Such policy can be risky, as presence may not always be justified, thereby undermining the reputation of these governments in the Court. Finally, some governments (*e.g.* Germany, Belgium or Portugal) appear to underestimate the importance of the oral hearing, as they rely predominantly on written submissions. Such practice may limit these governments' persuasive potential, as they lose the opportunity of putting their views directly to the judges.

Governments' views are more likely to be taken on board by the judges if they fall within their paradigms, that is, if "normal", as opposed to "revolutionary" reasoning is used.⁷³ Governments must thus refer to recognised sources of EU law (*e.g.* Treaty provisions, secondary legislation, international agreements, and general principles), adopt the interpretative methods favoured by the Court and make references to EU case law.⁷⁴ Political, economic or social arguments may also have their place, because they may help choosing between equally lawful alternatives, constitute a fundamental element of a judicial test,⁷⁵ or justify temporal limitations to the effects of judgments, although the Court prefers to stick to legal arguments in its reasoning.⁷⁶ Governments seem to follow these rules of the game, as governments' representatives insist on the fact that observations contain mainly legal arguments, and that political, social or economic briefs are made only to support legal points.

Governments may nonetheless decide to take a risk and argue outside the judges' paradigms ("revolutionary reasoning"). If convincing enough, such reasoning is likely to have a significant impact in the long run, transforming the substantive and normative structures of the decision-making in a way which could be more favourable to governmental actors.⁷⁷

⁷³ See P. Suber, "Legal reasoning after post-modern critique of reason" (1997) 3 *Legal Writing* 21.

⁷⁴ The *Emmot* case (Case C-208/90, *Emmott v Minister for Social Welfare* [1991] E.C.R. I-4269; [1991] 3 C.M.L.R. 894) provides a good example of governments arguing within the accepted paradigms of the judges. Observations were relying on the established case law of the Court, albeit trying to limit its scope of application. Governments have also been quick in picking up EU human rights arguments to "disguise" national interests. See M. Shapiro, "The European Court of Justice" in Sbraggia (ed.), *Europolitics: Institutions and Policy-Making in the "New" European Community* (1991).

⁷⁵ See the *Keck* case (Cases C-267/91 & 268/91, *Keck and Mithouard* [1993] E.C.R. I-6097; [1995] 1 C.M.L.R. 101), where the acceptability of indistinctly applicable national measures is determined on the basis of the degree of impact on trade.

⁷⁶ *e.g.* the economic concerns motivating the limitations in time of the effect of a Court ruling are disguised with the principle of legal certainty. See Cases 43/75, *Defrenne v Sabena* [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98, C-24/86, *Blaizot v University of Liège* [1988] E.C.R. 379; [1989] 1 C.M.L.R. 57, C-262/88, *Barber v Guardian Royal Exchange Assurance Group* [1990] E.C.R. I-1889; [1990] 2 C.M.L.R. 513. One exception: the *Keck* case where the Court acknowledged that its case law on Art.30 should be modified on the basis of policy reasons (*i.e.* the tendency of traders to rely on Art.30 to challenge any kind of rules whose effects is to limit their commercial freedom even when such rules are not aimed at products from other Member States).

⁷⁷ For example, French agents claim to resort to historical arguments (*i.e.* reference to the intentions of the authors of legal provisions), despite the traditional reluctance of the Court to use this interpretative method, which gives priority to governments' views as treaty-makers and co-legislators, where these can be identified in preparatory works. Is it only a coincidence that the Court is nowadays resorting more frequently to this method? See Cases C-320/94, *Reti Televisive Italiane* [1996] E.C.R. I-6471; [1997] 1 C.M.L.R. 346, C-355/95 P, *Textilwerke Deggendorf GmbH v Commission* [1997] E.C.R. I-2549; [1998] 1 C.M.L.R. 234, C-133/00, *J.R. Bowden v Tufnell's Parcels Express Ltd* [2001] E.C.R. I-7031; [2001] 3 C.M.L.R. 52. However, such evolution may also be explained by the greater availability of preparatory works or common law influences on the Court.

Reluctant to co-operate in the early years, governments seem nowadays to be keener to join forces.⁷⁸ This new co-operative attitude, beyond strategic designs, may also be linked to the Court's demand for more governmental co-ordination to speed up proceedings.⁷⁹ Intergovernmental co-operation can strengthen the impact of governmental views, in particular where a consensus exists, and lead to a more efficient use of resources. Governments' representatives can or sometimes must consult each other, so as to provide the Court with a wider range of focused arguments and to avoid repetitions. It is before the hearing that most of this co-ordination occurs. Indeed, due to short deadlines, there is little time to engage in intensive co-operation beforehand. However, governmental agents may occasionally have informal discussions by telephone or e-mail with administrations of other Member States, exchange with them information on facts, legislation and national positions, or even swap observations. They may even organise intergovernmental meetings to discuss cases of general importance.⁸⁰

Many governments therefore appear to have the ambitions of Repeat Players and have adopted policies which should enable them to influence case law development in the EU. But have they mobilised adequate resources?

Governments' unequal "endowment"

Resources affect not only actors' strategic choices⁸¹ but also their ability to influence law- and policy-making. Mobilising resources so as to maximise governmental influence by means of observations implies making available material, human and organisational resources of the same nature and at the same level than those available to corporate groups, the Commission and influential interests groups which populate the EU judicial arena. That requires sufficient financial allocations, adequate human resources policies (*e.g.* recruitment, training, promotion and workload), an efficient co-ordination structure, and the existence of adequate intra-governmental decision-making procedures for the selection of cases requiring participation and for determining the content of governmental submissions.

Human resources: the importance of staff's training, qualifications and experience

Governmental financial and human resources devoted to observations are difficult to assess, due to a lack of information and the involvement of various departmental and external staff. A few remarks can nonetheless be made. In the 1980s, some agents deplored a lack of human resources available for that purpose.⁸² Such complaints have now almost disappeared.⁸³ However, governmental departments dealing with European

⁷⁸ Sources: a United Kingdom's representative (from the Treasury Solicitor's Department) and an agent of the Finnish Government). See also T. Pratt, *supra* n.52.

⁷⁹ See "Notes of Guidance", *supra* n.13.

⁸⁰ Source: testimonies of agents from Denmark, Finland, Belgium, Sweden, and the United Kingdom and Sweden.

⁸¹ *e.g.* between lobbying, litigation and protest for interest groups. See C. Hilson, *supra* n.50, pp.240–241.

⁸² See A. Carnellutti, *supra* n.30 and J.-V. Louis, "The role of governments' representatives in Article 177 EEC proceedings: some comments on the case of Belgium" in Schermers *et al.*, *supra* n.2.

⁸³ Exception: Luxembourg.

litigation appear to be under strain.⁸⁴ Secondly, important disparities exist between governments. While some governments (*e.g.* Portugal, Luxembourg or Finland) appear to have only one or two persons in charge of organising and preparing litigation and participation before the EU courts, other governments have assigned this task to teams. Governments relying on teams, with strong links with departmental experts, are expected to make more frequent, opportune, consistent, accurate, useful and persuasive contributions to judicial proceedings, than those relying on one person, the quality of the civil servants involved notwithstanding.

Concerning the qualification and experience of those drafting written observations and representing governments before the Court, they usually have had a significant exposure to litigation, and especially to EU litigation, as well as a thorough knowledge of EU law and a good knowledge of domestic law, before taking up the job, which reflects suitable recruitment policies. Governments carefully resort to top-ranking highly qualified civil servants with extensive legal and political experience, assisted by legal or technical advisers, specialised in the subject-matter of the case at hand. The British and Irish Governments, however, have adopted a different approach. The drafting of observations and representation before the Court is entrusted to a practitioner, usually a barrister, specialised in EU law and if necessary in the specialised area of EU law involved in the case at hand. The governmental human resources must be compared to that of private litigants, who, with the exception of interest groups or corporate firms,⁸⁵ can not hope to match them, and to that of EU institutions, in particular that of the Commission, which has its own in-house Legal Service, composed of 10 specialised legal teams composed of highly qualified lawyers and legal advisers.⁸⁶

Organisational features: the co-ordination of governmental participation policy

Due to the short period of time available for the submissions of observations (usually two months),⁸⁷ governments must have effective internal co-ordination structures and decision-making procedures and practices. There are common points between the organisational and procedural arrangements of the various national administrations in relation to the existence of a co-ordination organ, the division of tasks, and the involvement of interested departments. However, there are also significant differences, reflecting the diversity of national administrative cultures and policies, which confirms that European integration has not led to a real Europeanisation of national administrations, but merely imposed some adjustments within established administrative structures.⁸⁸ An analysis of national administrative arrangements can help explain patterns of governmental participation and provide clues as to the governmental ability to influence judicial outcomes at EU level.

Each national administration has a co-ordination organ, the duties, powers and departmental membership of which vary. In most Member States, the co-ordination role rests within

⁸⁴ Source: contact with an agent in the Treasury Solicitor's Department (June 2003).

⁸⁵ On interest groups and EU litigation, see C. Harlow and C. Harding, *supra* n.1, C. Barnard, *supra* n.61, C. Hilson, *supra* n.50 and K. Alter and J. Vargas, "Explaining variation in the use of litigation strategies: European Community law and British gender equality policy" (2002) *Comparative Political Studies* 452.

⁸⁶ See http://europa.eu.int/comm/dgs/legal_service/organ_en.htm.

⁸⁷ Art.23 Court of Justice's Statute.

⁸⁸ See S. Bulmer and M. Buch, *supra* n.4.

the legal department of the Foreign Affairs Ministry. However, in a few countries, EU litigation has been given a more “transministerial” dimension. In the United Kingdom, the function of representation before the EU court was under the responsibility of the Foreign and Commonwealth Office until 1982, when it was entrusted, together with the function of legal advice, to a group of legal advisers, formally located in the European Division of the Treasury Solicitors’ Office (*i.e.* the “in-house” legal service of the British Government), but effectively adjunct to the Cabinet Office European Secretariat,⁸⁹ which is the co-ordination centre for the British EU policy.⁹⁰ Things are not too different in France, where the co-ordination lays with an inter-ministerial political body, the *Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne* (“SGCI”), which centralises the co-ordination of the French position within all the EU institutions. The SGCI, like the UK European Secretariat, is directly linked to the Prime Minister, although placed at the disposal of the acting minister in charge with European Affairs. Strong with 160 staff, it is considered as the jewel of the French European policy and has been looked at as a model for national administrations eager to influence EU decision-making.⁹¹ Concerning EU litigation, this secretariat co-operates closely with the *Direction des Affaires Juridiques* (“DAJ”) of the Foreign Affairs Ministry, which provides legal advice and represents France before international courts. In Denmark, the co-ordination of the government’s litigation and participation policy also lies with an inter-ministerial organ, the Special Committee for Legal Questions, which works under the supervision of the EC Committee and the Common Market Committee. The same format is followed in the Netherlands, where it belongs to an Interdepartmental Commission for European Law (Sub-commission V). Germany has adopted an unusual organisation, influenced by the original perception of the EU as an economic process,⁹² the system of the functional task delegation and the federal, decentralised and fragmented structure of the German State. The co-ordination of the governments’ litigation and participation policy is entrusted to the Federal Ministry of Economics (“BMWA”), which is the general co-ordination structure for the German EU policy. However, it is the Federal Ministry of Finances (“BMF”) which receives notification of references, translates them and sends them to the BMWA, which examines them and forwards them to departments concerned or competent *Länder* authorities. These report back to the BMWA, which gives instruction for the writing of observations to the Department EC2 of the European Community Law Division of the Department of European Integration within the BMF.

The functional specialisation of the co-ordination organ ranges from being very focused on EU law and litigation (*e.g.* in the United Kingdom, Finland, Denmark, Portugal, Sweden, or the Netherlands) or on international litigation (*e.g.* in Belgium and Luxembourg) to more general European policy definition (*e.g.* France or Germany). The role and powers of that organ vary. In some Member States (*e.g.* Portugal and Belgium), the role of this organ is limited to examining and circulating information on cases notified by the Court, being a mere transmission belt between the various departments potentially concerned. In other Member States, it plays a primordial role in co-ordinating and determining governmental action. In France, the Netherlands and Denmark, it has real

⁸⁹ *ibid.* p. 615.

⁹⁰ See K. Hussein, *supra* n.4, p.27.

⁹¹ See S. Bulmer and M. Buch, *supra* n.4, p.611.

⁹² *ibid.* p.606.

decision-making powers as to the opportunity of observations (with the possibility to appeal to the Prime Minister or the Cabinet). Moreover, this organ is often closely involved in defining the substance of observations, since it either “holds the pen” (e.g. in Luxembourg, Finland, or Sweden), or contributes to the drafting of observations (e.g. in Portugal), or carefully checks their content (e.g. in the United Kingdom, France and Belgium). The granting of decision-making and supervisory powers to a permanent and specialised interdepartmental organ is expected to enhance governments’ ability to make a long lasting impact on EU case law, as it ensures more strategic, consistent and coherent governmental policies. Besides, to the extent that it provides a forum for consensual decision-making, it is more likely to guarantee the taking into account of the various governmental interests in the determination of governmental positions, while making sure a policy decision can be made within the limited time frame. It also allows for significant technical in-puts in the decision-making on both the opportunity and substance of observations. It is nevertheless worth noting that this feature tends to coincide with governments which have strong concerns about the representation of their interests in EU decision-making processes (e.g. United Kingdom, France, Denmark, and the Netherlands).

Procedural resources: decision-making on the opportunity and content of observations

Governmental procedures as to the opportunity and substance of observations must guarantee pluralism, consistency and efficiency in the definition of governments’ position. In all the Member States, every interested department has some say. The co-ordination of the various departmental views may be more or less formally organised. The usual practice is for departments concerned to express their views in writing. Inter-ministerial meetings may also be called to discuss observations in cases presenting a general interest or on request from one ministry (e.g. in the United Kingdom, Germany, Netherlands and Finland). The decision regarding the opportunity of submitting observations can either be made on a consensual basis by the co-ordination structure (e.g. in France and Denmark) or between the departments concerned (e.g. in Germany and Portugal), or by the department most concerned (e.g. in the United Kingdom, Belgium and Portugal), or jointly between the co-ordination organ and the competent ministry (e.g. in Finland and Sweden). Sometimes, Cabinet approval may be necessary, either on a systematic basis (e.g. in Luxembourg and Denmark), or where disagreements arise within the government (e.g. in Sweden or France). Final decision-making by the competent department can prevent deadlock situations where no observations can be made due to a lack of consensus between departments. However, it may lead to the unfair representation of governmental interests, and to inconsistency in the governmental position in the medium or long run, which may undermine the government’s ability to impact case law developments in a way furthering its interests. Consensual decision-making appears more able to ensure the pluralist definition of governmental preferences, while the reaching of a decision can be safeguarded by the reliance on a permanent and powerful inter-ministerial body, used to consensual decision-making. Moreover, where there are unlocking mechanisms, such as an appeal to the Cabinet, the risk of a “non-decision” is limited.⁹³ However, such a

⁹³ A recent official report underlines some of the difficulties encountered nowadays by the SGCI in reaching decisions which means that more matters are now referred to the cabinet. See *Commissariat Général au Plan*, *supra* n.53.

structure may not be adequate within decentralised States, such as Germany, Belgium or Spain, where such centralised decision-making systems could not operate.

The procedure for drafting observations must be assessed with regard to its ability to both push forward governmental interests and to fit well into the Community judicial process. This task can be assigned on a functional or technical basis, *i.e.* either left to the legal experts of the department most concerned (*e.g.* in Belgium), sometimes in collaboration with those of other interested departments or with lawyers in the co-ordination organ (*e.g.* in Portugal), or entrusted to the lawyers of the legal department of the Ministry of Foreign Affairs (*e.g.* France, Luxembourg, Finland, or Sweden) or in Germany the Finance Ministry, usually in collaboration with experts in the department(s) concerned or on the basis of instructions provided by such department(s) or by the co-ordination organ. Some administrations have developed alternative practices. In Denmark, observations are drafted by a special lawsuit delegation composed of technical and legal experts instructed by a Special Committee. In the United Kingdom and Ireland, a barrister is specially appointed to draft the observations on the basis of a memorandum provided by the leading department and to represent the government before the Court. Observations drafted by lawyers of a central legal team, experienced in EU litigation, are expected to fit better in the EU judicial process, than those drafted by lawyers in specific departments, who may not always be familiar with the EU Court's practices and methods, except in departments which have had frequent exposure to EU policy- and law-making processes for a long time (*e.g.* agriculture, economics, finances, etc.). However, where the central team holds the pen, the technical input, which may turn out to be most useful to the EU judges, may be reduced, and departments' positions or specific domestic laws and policies may not be accurately presented. In order to overcome these two drawbacks, most governments have set up procedures of collaboration and mutual checks between the central team and the relevant departments for the drafting of observations. Control over the accuracy of observations is normally exercised by the department(s) concerned where a central legal team is the author of the draft (*e.g.* in the United Kingdom, the Netherlands and France), or by the co-ordination organ where the observations are drafted by lawyers in the competent department(s) (*e.g.* in Belgium), through the checking of observations and suggestion of amendments. Alternatively, observations are written within a framework of continuous collaboration between the legal team and the department(s) concerned or are then subject to substantial *a posteriori* control, *i.e.* the presentation of observations to various governmental authorities (*e.g.* in Sweden). In some administrations, a degree of official validation is required, such as the final approval by the co-ordination organ (*e.g.* in France or Belgium). In Germany, however, the observations drafted by the lawyers of the Department EC2 do not appear to be subject to such a *a posteriori* check. Reciprocal checks are likely to offer a more accurate presentation of governments' views and of the technicalities of national law and policies, while ensuring that they are "dressed" with EU legal clothes. However, these may be difficult to organise in federal States, where decision-making processes take longer, therefore leaving little time for control procedures.

In cases where the government did not submit written observations but reserved the possibility to attend the hearing, a follow-up procedure is used to monitor the case. The procedure usually followed for participation in the hearing is similar to the one for written observations, although simpler. The drafting of pleadings also tends to be more interactive

and to involve more intensive contacts between the legal team and the technical or policy experts in the department(s) concerned, in order to ensure that agents acting before the Court are properly briefed, so as to be able to emphasise the significant points and to be ready to reply adequately to the judges' queries.

All interested departments are usually kept informed of relevant developments. Relevant documents are circulated by the co-ordination organ or person. Follow-up mechanisms are usually in place to assess and discuss the impact of observations and the consequences of Court's rulings, so as to decide on further actions to be taken and to adjust participation strategies. This reflective stage takes place either at ministerial level (*e.g.* in Belgium) or at inter-ministerial level (*e.g.* in France).

Procedural and organisational resources: assessment

There are significant differences between the administrative organisation of the various Member States for the submissions of observations in preliminary reference proceedings. Some governmental arrangements, results of national cultures or to the State's organisation, size or wealth, lead some governments to start with a "handicap" (*e.g.* Germany, Belgium, Luxembourg, and Portugal). Other difficulties encountered by governments are linked to the Article 234 EC framework itself. Indeed, one of the main problems for governments, in particular those of decentralised States, is the two-months time limit. In the 1980s, some agents had suggested introducing the possibility of allowing time extensions on an exceptional basis.⁹⁴ This has not been done. Another problem for governments is the identification of significant cases, which can be due to the lack of clarity of some preliminary references. This question is addressed by the Court's case law on the admissibility of preliminary references,⁹⁵ guidance documents addressed to national judges,⁹⁶ questions to interested parties, and a greater inquisitorial role for the Advocate General and the Reporting Judge,⁹⁷ which should make it easier to identify the issues at stake and their relevance.

Governments' self-assessment of their influence

As emphasised by governmental agents, assessing the influence of governmental observations on the Court's decisions is an impossible task, because of the complexity of the judicial decision-making process which cannot be reduced to the interventions of a few factors and actors. Causal connections between observations and outcomes can not be objectively evidenced. Even a sophisticated statistical analysis integrating the nature of governments' observations in relation to final rulings would not make it possible to determine whether one particular government has been influential. Only a detailed case study of legal developments in particular areas could provide more valuable evidence as to the actual influence of governments' observations. And even so, assessment would still be difficult because the Court used to limit its reference to parties' arguments in its

⁹⁴ See Schermers *et al.*, *supra* n.2.

⁹⁵ See D. O'Keeffe, "Is the spirit of Article 177 under attack? Preliminary references and admissibility" (1998) 23 E.L.Rev. 509.

⁹⁶ "Information note on references by national courts for preliminary rulings," at www.curia.eu.int/en/instit/txt/docfr/autrestxts/txt8.pdf.

⁹⁷ New Art.54a Court of Justice Rules of Procedure [2000] O.J. C34/1.

rulings,⁹⁸ although it now shows a greater willingness to address each of them. In any case, it is not possible to generalise on the ability of each government to influence the making of EU case law, as each government's influence potential is context-based and will vary from one case to the other.

A general assessment of governments' influence is therefore not feasible. However, one may consider as valuable information agents' opinion regarding the influence of their governments on judicial decision-making, since after all, they would not be completely mistaken as to the impact of their activities.⁹⁹ Obviously, their assessment of the successful or unsuccessful nature of participation depends on governmental objectives and expectations with regard to each single case. Governmental representatives are quick to stress that the Court is independent and impartial and "not a servant of the Member States"¹ and that it is the quality of observations which makes a difference, not the political pressure attached to their participation. However, they also acknowledge that where observations are presented by many governments, these can put an "indirect pressure" on the Court,² by alerting it to the significance of the case in relation to domestic interests and to possible damaging consequences at domestic or EU level. It is interesting to note that governments which have an active policy of influence are also those which claim a high success rate, the highest degree of influence and the greatest contribution to European integration (*e.g.* the United Kingdom, France, the Netherlands and Finland).

Governments and the direction of EU case law

Governments can influence judicial decision-making at EU level, to some extent because they have "external" means of formal or informal control over the structural properties of that process, but to a greater extent because they can influence judicial outcomes by means of persuasion through participation, in particular in preliminary reference proceedings. Indeed, because of the specific features of the EU judicial decision-making, their participatory activities, although more subtle and discrete than "grand gestures", are more likely to durably influence the direction of EU case law.

Of course, governments are not the only participants in the process and their influence could be countered or overridden by that of others. However, to the extent that they have privileged access to the courtroom and that most of them attempt to act as Repeat Players, they are expected to have a greater influence on legal change than One-Shotters actors. Governments nonetheless face competition for influence with other Repeat Players, such as the Commission and powerful corporate and interests groups. Besides, not all governments are on equal footing. Some governments will have more persuasive power (*e.g.* the United Kingdom, France, the Netherlands, Finland, or Greece) than others (*e.g.* Luxembourg, Portugal, Germany, Belgium, Sweden).

⁹⁸ The Court follows a policy of declaring in the beginning of its rulings that the observations submitted by the interested parties should be mentioned or discussed only in so far as is necessary for the reasoning of the Court. *e.g.* Case C-213/89, *R. and Secretary of State for Transport Ex p. Factortame Ltd* [1990] E.C.R. I-2433.

⁹⁹ Governments' agents were asked by questionnaire or during the interview to rate the successful nature of their governments' observations, their influence on judicial decisions and their impact on European integration by judicial means, on a scale from 0 to 10.

¹ Source: a UK Government's agent.

² Source: a Luxembourg government's agent.

Judicial reform in the EU, which was “launched” by legal academia in the early 1990s, which culminated with the adoption of the Treaty of Nice,³ but which is still on the agenda of the Convention on the Future of Europe,⁴ should give a new impetus to the study of the EU judicial institutions. Research on the dynamics of judicial decision-making should be pursued, in particular now that the Court becomes closer than ever to a supreme constitutional court and that the Member States are asked to give life to a European constitution, the respect and interpretation of which will be entrusted to the courts. Constitutional adjudication, more often than not, goes beyond the mechanical application of legal norms to particular situations, involves more balancing of fundamental values and principles than other types of litigation, and is likely to have wider-ranging implications. Therefore, who can influence the EU judicial decision-making process and how this can be done is an issue which can not longer be kept hidden behind the mask of legal neutrality. It is also necessary to envisage governmental participation from a normative perspective, in order to develop suitable normative foundations for judicial policy in the EU.⁵ Let us thus examine to what extent governments’ contribution can improve the quality, legitimacy and effectiveness of EU case law, which are three inter-related fundamental concerns.

One cannot underestimate the importance of the informative role of governments acting as *amicus curiae* in Article 234 EC proceedings. By providing legal and factual information which otherwise would be difficult for the judges to obtain, they undoubtedly contribute to the informed nature of judicial decision-making at EU level. Moreover, by alerting the judges to the possible consequences and policy implications of alternative lawful solutions, they assist them in putting their decision-making in context, thereby affecting the social legitimacy of the Court. Moreover, the legal formatting of policy concerns by governments can be useful for the Court when it seeks to justify in legal terms a position motivated by policy concerns, in a way which helps preserve the Court’s credibility among legal circles. Weiler also argues that privileged status with regard to participation is justified by the fact that privileged applicants “represent different constituencies, different interests, different shades of the general interests”.⁶ Governments, the “masters of the Treaties”, should indeed be allowed to contribute to the process which consists in making sense, enforcing and filling the gaps of these Treaties, as after all this process should not be monopolised by the Commission’s Legal Service, the national and EU judicial elites and the few wealthy and well-organised corporations and interests groups.

From the point of view of pluralist, participatory and deliberative democracy applied to the judicial institution, governmental participation can thus be seen as a positive contribution to judicial decision-making, although most supporters of such approaches would rather insist on the need for an increased participation of non-governmental actors,

³ Treaty of Nice [2001] O.J. C80/01 at http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf.

⁴ See documents of the Discussion Circle on the European Court of Justice at http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI.

⁵ On the need for an EU judicial policy, see, *inter alia*, H. Rasmussen, *supra* n.24, and C. Harlow, *supra* n.1.

⁶ See J.H.H. Weiler, “Pride and prejudice—*Parliament v Council*, a note on ‘Comitology’” (1989) 14 E.L.Rev. 334 at p.345.

such as interests groups, NGOs, associations, corporate groups, etc.⁷ However, one should also be wary of the danger of using the courtroom as a “political surrogate,” of blurring the distinction between the political and the legal-judicial and of confusing the legitimacy basis of these two types of processes.⁸

Yet, one may still argue that judicial decision-making, like any kind of decision-making process, should tend towards pluralism and representativity, while preserving its efficiency in reaching appropriate outcomes in reasonable delays and the integrity of its reasoning. While liberalising standing rules⁹ can have damaging effects for both the judiciary and participants (delays, expenses and information overload), interventions or the presentation of observations appear as a good alternative to guarantee informed, pluralist and effective judicial decision-making.¹⁰ Some will argue that the popular voices, as opposed to those of parochial, élites or corporate interests, should have a greater echo in the EU judicial process. However, as active citizens do not usually have either the motivations, or the means, or even the opportunities to litigate or participate, this role can only be fulfilled by interests groups, to the extent that these are given more participatory rights and that they are “representative” enough, . . . and by governments, as after all, these are indirect representatives of the European peoples, accountable to them! The ability of governments to represent the public interest, or the interests of citizens, is often, and validly so, challenged.¹¹ It is true that governments do, perhaps more often than not, submit observations to defend sectoral, corporate or parochial interests. However, there are some positive features in governments’ policy as far as pluralism is concerned, as decisions on observations are usually made after various interested departments have been heard. Besides, interest groups active at national level can have access to governmental departments and put pressure for governments to promote their views in the Court. Many governmental agents mention that decisions to submit observations or even the substance of observations are influenced by groups such as environmental protection groups, farmers, consumer protection associations, hunters, trade unions, and by decentralised authorities (*e.g.* in the United Kingdom, France, the Netherlands, Sweden and Germany). Such groups are even occasionally consulted on the initiative of the government itself (*e.g.* in Finland). In such cases, governments act as representatives of these interests groups and therefore of some sections of the European citizenry. Obviously, this poses the question of access to governments themselves. If groups which have privileged access to national administrations are also those which already monopolise EU arenas, it can be problematic with regard to pluralist and democratic concerns. Ideally, for governments to act as proper “democratic transmission belts” between the European citizens and the Court, governmental decision-making on participation should involve the civil society (participatory deliberative democracy). Alternatively, governments should involve national parliaments (representative democracy) in the decision, since there is no reason why governments’ activities in the Court should be subject to less scrutiny than that in other EU law and

⁷ See T. Campbell, “Legal positivism and deliberative democracy” (1998) 15 *Current Legal Problems* 65.

⁸ See C. Harlow, “Public law and popular justice” (2002) 65 *M.L.R.* 1.

⁹ The Court recently reiterated its reluctance to do so. See Case C-50/00, *Unión de Pequeños Agricultores* of July 25, 2002.

¹⁰ See C. Harlow, *supra* n.1, pp.215 and 244.

¹¹ *ibid.* p.247.

policy-making processes.¹² National parliaments could set up mechanisms in order to examine preliminary references emanating from the Court and put forward parliamentary views as to the opportunity and substance of governmental observations, to be taken into account by the governments when deciding on observations. Similarly, associations and other interests groups could scrutinise (like some already do) preliminary references sent to the Court and then lobby their governments (or other governments and EC institutions) for them to defend their positions in the Court, although such practice poses the eternal question of the representativeness of the consulted bodies. The democratic and pluralist in-put in governmental observations therefore depends not only on the openness of governmental structures towards the peoples' voices, but also on the nature and degree of interests' mobilisation in domestic constituencies.

However, one should keep in mind that the legitimacy of judicial decision-making is not primarily based on its representative or participatory nature, but on its certainty, finality, independence, neutrality and objectivity.¹³ To what extent governments should contribute to the judicial process becoming more representative is therefore a question of perspective. It remains that governments fulfil a vital role in the judicial process, as exposed by former judge Everling:

“when the Court is engaged in the process of making a decision it engages in a work of construction which, in a certain sense, reflects the whole process of integration. It therefore cannot work in isolation; the members of the Court need the support by the public in their respective countries, by legal writers, by references from national courts and by participation of national authorities in proceedings. Only if all legal systems represented in the Community contribute fully to the making of the Court's decisions is it able to fulfil its task of developing a genuine Community legal order.”¹⁴

And one could add, only if “local” political and social values are taken into account, can the Court fully contribute to the harmonious development of the Union . . .

¹² Regarding the House of Commons' scrutiny over the British Government acting as EU co-legislator, see S. Bulmer and M. Buch, *supra* n.4, pp.617–618.

¹³ C. Harlow, *supra* n.8, pp.2 and 13.

¹⁴ U. Everling, *supra* n.2, p.1308. Italics added.