

Enduring Borders The Politics Separating Law from Policy on National Discrimination

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I. Introduction

[The judiciary] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
Alexander Hamilton, Federalist No. 78

The European Court of Justice (ECJ) receives increasing attention as a major actor in the process of European integration. The emerging story is one of judicial triumph: the ECJ successfully imposes its decisions on member state governments. Most accounts portray the Court as the hero of regional integration, defending individual Community rights against national prerogatives, determining major policy initiatives, and constructing institutions for governance at the European level (e.g. Weiler 1991 and 1994, Shapiro and Stone 1994, Pelkmans 1994, Stone 1995, Wincott 1995).

Neofunctionalists attribute the development of this novel European rule of law to self-interested interactions among individual litigants, national courts, and the Court of Justice (Burley and Mattli 1993, Alter 1996a and b, Mattli and Slaughter 1996, Stone 1996). Intergovernmentalists counter that the ECJ elicits consent by strategically solving contracting problems as member states maintain control over the ultimate direction and pace of legal integration (Garrett 1992, Garrett and Weingast 1993, Garrett 1995, Moravcsik 1994, 1995). Intended to explain the puzzling victory of a supranational David over a set of sovereign Goliaths, the regional integration literature focuses on Court rulings that became prominent components of the European policy agenda.

Yet those Goliaths do not always hang on David's every word. Many innovative ECJ decisions fall into obscurity, disregarded by virtually everyone but the original parties to the suit. The consequences of other verdicts resonate in heated political debates long after the cases close. Thus, path-breaking judicial choices neither necessarily nor immediately redirect activities across the European Union (EU). Rather, the extent to which ECJ jurisprudence guides policy is conditioned by institutional and political responses at both the national and supranational level. The constraints and opportunities generated by these responses have little to do with the fact that the ECJ is an international legal body; they constitute fundamental challenges for courts in domestic contexts as well.

Legal institutions offer very limited means to promote policy reforms and are difficult to access for many segments of society. These two characteristics render the policy effects of jurisprudence highly dependent on extra-judicial reactions. Responses from administrative and legislative institutions, other courts, individuals, and organized groups all operate to amplify or dilute judicial solutions. To illustrate the variable influence that the European Court of Justice exerts over policy outcomes in the EU, I discuss national discrimination as it relates to the free movement of persons.

Treaty provisions prohibit discrimination on the grounds of nationality for individuals engaged in economic activity: as a worker under Article 48, as an entrepreneur under Article 52, and as a service provider under Article 59. Because distinctions among Articles 48, 52, and 59 are frequently blurred, the Court has declared that they must be read as a whole, such that principles applicable in one area extend to the others (*Royer* C-48/75, 1976). These provisions all have direct effect (*Commission vs France* C-167/73, 1974; *Van Duyn* C-41/74, 1975; *Reyners* C-2/74, 1974; *Van Binsbergen* C-33/74, 1974) and represent fundamental freedoms, which require that any derogations be interpreted restrictively (*Levin* C-53/81, 1982; *Van Duyn* C-41/74, 1975; *Reyners* C-2/74, 1974; *Van Binsbergen* C-33/74, 1974). Community law prohibits both

direct and indirect forms of discrimination: member states must eliminate policies which may appear neutral in letter, but have either a greater impact on the nationals of other member states or hinder the free movement of persons (Barnard 1995, 107-108).

Secondary legislation has extended rights of movement and residence to those with sufficient financial means, retirees, and students (Council directives 90/364 EEC, 90/365/EEC, and 93/96 EC). Extending beyond simple employment and residence, Community rights involve the equal provision of social and tax advantages to EU migrants¹ and their families (EC Regulation 1612/68) and equal access to social security schemes (EC Regulation 1408/71). Third country nationals from states with EU Association agreements also possess a set of rights related to entry, residence, employment, and participation in contributory social insurance schemes.²

The Court of Justice regularly identifies subtle forms of discrimination in its interpretations of these legal provisions. Despite consistent clarifications of legal obligations in this field, member states operate tax programs, occupational restrictions, and social benefit schemes that exclude EU migrants and nationals of associated states who possess free movement rights. Until these suspect practices inspire infringement proceedings or *repeated* challenges by individuals in national courts, member states can evade the policy implications behind established jurisprudence. Technically legitimate, this avoidance does not constitute straightforward noncompliance.

II. Case law or a Rule of Law? Missing Links between Jurisprudence and Policy

Most of the literature on European legal integration overlooks such evasion because scholars inflate the meaning of case law and ignore post-judgment politics. Assumptions that innovative rulings generally serve as authoritative *policy precedents*

¹I will refer to all individuals working and/or living outside their country of citizenship as migrants, whether they are workers, service providers, or self-employed.

²The rights of individuals from associated states vary according to particular association agreements. The agreement with Turkey includes the most extensive free movement rights. New association texts, e.g. with east European states, do not confer free movement rights (*Bundesgesetzblatt* 1993, 1316, 1322).

lead observers of the Court to equate theoretical legal possibilities with actual policy outcomes. Compliance with an individual judgment is read as broad adherence to a new principle. Once jurisprudence clarifies a right or obligation, proponents of legal integration see a change in *the law*, the cumulative effect of which constitutes a fundamental judicial contribution to the evolving rule of law in Europe. Yet case law does not always contribute substantially to modifications to a *rule of law*, which "requires that rules are *clear*, in the sense that people need not guess about their meaning, and that are *general*, in the sense that they apply to classes rather than particular people or groups" (Sunstein 1996, 104 emphasis in original).

Judges habitually produce unambiguous solutions for the parties before them, but less commonly produce rules that are sufficiently clear and general for others to rely on in their future interactions. Courts usually take incremental exploratory steps, linking verdicts to the particular facts of the case and eschewing comprehensive policy guidelines. Decisions frequently involve important elements of compromise that produce intermediate resolutions for the affected parties. As they confront political, social, and economic responses to their rulings, courts alternatively extend, restrict, or qualify their original principles. This relatively tentative, gradual approach to decisionmaking stems from a desire to encourage consent and avoid further conflict (Shapiro 1981, viii, 15, 36; Sunstein 1996, viii, 37; Hartley 1994, 87-88; Chayes 1976, 1316; Fisher 1988, 10, 276; Johnson and Canon 1984, 32, 79; Shapiro 1964, 41-42). While ECJ scholars have recognized the strategic evasion of political resistance that motivates this distinctive decisionmaking style (Garrett, Kelemen, and Shultz 1995; Alter 1996b), the judicial approach also places important limitations on the policy ramifications of innovative jurisprudence.

As judges connect solutions and their justifications to specific events, they produce only *incompletely theorized agreements* on particular outcomes (Sunstein 1996, viii, 37). By disavowing large-scale theories, "losers in particular cases lose much less.

They lose a decision, but not the world. They may win on another occasion" (Sunstein 1996, 41). Because courts do not put the world at stake, the broad application of their decisions remains ambiguous. Thus even the generality of reasonably clear legal principles, because they are embedded in concrete disputes, remains open to challenges on contextual grounds. Uncertainty about the extension of legal principles across cases precludes rapid reform. Instead, the policy parameters of a judicial principle slowly develop as remaining questions are settled through ongoing litigation, interpretations by governments and their administrations, and legislators' efforts to accommodate gaps left by judicial silence.

Rejection of the policy implications behind novel jurisprudence can proceed even in the absence of overt noncompliance with judgments. Judges in other courts and administrators in affected agencies, whether in reaction to broader political trends or their own preferences, may effectively confine the impact of a verdict with officially legitimate mechanisms of evasion. The policy ambiguities associated with the judicial approach to decisionmaking generate broad choices of interpretation and implementation. Given an indeterminate route to compliance, the reactions of other judges and officials generally diverge. US public law research extensively documents the wide range of outcomes that follows centralized judicial review which is intended to provide uniform solutions to policy controversies (e.g. Rosenberg 1991, Katz 1965, Sorauf 1959, Patric 1957, Muir 1973, Rodgers and Bullock 1972, Horowitz 1977, Choper 1980, Fisher 1988).

Other courts can limit the application of principles in established jurisprudence by distinguishing factual differences between the original and ongoing cases, or by interpreting previous decisions very narrowly. In the European legal system, most ECJ judgments provide no binding precedents.³ Preliminary rulings, provided by the ECJ to national courts who ask questions of Community law under Article 177, have no *erga*

³Judgments in civil law jurisdictions, which include all member states with the exception of Great Britain and Ireland, create no binding precedents; civil law traditions do not include the concept of *stare decisis*.

omnes (generally binding) or *ultra partes* (beyond the parties) effects. While national judges may sometimes apply a principle established in one Article 177 preliminary ruling to similar cases that come before them, they are not obligated to do so (Hartely 1994, 301; Toth 1990, 202, 321; Schermers and Waelbroeck 1987, 398-399; Merryman 1985, 45-47; Trabucchi 1974; 64-65, 69-72, 77-82; SAFA 1972, 155-156). With the exception of judgments declaring an act of an institution void in a direct action for annulment under Articles 173 and 174, ECJ rulings have only *inter partes* effects, a relative effect binding only between the parties in the particular case (Toth 1990, 321).

Beyond active recalcitrance, courts are not organized principally to diffuse high court legal solutions. Rather than having lower courts serve as the bureaucratic battalion of the upper judiciary, appeals are essentially designed to allow "mistakes" to percolate to the top. If courts overlook relevant existing jurisprudence and parties fail to appeal, judicial legal principles fade despite the absence of any intentional resistance.

Responses from national governments and their administrations are also fundamentally important for the practical application of Community law. National courts apply ECJ principles only in decisions for the litigants before them. To give European legal developments a meaningful general effect, national governments often must adapt legislation or initiate changes in administrative practices. The choice to apply or disapply an act that violates Community law is frequently an action of the government, lacking any court involvement (Schermers and Waelbroeck 1987, 292). Delays to comply with individual ECJ judgments⁴ (see Figure 1)⁵, which often result from an incapacity to legislate efficiently or control state bureaucracies, represent only a fraction of the gaps associated with member state implementation of ECJ case law.

The standard administrative response to Article 177 preliminary rulings also jeopardizes the uniform application of the law in Europe. Member state officials do not

⁴I refer here to noncompliance with the text of the judgment as it applies to the specific parties of the case, not to the application of a legal principle to all similarly situated individuals.

⁵All figures appear in the appendix at the end of the paper.

routinely treat preliminary rulings as binding policy prescriptions. National administrators choose to apply the principles of some preliminary rulings universally, seeking to avoid a deluge of copy-cat cases. However, the fear of a cascade of lawsuits is not common, and the more typical response is to avoid any generalized policy changes until a serious legal threat materializes. Governments do not always have malicious intents when they fail to apply jurisprudential principles to segments of their own law and practice. They may genuinely consider their own situation to be distinctive from that of the parties in the suit or be uncertain as to how far they need to go in applying an ECJ principle (see interview note in the Bibliography).

Yet, officials in France, Germany, and the UK, which are member states with respectable records of compliance with ECJ rulings and capable bureaucracies, also indicate that their administrations wait for direct legal challenges before altering preferred practices or legislation that are very similar to those that have been denounced in a related case. German ministries seek verdicts addressed specifically to their policies, even when their central legal advisors have indicated that existing jurisprudence virtually guarantees that they will lose in an Article 169 infringement proceeding or Article 177 preliminary ruling. Formally legitimate, the standard administrative response to case law fragments judicial authority, allowing single-shot applications of Community law to coexist within a sea of conflicting national policy.

Administrative evasion even escapes judicial review in some jurisdictions. The French *Conseil d'État* holds that it cannot review non-legislative administrative decisions for compatibility with Community law. Essentially, the French administration can act as it pleases, as long as it does not codify its choice in subordinate legislation (C-254 1995, 166 and C-154 1994, 176). This contrasts with the French *Cour de Cassation*, which reviews administrative acts for compatibility with Community law. Its review of a Ministry of Justice policy found the administration in violation of two long past Article 169 ECJ rulings (Com (96) 600 final, 427-428). In Spain, both the Constitutional Court

and an administrative division of the *Tribunal Supremo* denied themselves of either the need or the authority to review administrative action in light of Community law (C-250/1992, 71).

The need to invoke support from courts and administrations is not a function of the supranational character of the European legal regime. Students of US public law and public policy have long recognized problems in inter-judicial coordination and the bureaucratic implementation of evolving legal developments (e.g. Sorauf 1959, Shapiro 1964 and 1981, Johnson and Canon 1984, Fisher 1988, Handler 1978, Riley 1987, Gormley 1989, Dolbeare and Hammond 1971, Pressman and Wildavsky 1984). Most American public law scholars accept that courts generally fail to elicit change independently, but do not dismiss the judiciary and law as politically irrelevant. The dominant tradition stresses the centrality of interactions between legal and political institutions, acknowledging that most significant policy initiatives require the cooperation of multiple branches of government (e.g. Shapiro 1964, Chayes 1976, Horowitz 1977, Fisher 1988, McCann 1994).

Indeed discussions of the limitations of judicially-driven policy change are most extensive in the US public law literature, which tests an easy case for politically salient judging: a well-established federal system with a long tradition of judicial review that is situated in the most litigious society on earth. By contrast, accounts of judicial influence in the emerging literature on comparative judicial politics fall victim to what Stuart Scheingold labeled the "myth of rights," a tendency to forge an automatic linkage between judicial stimulus and affirmative political response (Scheingold 1974, 13). Enthusiastically rejoicing that their courts are meaningful political actors, many comparative courts scholars exaggerate the force that jurisprudence exerts in politics.

Long focused on the centralizing force of ECJ jurisprudence, research on legal integration must take account of limitations that generally afflict judicial institutions. As discussions of regional integration address forms of fragmentation in European

governance (Scharpf 1994, Shaw 1995, Caporaso 1996, Hurrell and Menon 1996, Marks and McAdam 1996, Kohler-Koch 1996, Héritier 1996), the means by which legal institutions generate differentiated structures of governance deserve greater attention.

III. Contained Justice: Migrant Rights in Law and Policy

The Court of Justice consistently rejects provisions that discriminate between individuals on the basis of nationality. Despite this judicial commitment to upholding migrant rights (Ball 1996, 353-367; Martin 1994), practical policy adaptation in this field is problematic. In its reports on the application of Community law, the Commission repeatedly chronicles ongoing infringement proceedings against multiple member states for infringement of Community provisions that determine the extent of actual equality in treatment for migrant workers. Most of these cases address issues that are regularly referred to the ECJ by national courts such as, equal access to social security benefits, equal access to occupational pension schemes, equal treatment regarding income tax and dependent tax relief for non-resident workers, access to employment in the public sector, mutual recognition of vocational qualifications, and the 'export' of disability, unemployment, and other social insurance benefits (Com (96) 600 final, 118-147; C-254 1995, 70-83; C-154 1994, 71-86; C-233 1993, 24-32).

Standard administrative evasion of the implications of case law drives this pattern of infringement proceedings. The primary text prohibiting discriminatory practices, Regulation 1612/68, indicates that migrants must share the same social and tax advantages as national workers (Article 7 (2)). Member states most frequently hedge the provision on social advantages. Despite a long trail of verdicts rejecting all forms of discriminatory access to benefits (e.g. *Ugliola* C-15/69, 1969; *Marsman* C-44/72, 1972; *Casagrande* C-9/74, 1974; *Michel* C-76/72, 1972; *Alaimo* C-68/74, 1975; *Cristini* C-32/75, 1975; and *Sotgiu* C-152/73, 1974) and a very encompassing definition of what constitutes a social advantage with its 1979 *Even* ruling (C-207/78, 1979), the ECJ continues to receive cases that illustrate that member states ignore judicial principles on

social advantages (e.g. *Commission vs. Greece* C-15/ 87 and *Lopes* C-9/88, 1989; *Mutsch* C-137/84, 1985; *Reina* C-65/81, 1982; *Groener* C-370/87, 1989; *Hoeckx* C-249/83, 1985). Member states argue that particular benefits constitute no social advantage, in order to avoid offering the benefit to non-nationals.

Member states have also been reluctant to honor the policy implications of case law that grants all EU citizens access to most fields of public sector employment. Article 48 allows an exception for "public service." However, the meaning of this term varies considerably among member states, including sectors as distinct as diplomacy, teaching, and postal delivery. In the 1974 *Sotgiu* case (C152/73), the ECJ ruled that exceptions to the free movement of workers must derive from Community law and are not subject to national rules that define the identity of "public officials." In 1980 the Court went on to define the nature of activities that could be exempted from free movement provisions. Posts that member states could restrict to their own nationals include those

which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality (*Commission vs. Belgium* C-149/79, 1980).

In this case, the ECJ did not consider that Belgian railway workers "exercise powers conferred on them by public law" and they did not require a "special allegiance to the state."

The Court asked Belgian and Commission officials to test whether contested positions in Belgium fell under the judicial definition of public service. Unable to agree, the Commission and Belgium ended up in Court two years later to hear that nurses, electricians, plumbers, and gardeners employed by local governments, as well as drivers, signal men, cleaners, painters, canteen staff, workshop laborers, and night guards employed by the state's railways were not engaged in public service employment (*Commission vs. Belgium* C-149/79, 1982). In challenges to other member states'

restrictions, the Court has held that nurses, student teachers, teachers, university foreign language instructors, and researchers are not public servants (*France vs. Commission* C-307/84, 1986; *Lawrie-Blum* C-66/85, 1986; *Commission vs. Italy* C-225/85, 1987; *Bleis* C-4/91, 1991; *Allué* C-33/88, 1989).

The ongoing referral of Article 177 references concerning restrictive state practices led the Commission to issue a statement on its view of valid public service exceptions in March of 1988: inappropriate restrictions included those in the fields of state-owned airlines, public transport, utilities, post and telecommunications, and public health services. The public service exemption remains justifiable for high state offices, the judiciary, armed forces, as well as police and tax authorities. Nonetheless, the infringement trail continues, with cases against restrictions on such sensitive positions as tourist guides and cellists, in addition to positions already identified as inappropriate, e.g. public utilities, airlines, and hospitals (Com(96) 600 final, 121-128).

The absurdity of member state arguments in some of these cases exposes very transparent attempts at protectionism. For instance, in the 1986 *Gül* case (C-131/85, 1986), German authorities tried to restrict a Cypriot physician from obtaining a regular permit to practice medicine in Germany. Married to a British national working in Germany, Gül had received a temporary permit to practice medicine while training as an anesthesiologist in Germany. Regulation 1612/68 explicitly provides rights of access to any occupation for the spouses of employed EU nationals. Spouses of migrant workers must simply demonstrate that they have the diplomas and qualifications necessary to fulfill job requirements. Since Gül completed a German anesthesiology residency, he satisfied these requirements.

German officials tried to argue that the regulation did not provide the right to work in a particular profession such as medicine, non-EU nationals only receive temporary permits, and renewal is not desirable because many German physicians are unemployed. They even attempted to connect restrictions on the freedom of movement

due to public health grounds to the public health sector, even though these exceptions are clearly designed to restrict the movement of diseased individuals rather than individuals employed in the medical field. The Germans lost the case on all grounds.

Not alone in their evasion, examples from France and the UK also illustrate administrative aversion to judicial policy solutions. When the ECJ ordered French officials to export supplementary pension benefits to individuals who chose to leave France for their retirement (disproportionately affecting EU migrants), French authorities chose to provide benefits only to those individuals who initiated proceedings in French courts ("Condition d'attribution du Fonds National de Solidarité," 7/95 and 1/96, Lettre-circulaire, 29/6/95). Only low income retirees qualify for this supplementary pension. Also having left France, most potential beneficiaries would not be in a terrific position to begin pleadings in French courts.

In order to adopt a restrictive position on the *Surinder Singh* case (C-370/90, 1992), UK officials included no reference to the judgment in its order on residence rights for non-EU nationals. Such an exclusion would not have been legitimate if the judicial principle existed in a directive, which would need to be cited. Not pleased with the potential implications of the *Vander Elst* case (C-43/93, 1994), UK officials apply the condition that third country nationals who work for EU firms in the UK must have been part of the firm's "normal" work force and not a recent "import," which is not a condition discussed in the ECJ judgment. The UK would rather wait for legal challenges to these positions than apply rights exactly as they appear in jurisprudence.

Side-stepping unwelcome case law as it develops can involve direct efforts to legislate around judicial principles. As the ECJ expansively interpreted the definition of social security in Regulation 1408/71, allowing individuals to "export" an increasing number of benefits across borders, member states approved an amendment to clarify distinctions between social security and social assistance. While social security is exportable, social assistance is not. The amendment Regulation 1247/92 defines a class

of special non-contributory benefits that are not to be exported and includes a listing of specific national benefit schemes which fall into this category, removing opportunities for judicial interpretation.

Because the ECJ could declare this amendment void on the basis of Treaty provisions, German leaders opted not to identify any benefits for future judicial tinkering. Planning to defend existing social assistance schemes on the basis of the original definition in the Regulation 1408/71, the German government also abandoned an initiative for a supplementary pension scheme, the *Fink Modell*, that enjoyed substantial support from both Social and Christian Democrats. The *Fink Modell* was designed as a means to supplement the income of retirees who fell below the level that normally qualifies a resident for social assistance (welfare), relieving poor pensioners of the stigma of regular social assistance programs. Adjusted to the cost of living in Germany, leaders did not want retirees who left Germany to receive the benefit (*Kölner Rundschau* 19/12/88, interviews). Germans hope to preempt the exportability of another social benefit, *Pflegeversicherung* (long term care insurance), by carefully tying the program to institutions based in Germany. Rather than offering any cash payments to individuals, the new insurance program provides funding directly to the relevant health care facilities (*Bericht der Beauftragten*, 12/95).

Member state responses to ECJ jurisprudence render individual and Commission action critical to the alignment of law and policy. Most literature on European legal integration focuses almost exclusively on the judicial dialogue between national courts and the ECJ in the form of Article 177 references. Although this judicial cooperation has been critical to the development of Community legal institutions and the protection of individual rights, the Commission's Article 169 infringement proceedings also play an important role in legal transformation. Infringement proceedings at the Article 169 Letter of Formal Notice and Reasoned Opinion stages facilitate changes on more points of national law than Article 177 references (see Figures 2 and 3). Established infringements

(Reasoned Opinions and ECJ judgments) outpaced Article 177 references in all but two member states through 1990 (see Figures 4 and 5). Because the Commission uses the multiple stages of infringement proceedings to settle disputes without recourse to litigation, the rate of referral to the ECJ is low. Despite the low degree of Court action, Article 169 proceedings constitute an important means to enforce existing case law.

The jump in established infringement related to Article 48 after 1991 (see Figures 6, 7, 8) represents a Commission attempt to bring national policy into line with ECJ jurisprudence on national discrimination related to the free movement of persons, particularly as it applies to access to employment in the public sector (Com(96) 600 final, 121-128). Commission action is particularly critical to induce reform in member states who do not face many challenges to their policies through Article 177 references.

For instance, Denmark, Greece, Ireland, Luxembourg, Portugal, and Spain face proportionally fewer Article 177 references than Article 169 Letters of Formal Notice (see Figure 9). France, Greece, Italy, Luxembourg, and Spain have a higher proportion of established infringements than Article 177 references related to Article 48 issues (see Figure 10). Although relatively few EU nationals move to work or reside in most of these member states, France accounts for twenty-seven percent of EU migrants, second only to Germany (see Table 1). Therefore, despite the probable high demand for nondiscriminatory measures among EU migrants in France, Commission action has targeted more suspicious French practices than national court references to the ECJ.

Table 1: The Dispersion of Migrant EU Nationals 1991-1993

Germany	1, 532, 000
France	1, 312, 000
United Kingdom	782, 000
Belgium	552, 000
Spain	273, 000
Netherlands	169, 000
Italy	153, 000
Greece	85, 000
Portugal	29, 000
Denmark	27, 000

Source: *Ausländerinnen und Ausländer in europäischen Staaten*, Mitteilungen der Beauftragten der Bundesregierung Für die Belange der Ausländer, August 1994, 54-57.

Active promotion of the policy implications of particular lines of jurisprudence by the Commission deserves further attention. Few studies examine the impact of Commission activities, either with respect to the promotion of case law or the politics of infringement proceedings (exceptions include Alter and Meunier-Aitsahalia 1994, Mendrinou 1996, Bradley and Sutton 1994).

IV. Due Process or Due Punishment?

Individuals and Legal Recourse in the European Union

Commission action may be the only viable means to promote the interests of some segments of European society. Protective of individual rights, courts can offer minorities the opportunity to overturn majority law and defeat policies that are preferred by those who dominate political arenas. Formal access to the judicial arena that confers this power is equally available to groups that have traditionally been politically disadvantaged and privileged. Therefore, legal action is often discussed as a force to level the playing field among differentially powerful actors.

However, participation in legal arenas requires knowledge, and in appeals before national courts, it can depend on financial resources as well. Wealthier and better-organized interests will have more resources to track legislation and case law, and therefore be set to benefit disproportionately from European legal opportunities. On a practical level as well, "business and commercial interests are simply in a better position to purchase the leverage of due process" (Scheingold 1974, 127), which could involve litigation, legalized negotiation with recalcitrant administrations, or lobbying the Commission to pursue infringement proceedings vigilantly. In the absence of class actions and a European system of legal aid that could defray the costs of bringing cases in some national jurisdictions, Community law remains inaccessible to many EU citizens.

Even if obstacles to litigation were removed, significant gaps in knowledge about Community legal opportunities preclude the active participation of most individuals. Community legislation is not communicated effectively to citizens (McLaughlin and

Greenwood 1995, 147), and the possibility of complaining to the Commission is not sufficiently understood (Com.(96) 600 final, 7). The visibility of the ECJ and its decisions also tends to be low: a December 1992 *Eurobarometer* survey reports that 22 percent of EU citizens polled had not heard of the ECJ; 48 percent were not very aware of the Court; 20 percent were somewhat aware, and 4 percent claimed to be very aware (for further data on mass attitudes toward the ECJ, see Caldeira and Gibson 1995). Few ECJ rulings receive extensive press coverage: articles on judgments rarely make the front page, frequently misrepresent the meaning of ECJ rulings, and usually fail to stir ongoing debate. Without information about Community legislation or broad developments in case law, average individuals have little hope of holding their governments accountable.

Once an individual has the knowledge and finances to bring a suit, national judges pose the final hurdle to individuals seeking Community rights. The Commission expresses no confidence that national means of redress for infractions of EC law are adequate (Com (96) 600 final, 7, 14; C-233 1993, 7), but preferring to promote voluntary cooperation, it also takes no active measures to enforce the obligation of national courts to refer cases or respect the preliminary rulings they request (Hartely 1994, 309; Schermers and Waelbroeck 1987, 277-278, 349, 375).

From patterns of judicial participation in the Article 177 procedure, it is not evident that judicial cooperation is a standard procedure across European courts. While courts in Germany, France, Italy, and the Netherlands have a high rate of references to the ECJ, courts in Denmark, Luxembourg, Ireland, Greece, and Portugal refer very few cases for preliminary rulings (see Figure 9). Within Germany, whose courts out-refer those in every other member state, references are highly concentrated in some jurisdictions: tax courts produce 49 percent of all ECJ references, administrative courts 22 percent, civil and penal courts 12 percent, social courts 11 percent, and labor courts 5 percent (Alter 1996 b, 118). Between 1990 and 1995 the Commission documents 24 cases in which courts of last instance did not request ECJ preliminary rulings even though points of

Community law remained ambiguous and these courts are obligated to refer questions of Community law that come before them. The rate of these incidents is underestimated because the Commission cannot review all decisions of national high courts (Com (96) 600 final, 417-421; C-254 1995, 164-165; C-154 1994, 174-175; C-233 1993, 213; C-250 1992, 71; and C-338 1991, 78).

Explanations for national judicial behavior suggest that European law is applied by domestic judges on a fair weather basis: Karen Alter argues that lower courts in Germany and France initially referred questions when they expected a favorable outcome and higher courts accepted ECJ jurisprudence as long as it did not encroach too far into their own jurisdictional authority. Concerns about loss of competence still make some national courts reluctant to send references and lead high courts to threaten noncompliance with ECJ case law (Alter 1996a, 466-468, 470-471). Jonathan Golub argues that national courts withhold references to shield domestic policies from unfavorable ECJ decisions, and provides evidence that British courts slowed the pace of European integration and maintained control over particular policy outcomes by limiting references to the ECJ and interpreting Community law independently (Golub 1996, 376, 380-381).

Multiple appeals through national courts and the lengthy wait for an Article 177 preliminary ruling from the ECJ (averaging from 15 months to over two years) are impractical for individual justice. Organized groups may be able to fund a lengthy litigation campaign, forum shop for a friendly national judge, and keep their model litigant under a roof. Lacking institutional support, individuals may find legal battles frustrating.

In the field of national discrimination and free movement of persons, individuals are not extensively organized for political or legal action. Associations assisting the 4.9 million EU migrants, 2 million of which are employed (Com (94) 595, 67; *Social Europe* 1993, 31), primarily engage in cultural, social, and educational activities or provide basic

information about housing, employment, and vocational training opportunities in local communities. Of the 791 associations who deal with migrants in France, Germany, and the UK, legal assistance is the primary activity for only 11 and among the secondary activities of 64. Among the groups that devote efforts to legal aid, a small minority deal with EU nationals specifically. Most groups involved with legal counsel deal overwhelmingly with asylum, basic human rights, third country immigrants, and racism (*Répertoire des associations immigrées et de solidarité dans l'Union européenne* 1994).

The celebrated case of Jean-Marc Bosman (C-415/93, 1995), whose Article 177 reference led to the denunciation of transfer fees and nationality restrictions for European soccer clubs under Article 48, illustrates the perils of litigating to Europe. As his case progressed through the Belgian courts, subject to delays and aborted references to the ECJ, leading soccer clubs boycotted Bosman despite an interim order in his favor. In seeking his Community rights, Bosman effectively sacrificed his professional soccer career (Weatherill 1996, 997, 1025-26). The confrontation involved in litigation leads to similar outcomes in domestic legal systems as well. In the flurry of excitement over a functioning international legal system, it is important not to overlook factors that constrain legalized strategies of political influence in any context.

V. Conclusion

Neofunctionalist and intergovernmentalist accounts of legal integration tell us little about the variable policy impact of jurisprudence. Neofunctionalists chronicle the process by which national courts came to apply Community law in single doses as concrete cases arose before them. Focused on the constraints litigants and court rulings place on governments, they ignore factors that impede persistent litigation strategies and the application of jurisprudence as general policy. Dismissing the prospect that institutions other than state executives exert major political influence, intergovernmentalists interpret apparent instances of judicial policy entrepreneurship as epiphenomenal of state interests and judicial prudence.

Literature on the ECJ should be informed by broader theorizing in the field of public law and comparative judicial politics, where attention to the particular strengths and weaknesses of legal institutions can be applied to the European case. Distinctive traditions and legal institutions may frustrate efforts at direct comparisons between domestic courts and the European Court of Justice. Yet understanding the place of courts in national systems facilitates the development of appropriate criteria with which to evaluate the authority of the ECJ. If dominant challenges faced by the Court of Justice parallel those of domestic courts, this suggests that the ECJ shares the standard limitations of judicial institutions rather than the typical shortcomings of international organizations. It is highly unlikely that the Court confronts fewer constraints than its national counterparts.

Writing of the ECJ in 1965, Scheingold observed that

The Court finds itself part of a unique governmental structure with weaknesses at critical points. To the extent that the institutions of the Community are unable to respond to the demands for change which are made upon them, the written law of the treaty and the 'living law' of the Community are likely to become increasingly disparate. Questionable compromises with the requirements of the treaty can be expected. Alternatively, deadlock and paralysis may set in. For the Court -- guardian of the treaty -- the implications are clear: aggrieved parties are likely to call upon it to invalidate the compromises or to break the deadlocks by indicating the legally proper way to proceed. The shortcomings of the system threaten to saddle the Court with a disproportionate and uncongenial role in the adaptation of the Community to changing circumstances (Scheingold 1965, 15-16).

Scheingold found little evidence that the Court was able to impose legal solutions on difficult problems and identified a considerable "gap between the assertive rhetoric of the Court of Justice and the modest role judges have played in the policy process" (Scheingold 1971, 47). To assess legal integration, we need to return to the questions posed in Scheingold's early study of the Court: do ECJ rulings become the operating norms of the EC system? Do judicial principles in "leading" cases control analogous transactions? Understanding European judicial authority requires comparisons of linkages between case law and policy outcomes across different policy sectors.

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My findings on administrative responses to ECJ case law rely in part on discussions I had during field research from May 1995 - March 1996 with officials in the British Treasury Solicitors Office, French SGCI and Foreign Ministry, and German Bundesministerium für Wirtschaft as well as officials in all three countries who deal with EC law related the free movement of persons with respect to access to employment and social benefits, establishment, and provision of services.

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Appendix: Figures 1-10

Figure 1: Of Rulings and Rebellion 1990-1995

Average annual number of 169 and 177 references by member state, compared with the average number of ECJ rulings not complied with in any given year.

Figure 2: Identifying the Culprits 1982-1995 (EC wide)

Aggregate rates of 177 references, 169 letters, suspected infringements detected by the Commission, suspected infringements voiced in complaints.

Figure 3: Applying EC Law: Infringement Proceedings and Article 177 References 1982-1995 (EC wide)

Aggregate rates of 177 references, 169 letters, reasoned opinions, and 169 ECJ referrals.

Figure 4: Sources of Legal Challenge 1986-1990

Aggregate rates of 177 References and established infringements by member state.

Figure 5: Sources of Legal Challenge 1991-1995

Aggregate rates of 177 References and established infringements by member state.

Figure 6: Top Five Fields for Established Infringements 1986-95 (EC wide)

Aggregate rates of established infringements related to Article 48, Articles 52 and 59, the Internal Market, Agriculture, and Customs Union.

Figure 7: Aggregate Legal Challenges Related to Article 48 in the European Community

Aggregate rates of established infringements, 177 references, and suspected infringements, 1986-1990 compared to 1991-1995.

Figure 8: Proportion of Legal Challenges Related to Article 48 in the European Community

Proportions of established infringements, 177 references, and suspected infringements, 1986-1990 compared to 1991-1995.

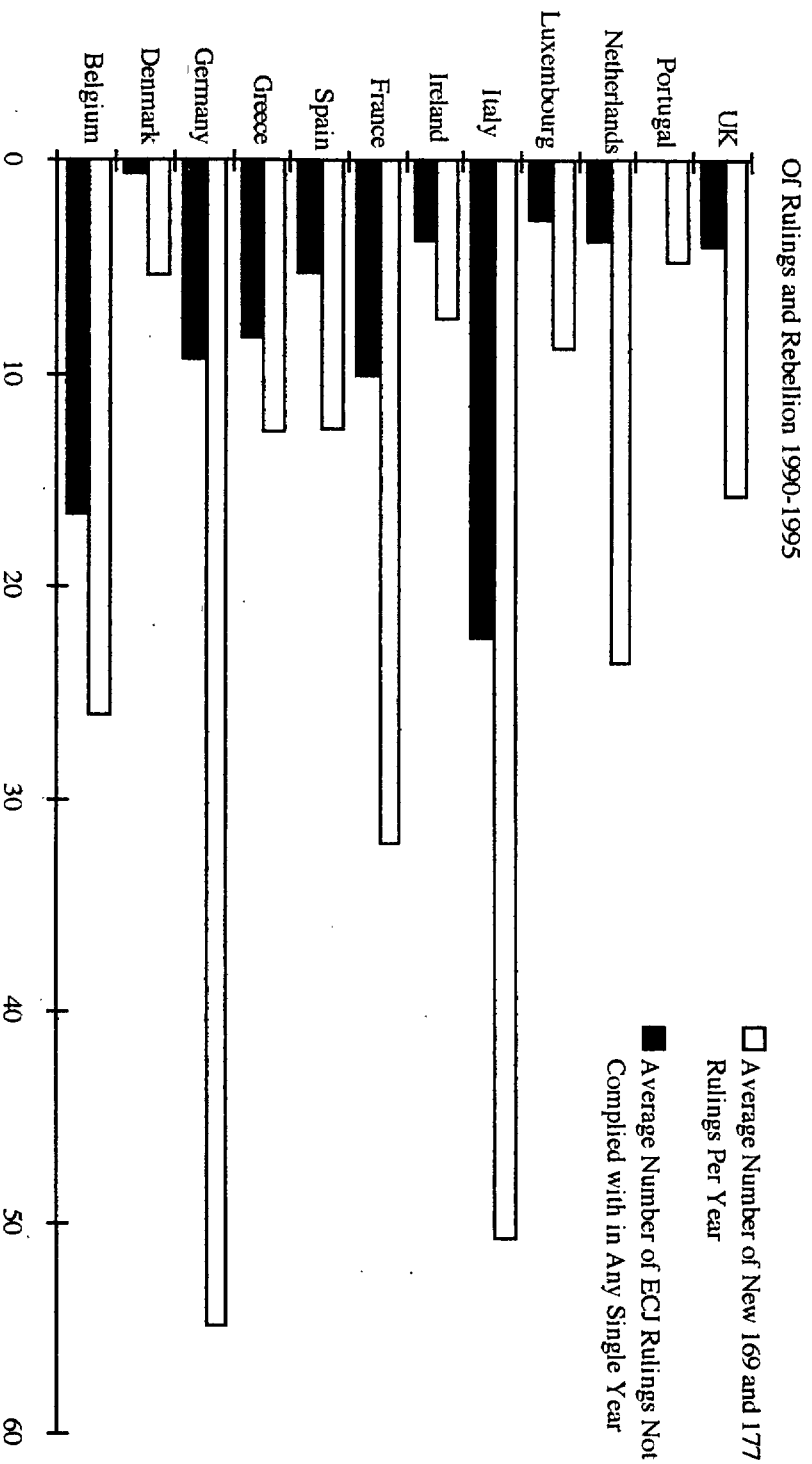
Figure 9: Proportion of Legal Inquiries by Member State 1982-1995

Percentage of suspected infringements, 169 letters, and 177 references.

Figure 10: Legal Challenges Related to Article 48 by Member State

Proportions of established infringements, 177 references, and suspected infringements by member state.

Figure 1

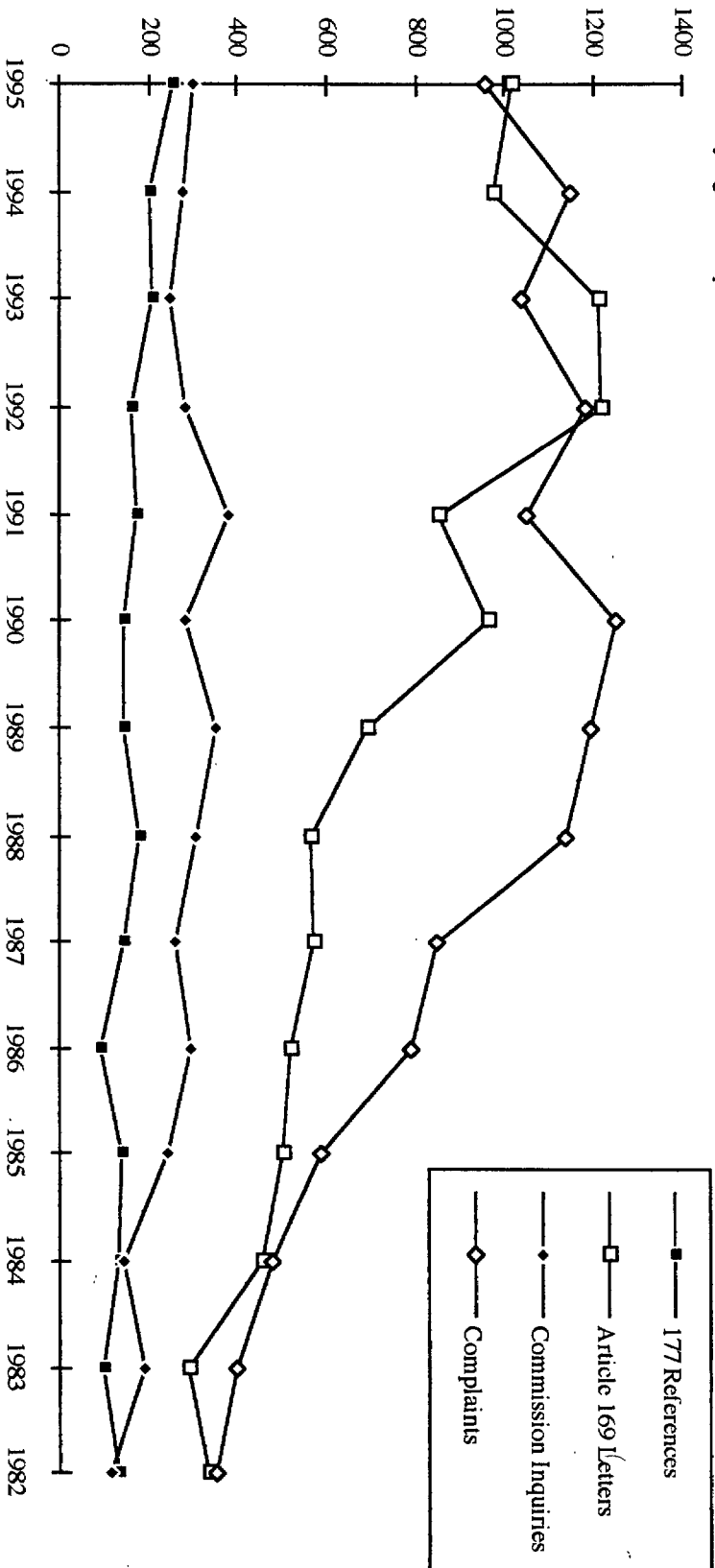


Sources: COM (96) 600 final, 111, 399-412, 415; C-254 1995, 160-164; C-154 1994, 63, 169-173; C-233 1993, 207-212; C-250 1992, 55-69, 77; C-338 1991, 62-68.

The number of cases that are not complied with can include judgments from previous years. Thus, in any given year a member state may be complying with new rulings as they continue to fail to implement past decisions. Portugal and Denmark hold the best records on straight compliance, but they must respond to very few ECJ rulings. Germany and the Netherlands have a relatively good rate of compliance, given the large number of decisions they must implement yearly. The Commission is not thrilled with persisting delays in giving effect to ECJ rulings. In July 1994 it informed member states that it was going to make full use of Article 171 of the EC Treaty as amended by the TEU, requesting that the Court use its jurisdiction to impose financial penalties on lagging member states. In early 1997 it established a fining schedule and threatened to initiate proceedings with the intent to fine (*Agence Europe* 9 January 1997, 8-9). In its 1995 and 1996 Work Programmes, the Commission prioritized the proper application of existing Community rules over new legislation (COM (96) 600 final, 15-16 and C-254 1995, 7, 9).

Figure 2

Identifying the Culprits 1982-1995

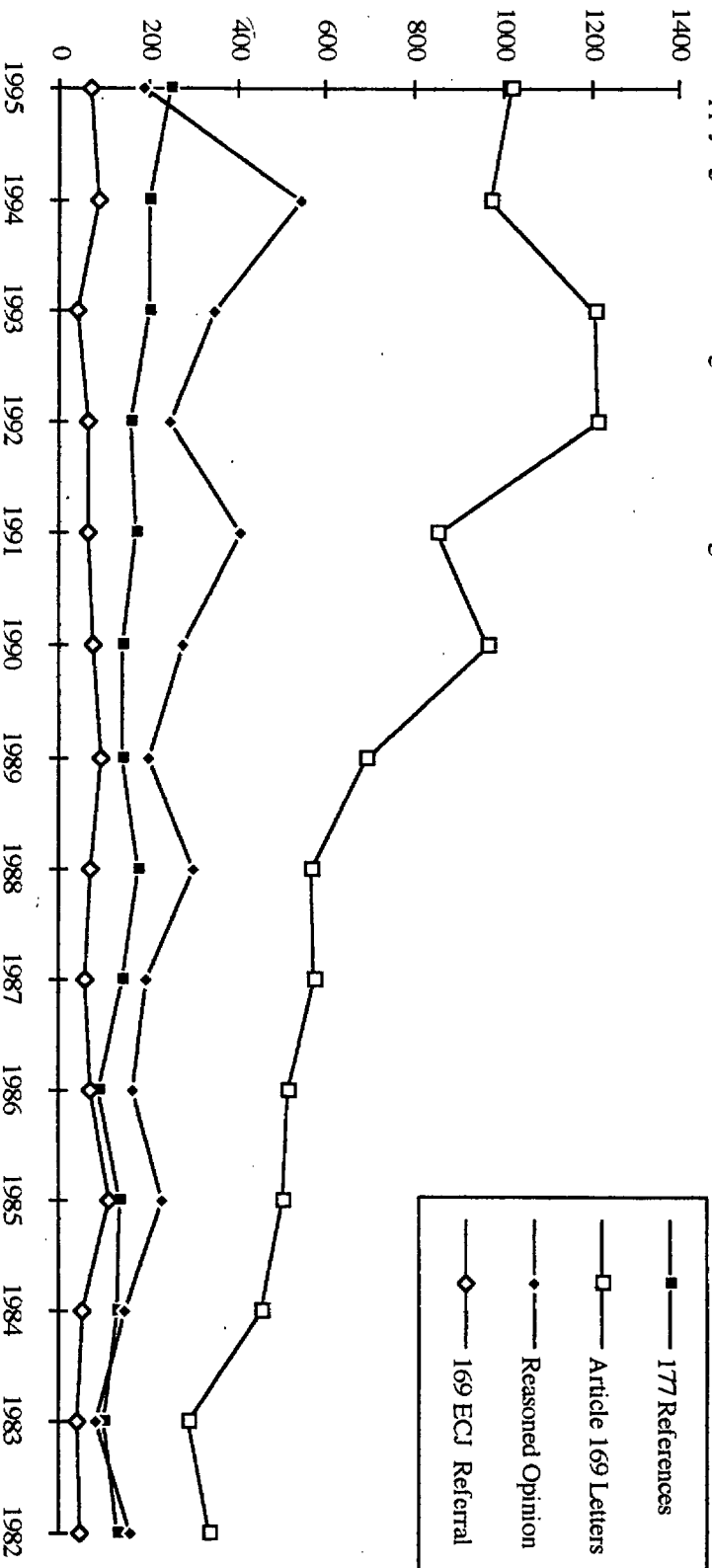


Sources: COM (96) 600 final, 91-95, 103, 111, 414-415; C-254 1995, 56, 63, 164; C-233 1993, 68, 212; C-338 1991, 77, 83; C-330 1989, 53; C-310 1988, 23; Court of Justice of the European Communities, *Annual Report 1991*, 136.

The formal actions that the Commission pursues with its Article 169 letters outnumber the suspected infringements that it finds with its independent investigative powers. Without the Article 169 complaint procedure, only a minority of suspect national policies would be pursued by the Commission or reviewed by national courts. Complaints by individuals, firms, and interest groups represent the single largest source of information on suspected infringements of Community law (COM (96) 600 final, 8).

Figure 3

Applying EC Law: Infringement Proceedings and Article 177 References 1982-1995

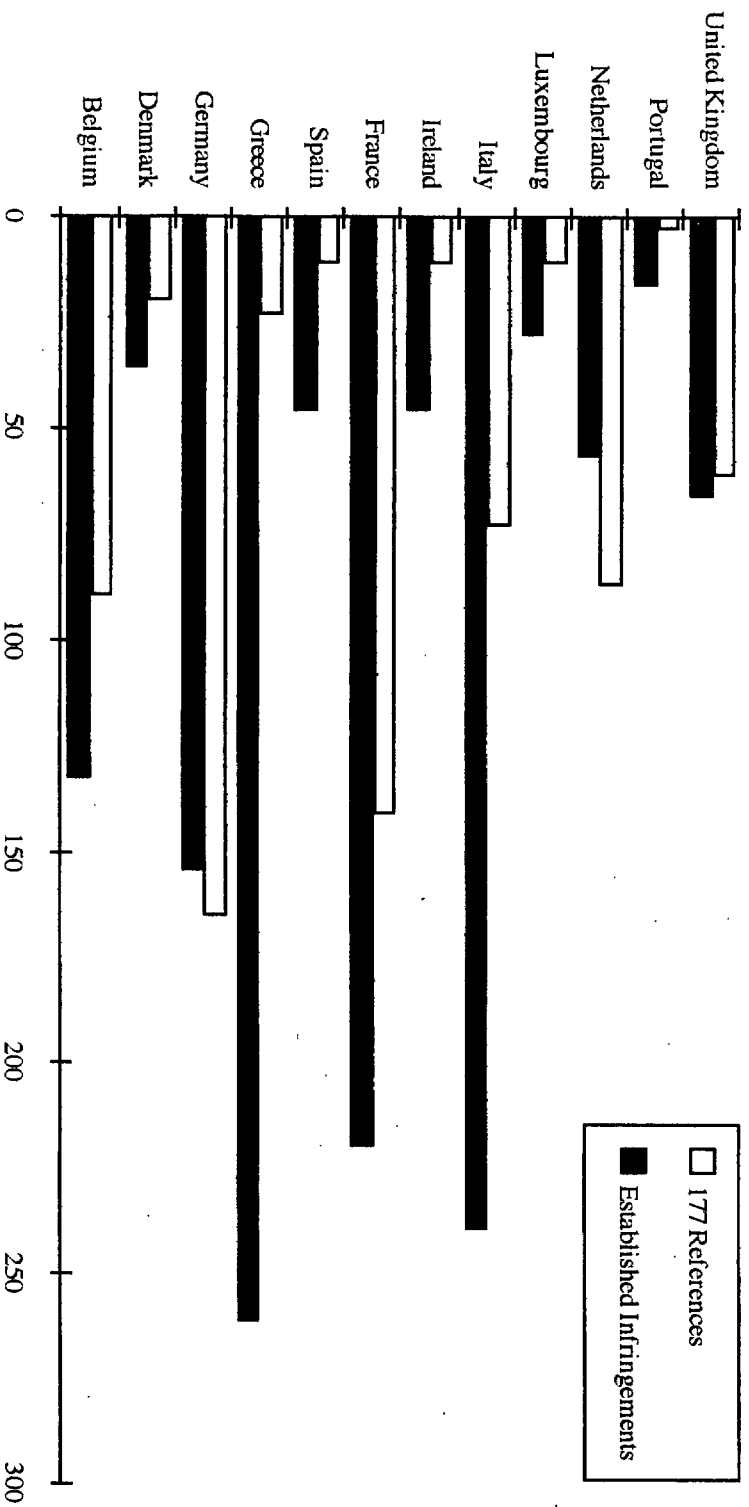


Source: COM (96) 600 final, 91-95, 103, 111, 414-415; C-254 1995, 56, 63, 164; C-233 1993, 68, 212; C-338 1991, 77; C-330 1989, 53; C-310 1988, 23; Court of Justice of the European Communities, *Annual Report 1991*, 136.

The Commission commences infringement proceedings with an Article 169 letter. If the member state does not satisfy the Commission with its response, the Commission adopts an official position on the infringement in a Reasoned Opinion. Failing to respond favorably to the Commission's Reasoned Opinion will generally land a member state in Court. Reasoned Opinions outnumber Article 177 preliminary rulings for national courts in every year except 1995 and 1983. The low count in 1995 resulted from the high number of Reasoned Opinions issued the previous year and temporary technical delays. The number of Article 169 referrals to the ECJ is relatively low because the Commission seeks to resolve problems without resort to litigation (COM (96) 600 final, 9). When member states land in Court, they are unlikely to defend their position successfully: Commission victories substantially outpace member state victories from 1980-1993 (Com (96) 600 final, 113-117; C-254 1995, 65; C-250 1992, 51-54; C-310 1988, 31-33).

Figure 4

Sources of Legal Challenge 1986-1990

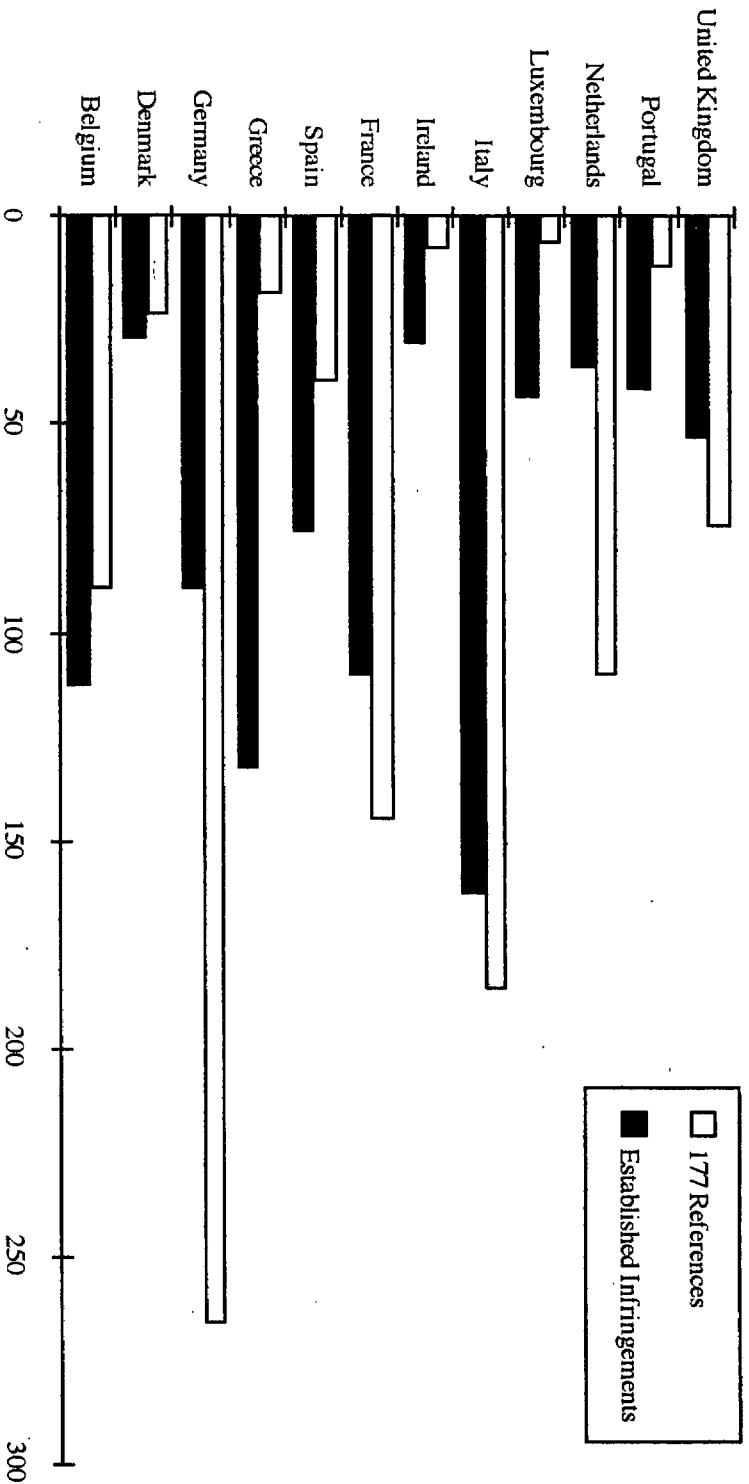


Sources: C-338 1991, 89-110, 77; C-232 1990, 63-81; C-330 1989, 62-81, 53; C-310 1988, 53-69; C-338 1987, 40-54; Court of Justice of the European Communities, *Annual Report 1991*, 136.

With the exception of Germany and the Netherlands, member states faced formal legal challenges more frequently through the Commission's infringement proceedings than through individual legal action in national courts.

Figure 5

Sources of Legal Challenge 1991-1995

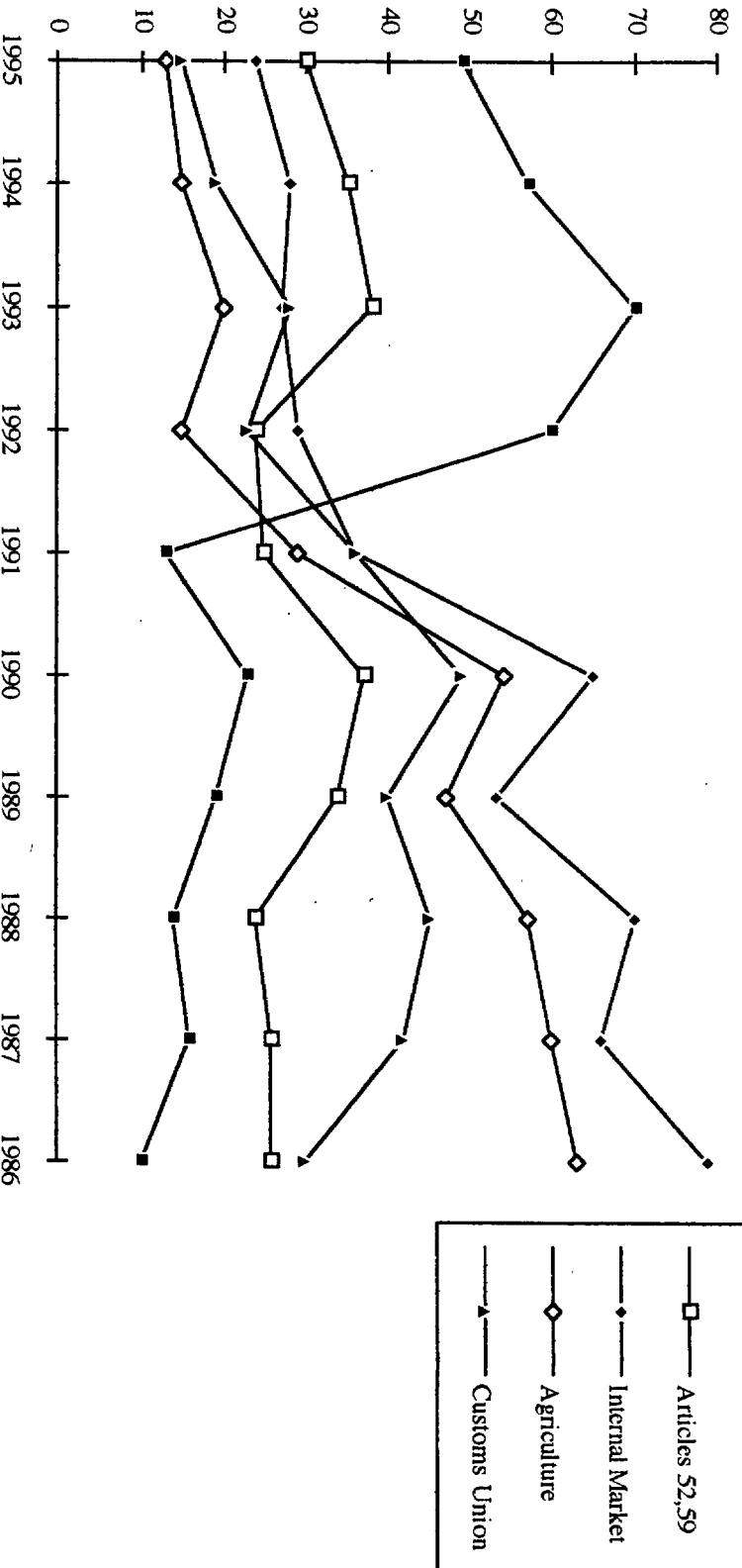


Sources: Com(96) 600 final, 118-147, 415; C-254 1995, 70-83, 164; C-154 1994, 71-86; C-233 1993, 127-137, 212; C-250 1992, 81-95.

Infringement proceedings continue to dominate challenges to national policy in Denmark, Belgium, Greece, Ireland, Luxembourg, Portugal, and Spain, while Article 177 references overtook infringements in France, Germany, Italy, the Netherlands, and the UK.

Figure 6

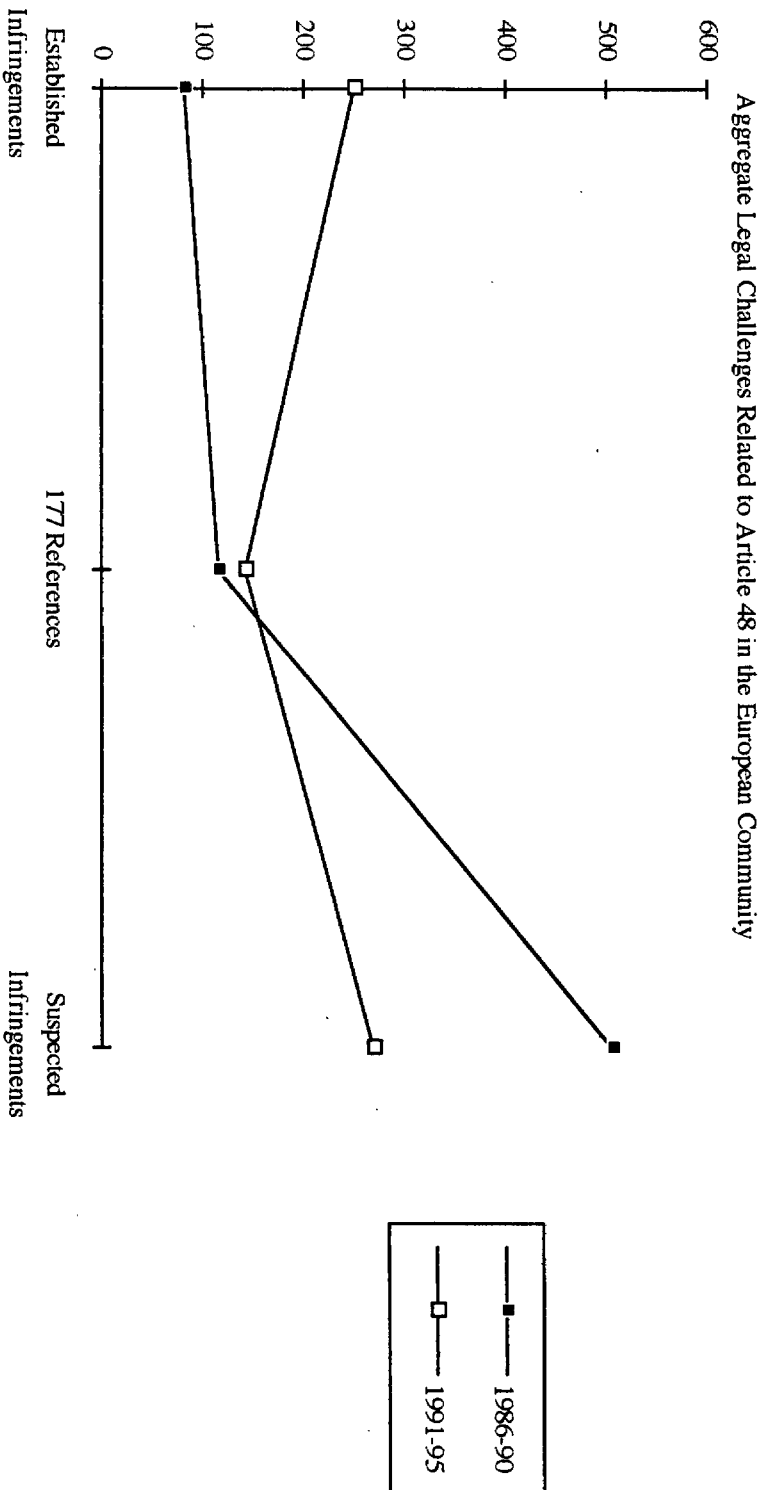
Top Five Fields for Established Infringements 1986-95



Sources: COM (96) 600 final, 118-147; C-254 1995, 70-83; C-154 1994, 71-86; C-233 1993, 127-137; C-250 1992, 81-95; C-338 1991, 89-110; C-232 1990, 63-81; C-330 1989, 62-81; C-310 1988, 53-69; C-338 1987, 40-54. Article 52 and 59 infringements are extracted from policy-specific listing of infringements, e.g. in the internal market and fisheries categories. In this graph, internal market infringements do not include issues that affect freedom of establishment or free movement of services. Article 48 infringements include all violations related to nationality discrimination and the free movement of persons other than questions concerning Articles 52 ad 59. The customs union category includes infringements on customs union and indirect taxation.

Established infringements concerning national discrimination issues related to employment, residence, social insurance, and other advantages (captured in the graph under the categories Article 48 and Article 52 and 59) trailed infringements related to the free movement of goods (internal market category), agriculture, and customs union until 1991. After 1991, the Commission has established more infringements related to the free movement of workers than any other area, and issues of establishment and provision of services rank second after 1992.

Figure 7

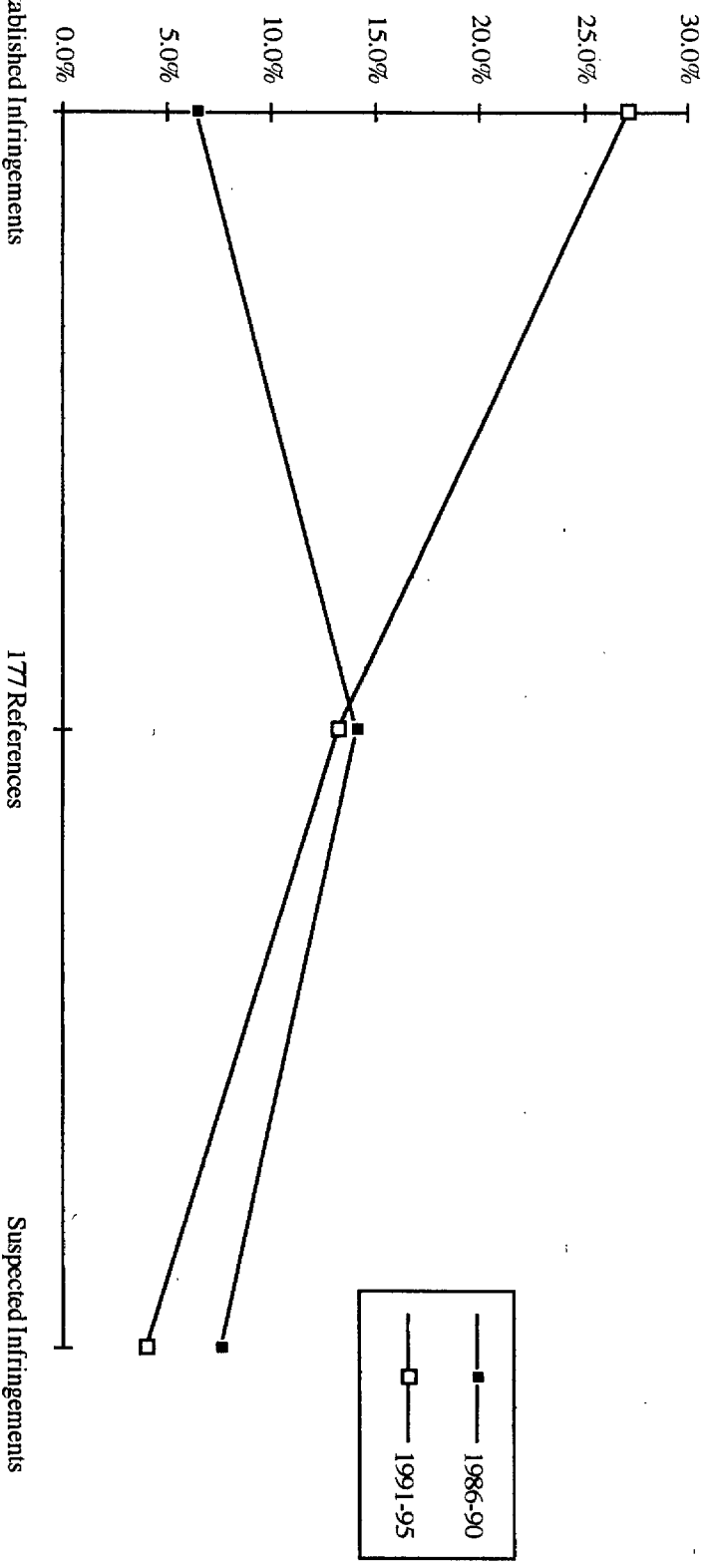


Source: Com(96) 600, 103, 118-147, 415; C-254 1995, 70-83, 164; C-154 1994, 71-86; C-233 1993, 127-137, 212; C-250 1992, 81-95; C-338 1991, 80, 89-110, 77; C-232 1990, 63-81; C-330 1989, 62-81, 53; C-310 1988, 53-69; C-338 1987, 40-54; Court of Justice of the European Communities, *Annual Report 1991*, 136. Suspected infringements are from DG V, the Commission Directorate for Employment and Social Affairs. Although it is not possible to identify the specific legal issue under suspicion, all established infringements in this area related to free movement of persons and nationality discrimination.

While Article 177 references related to national discrimination in employment, residence, social benefits, and other advantages remained relatively steady from the 1986-1990 period to the 1991-1995 period, the number of established infringements jumped in 1991-1995. The similar rates of suspected and established infringements during 1991-1995, in contrast with 1986-1990 when suspected infringements substantially outpaced established infringements, reflects the Commission's increased vigilance in prosecuting issues related to Article 48.

Figure 8

Proportion of Legal Challenges Related to Article 48 in the European Community

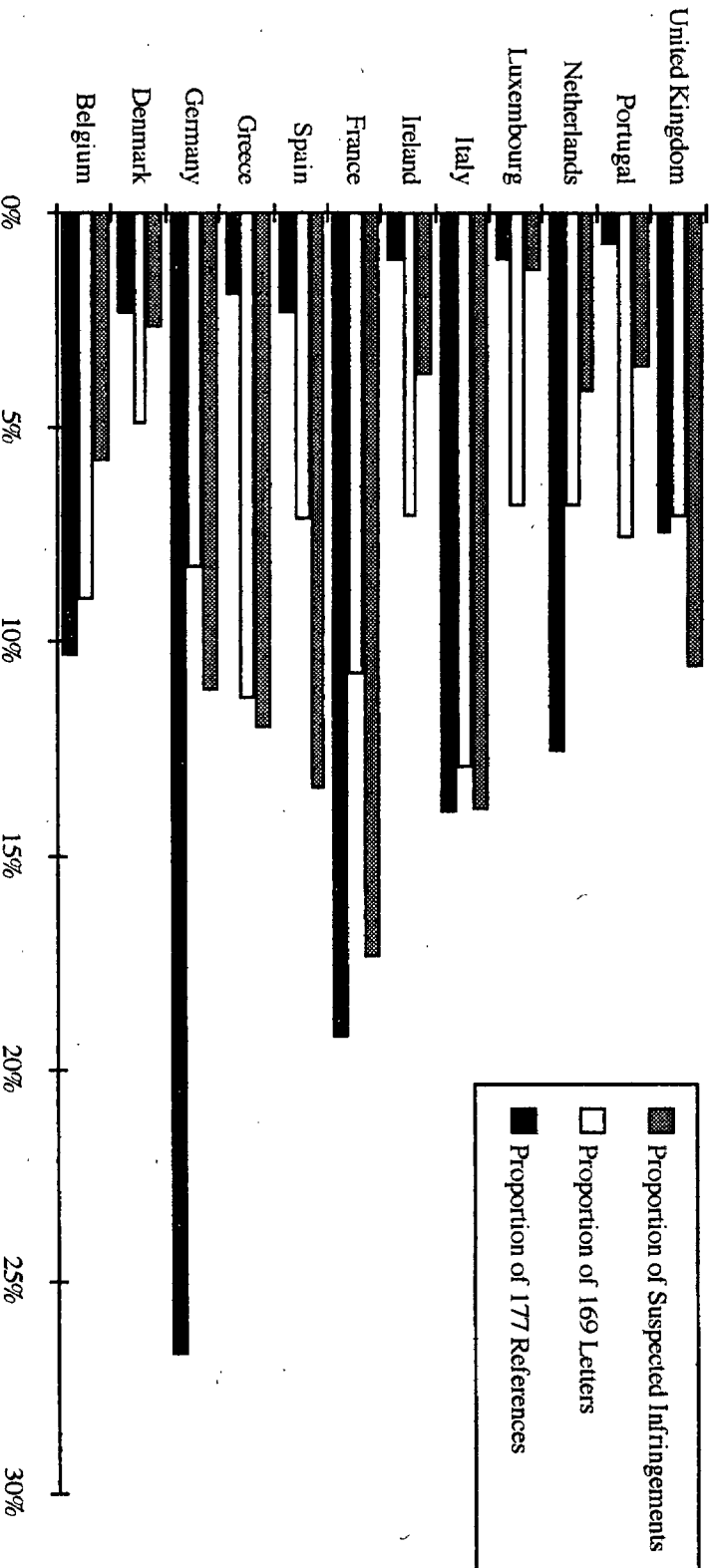


Source: Com(96) 600, 103, 118-147, 415; C-254 1995, 70-83, 164; C-154 1994, 71-86; C-233 1993, 127-137, 212; C-250 1992, 81-95; C-338 1991, 80, 89-110, 77; C-232 1990, 63-81; C-330 1989, 62-81, 53; C-310 1988, 53-69; C-338 1987, 40-54; Court of Justice of the European Communities, *Annual Report 1991*, 136. Suspected infringements are from DG V, the Commission Directorate for Employment and Social Affairs. Although it is not possible to identify the specific legal issue under suspicion, all established infringements in this area related to free movement of persons and nationality discrimination.

The proportion of all 177 references and suspected infringements related to Article 48 remained similar from 1986-1990 to 1991-1995 while the proportion of all established infringements related to Article 48 increased more than four fold. The Commission's priorities with respect to particular fields exerts an important influence on the extent to which different member state policies come under scrutiny.

Figure 9

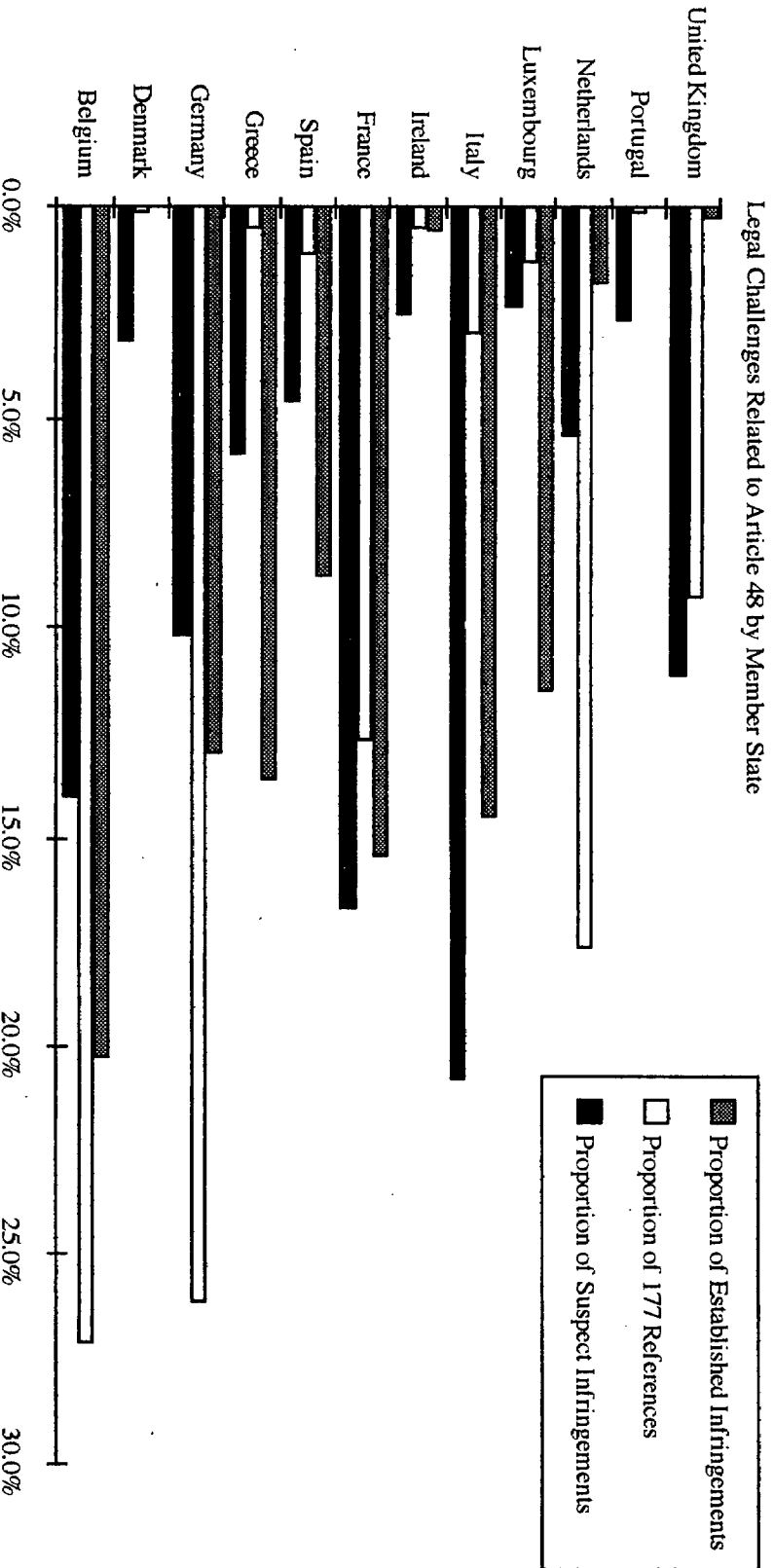
Proportion of Legal Inquiries by Member State 1982-95



Sources: COM (96) 600 final, 108, 111, 415; C-254 1995, 56, 63, 164; C-233 1993, 68, 212; C-338 1991, 77, 83; C-330 1989, 53; C-310 1988, 23; Court of Justice of the European Communities, *Annual Report 1991*, 136.

Discrepancies between suspected infringements, Article 169 letters, and Article 177 references may indicate problems with the level of awareness or interest in Community law or limited access to judicial recourse, e.g. Denmark, Luxembourg, Ireland, and Portugal have a smaller proportion of suspected infringements and Article 177 references than Article 169 letters. In such cases the Commission is targeting problems in the absence of a high level of complaints, and either no one is questioning EC law in national courts or the judges refuse to refer. Conversely, elevated levels of both suspected infringements and 177 rulings, e.g. Germany, Italy, and France, suggest that Europeans are actively communicating with the Commission and seeking their rights in national courts. If Article 169 letters and Article 177 references are proportionate to each other, actions that challenge state practices may be appropriate for the state's vigilance in applying Community law, even if the absolute number of Article 177 references seems "low" for state size, e.g. the UK. A high proportion of Article 177 references reflects well on access to courts and judicial willingness to refer questions to the ECJ, e.g. Germany and the Netherlands.

Figure 10



Source: On established infringements of Article 48 and its corresponding secondary legislation 1986-1995, Com(96) 600, 118-147; C-254 1995, 70-83; C-154 1994, 71-86; C-233 1993, 127-137; C-250 1992, 81-95; C-338 1991, 89-110; C-232 1990, 63-81; C-330 1989, 62-81; C-310 1988, 53-69; C-338 1987, 40-54. On suspected infringements concerning Employment and Social Affairs (although it is not possible to identify the specific legal issue under suspicion, all established infringements in this area related to free movement of persons and nationality discrimination) 1982-1995, Com (96) 600, 104-108; C-250 1992, 73-75; and C-338 1991, 80-83. On Article 177 references related to Article 48 and social security (overwhelmingly concerning nationality discrimination) 1961-1995, Article 177 reference data set compiled by Alec Stone Sweet and the ECJ.

Constraints related to judicial access and/or cooperation in this field may pose problems in member states that have a greater percentage of suspect and established infringements relative to their proportion of Article 177 references, e.g. France, Greece, Italy, and Spain. This contrasts with Belgium, Germany, the Netherlands, and the UK, where the largest percentage of challenges to these member states derive from national courts.