

**Member State Participation Before
the European Court of Justice**

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Introduction

After decades spent on the fringe of any debate on European integration, the European Court of Justice (ECJ) in the past few years has not only been noticed by national leaders, it has come under serious scrutiny. Chancellor Helmut Kohl said of the Court in October 1992: "[t]he Court of Justice does not only exert its competencies in legal matters, but goes far further. We have an example of something that was not wanted in the beginning. This should be discussed so that the necessary measures may be taken later."¹ Diplomatic initiatives to limit the role of the Court had been explored before Kohl's statement. At the Edinburgh Summit leading to Maastricht, the curtailment of the powers of lower national courts to make Article 177 EEC references was discussed but eventually tabled. It was decided, however, not to extend the jurisdiction of the Court of Justice to two of the three pillars in the Treaty on European Union.² The Court has even entered national political debates over the breadth and depth of integration. Earlier this year, British Tory Eurosceptics included among the seven aims in their manifesto on Europe a call for diminishing the capacity of the ECJ: "The right of the European Court to intervene in national politics should be revoked, and in particular the right to make decisions with retrospective effect should be removed."³ This heightened public profile of the Court of Justice comes at a time leading up to the 1996 inter-governmental conference for drafting new treaty amendments. What it portends for the Court and its powers is not yet clear, but it does raise the question of what has historically been the interaction of the European Court of Justice with member states' governments and how that relationship changed over time.

¹"Chancellor Kohl Accuses the Court of Going Beyond its Competencies: The 'Paletta' and 'Boetel' Cases," *Europe*, October 14, 1992, No. 5835.

²In Article L of the Treaty on European Union, the jurisdiction of the ECJ was not extended to the common foreign and security policy or the justice and home affairs provisions (except in the latter which allows conventions agreed to among the member states to stipulate that the ECJ shall have jurisdiction).

³"Political Integration within Europe Threatens the Survival of the U.K.," *The Guardian*, January 20, 1995, at p. 6. Concern with the Court treading on national sovereignty is not new to the British Conservatives. In June of 1990 a Tory Eurosceptic requested an interruption of the House of Commons schedule for an immediate debate on the consequences of an ECJ decision on national sovereignty. *Hansard*, 6th ser. (20 June 1990), cols. 921-6.

Early studies of member state interaction with the ECJ often focus on Article 177 proceedings before the Court⁴ Article 177 is the preliminary ruling procedure whereby a national court refers a question on the interpretation of Community law or the validity of Community acts to the ECJ This emphasis is justified because the largest number of cases brought before the ECJ are Article 177 cases From 1980-91, the Court decided 1,046 Article 177 cases as opposed to only 744 cases for all direct actions combined⁵ Article 177 not only accounts for the bulk of the Court's judgments, it is also considered the most effective Treaty tool for the development of the Community's (now Union's) legal order For example, in Article 177 cases the Court has declared Community law supreme to national law,⁶ given certain Treaty provisions and Community secondary legislation direct effect⁷, and required member states, in certain cases, to provide compensation to individuals for any damages arising from the failure of the state to implement Community obligations⁸

Because of the importance and the substantial use of the Article 177 preliminary ruling procedure, the focus of this paper is to assess the trends of member state participation before the ECJ by conducting a systematic study of the filing of observations in Article 177 cases brought before the Court by the end of 1991 and decided by October 20, 1994⁹ This emphasis is in contrast to the attention recent literature pays to the

⁴K J M Mortelmans, "Observations in the Cases Governed by Article 177 of the E E C Treaty Procedure and Practice" Common Market Law Review 16 (1979) 557-90, C A Crissham and K Mortelmans, "Observations of Member States in the Preliminary Rulings Procedure before the Court of Justice of the European Communities," in Essays in European Law and Integration, eds David O'Keefe and Henry G Schermers (Boston Kluwer-Deventer 1982), pp 43-69, Ulrich Everling, "The Member States of the European Community Before their Court of Justice," European Law Review 9 (August 1984), pp 215-41, Hjalte Rasmussen, On Law and Policy in the European Court of Justice (Boston Martinus Nijhoff 1986) at pp 275-300

⁵1991 Annual Report of the Court of Justice of the European Communities at p 134

⁶Case 6/64, Costa v. ENEL [1964] ECR 585, Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, [1978] ECR 629

⁷The direct effect doctrine makes certain Treaty provisions and secondary legislation automatically part of national law, regardless of member state inaction or passage of contrary legislation, once any transition period has lapsed This doctrine enables individuals to rely on Community law before national courts without the need for implementing legislation in the member state The doctrine was first stated by the Court in Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1

⁸Joined Cases 6 and 9/90, Francovich and Others v. Italy [1992] ECR 5357

⁹As of October 20, 1994 there were still pending two cases for 1990 and four for 1991

interaction between the ECJ and national courts¹⁰ Slaughter and Mattli's account of the development of Community law emphasizes that the key actors in the development of the Community legal order are supranational (the ECJ) and sub-national (national courts, lawyers, private parties to lawsuits) actors My intention is not to disagree with that account Rather, I want to suggest that only by systematic study of member state interactions with the ECJ can the role, if any, of national governments in legal integration be assessed Further, the study of member states' discretionary filings of observations can give insight into member states' views of the Court as a supranational institution and how that has changed over time

My study will focus in particular on three claims made in the literature about member state interaction with the Court The first claim is that member state participation was initially low and that much of the Court's constitutionalization of the Treaty occurred when member states were simply too inattentive to notice the magnitude of the Court's activity The second claim is that early member state participation reflected a concern to protect national laws, but that this pattern of member state participation is changing as member states evince more of a desire to influence the general trend of Community law The final claim tested is that, with the Single European Act's change to qualified majority voting in the Council, member states' attitudes of acceptance toward the Court will change, and criticism of the Court will increase This hypothesis is based on the belief that the supranationalism of the ECJ was accepted because of the intergovernmentalism of the Council The data on member state participation suggests, however, that none of these claims provide an accurate picture of member state interaction with the Court While there has been an increase in participation over time, member states have shown a high degree of participation in Article 177 cases from the outset Further, trends in member states participation do not provide adequate empirical proof of a change in member state participation from self-interest to a Community interest Finally, member states do not appear to have changed their behavior toward the Court since the passage of the Single European Act

Data supplied by the ECJ

¹⁰See, for example, Anne-Marie Burley and Walter Mattli, "Europe Before the Court A Political Theory of Legal Integration," *International Organization* 47 (Winter 1993), pp 41-76

Article 177 Preliminary Ruling Procedure

Under Article 177's preliminary ruling procedure, lower national courts may refer cases to the ECJ which raise questions concerning the interpretation of Community law or the validity of Community acts, while national courts of last resort must refer such cases. The ECJ does not decide the case in the Article 177 proceeding. The national lawsuit is simply suspended awaiting the ECJ's ruling on the Community law question. Once that ruling is made, the case is sent back to the national court. It is the national court that makes the actual decision in the case by applying the ECJ's interpretation of Community law to the issues involved in the case. Through this preliminary ruling procedure, the uniformity of Community law can be maintained. By giving lower national courts the option to refer and requiring national courts of last resort to refer questions of Community law, the ECJ is the final arbiter of all questions concerning Community law. The ECJ's interpretation is binding on the referring national court,¹¹ and while the ECJ has not ruled on whether its Article 177 decisions are binding on all other national courts, several national courts consider the decisions binding.¹² This system helps ensure that there are not multiple interpretations of Community law among the member states.

Unlike Article 169, where the Commission has brought an action against a member state for infringement of Community law, in Article 177 the member state is not necessarily a party to the action. This does not mean, however, that member states do not have the opportunity to participate in Article 177 proceedings. Under Article 20 of the Protocol on the Statute of the Court, after the ECJ has received a request for a preliminary ruling, it notifies the member states. Once notified, the member states have two months in which to file what are called observations. In this way member states can inform the Court of their positions on a case. Sometimes member states do not submit written observations in a case but present their views at the oral hearing.

Because the filing of observations by member states is discretionary, the decision whether or not to file in a case becomes one of interest. What does it mean when member states do not participate in cases which become foundational decisions in Community law? Do member states tend to mainly participate in cases in which they have particular interest (i.e., the validity of their national law is indirectly at issue, or the case involves restrictions placed by another member state on their goods or nationals), or does their participation indicate a general concern with the development of European law? Is member state

¹¹T. C. Hartley, *The Foundations of European Community Law*, 3d ed. (Oxford: Clarendon Press 1994) at p. 301.

¹²*Id.* and citations in note 151.

participation in Article 177 cases affected by the general tensions between member states and the political institutions of the European Union? This paper begins to look for answers to these questions

The Sample

The sample used to study the trends of member state submissions in Article 177 cases is all cases brought under Article 177 between the years 1961-91 for which a judgment had been given by October 20, 1994. The data was provided by the ECJ's Legal Data Processing Service. This yielded a total sample of 1788 cases. In this study cases are coded by their year of filing, or lodging, rather than the year of judgment in order to more clearly reflect the actual member state participation for any given year. With the increasing lag time between the date a case is lodged with the Court and the date of decision,¹³ it is conceivable that member state observations were filed over a year prior to judgment. This method of "dating" a case by the year it was lodged, as opposed to the year of the Court's decision, should more closely approximate a member state's filing activity in a given year.

In part for convenience's sake in presenting the data, but also because some of the hypotheses on member state participation that will be tested in this paper are based on a contextualist analysis, where the reciprocal relationship of law and politics is considered, I have divided the data into five year intervals (except for the 1961-66 interval, which contains so few cases that the extra year does not skew the data). These intervals closely follow divisions in the European Union's political and legal history that are often referred to by historians and political scientists.¹⁴ The data were also observed year-by-year to ensure that, in presenting it in these increments, the results are not distorted and fairly reflect the trends seen.

General Trends: Attentiveness of Member States

Early studies of member state participation concluded that member states were noticeably not involved in Article 177 cases. A 1979 study of member state activity in

¹³The time for the Court to dispose of a preliminary reference rose from nine months in 1980 to 18 months in 1988. Anthony Arnall, "Judging the New Europe," European Law Review 19 (Feb 1994), pp 3-15, at p 12.

¹⁴The founding period is considered to be roughly 1958 to the very early 1970s. Eurosclerosis is placed from about the early 1970s to mid-1980s. And, of course, the post-Single European Act period is 1987-present.

Article 177 cases found that in the 346 cases decided between 1962-65 and 1973-78, member states submitted observations in approximately 37.5% of the cases referred by their own national courts and in only 5.59% of cases referred by other member states' courts.¹⁵ This evidence was used to support the conclusion that member states were rather inattentive to the ECJ, both generally and in early constitution-building cases.¹⁶ To borrow a phrase from Eric Stein, the attitude of the member states to the ECJ was characterized by "benign neglect."¹⁷ A later study of member state participation also noted that "[i]t has taken many years for the Member States to become at least partially conscious of [the Court as a "genuine supranational body"]"¹⁸ The view of member state participation, initially at least, was that it was light, unorganized and mostly reflected a concern for cases referred by their own courts as those often involved their own laws. There is evidence that this view of member state participation is no longer completely accurate, if it ever was.

Updating Mortelmans's 1979 study shows that the purportedly light amount of member state participation in their own courts' referrals has changed over time. From 1972 to 1976, roughly the period covered in Mortelmans's study, member states participated in references from their own courts 38.2% of the time. By 1987-91 member states participated in well over half of the cases referred by their own courts (56.3%), clearly revealing a much greater rate of participation. See Table 1. In terms of the numbers of total observations, Table 1 also shows a steady increase over time. In 1982-86, the number of observations surpassed the number of referrals for the first time, indicating that in a number of cases multiple member states filed observations. This seems to show a growing interest on the part of member states to participate in Article 177 proceedings.

¹⁵Mortelmans, *supra* note 4, at p. 577.

¹⁶Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* 75 (1981), pp. 1-27, at p. 26 and n. 89. Stein concludes, "Although all member governments have a legal right to be notified of any proceedings referred to the Court under Article 177 and state their views, relatively few have taken advantage of the opportunity." "

¹⁷*Id.* at p. 1.

¹⁸Everling, *supra* note 4, at p. 216. As Rasmussen also noted, "A simple count of Member States' briefs filed under Article 20 [in the 1960s and 1970s] demonstrates a marked lack of will to participate in this process on any regular basis, not to mention participate in any sort of coordinated manner." Rasmussen, *supra* note 4, at p. 277.

Moreover, dividing member state participation into which court made the reference (a member state's own court versus another state's courts) leaves the impression that in most Article 177 cases no member states participated. This is simply not the case. While the percentage of cases where at least one member state filed observations has increased over the years, even during 1961-66, when member states are considered to have had low rates of participation, at least one member state filed observations in 57% of the cases. See Table 2. Although the percentage of cases where at least one member state filed an observation dropped during 1967-76, the lowest percentage recorded was still 50%. During the most recent interval studied, 1987-91, member states filed observations in 69% of the cases. These figures give a much more active picture of member state participation than that found in the 1979 study and show a continued increase in member state participation since 1977.

Yet the above figures still do not adequately represent member state participation. Most studies of member state participation in Article 177 cases underestimate member state interest by testing member state participation against all cases referred to the ECJ. This assumes that all cases are equally deserving of member state attention. However, Article 177 cases often do not involve issues of substantive law that are of general interest to the member states,¹⁹ and many cases may raise issues that are of interest only to the member state from which the case was referred. In order to fairly assess member state attention, cases where member states may legitimately have no interest in participating should be excluded. As a means of gathering a sample of significant Article 177 cases, I have included only those cases where at least one member state filed an observation.²⁰ To defend this step against the charge that it biases the sample, let me briefly review the possible reasons for the failure of member states to file observations.

Mortelmans posits four possible reasons for member states' failure to file observations.²¹ First, it may be the case that the member state has not been able to meet the two month deadline for filing observations. However, it seems unlikely that no member state would be able to meet the filing deadline in any given case.²² Furthermore,

¹⁹The Financial Times recently surveyed 54 cases assigned to one ECJ judge between March 1992 and March 1995 and found only two cases on "important points of law" and three of "principle." "A Law Unto Many," Financial Times, April 3, 1995, p. 15.

²⁰In the original sample, 1110 cases had one or more observations by a member state and 678 had no observations filed by member states.

²¹Mortelmans, *supra* note 4, at pp. 578-79.

²²While in 1978 the United Kingdom submitted a memorandum to the 537th session of the Council of Ministers proposing to extend the two month deadline, the proposal did not

in a 1987 appraisal of the Article 177 procedure, no member state complained that the time available to them was inadequate²³ Finally, the fact that member states can make oral submissions to the ECJ argues against the time limit operating as a constraint against member state participation Secondly, member states may fail to file because a government agency is a party to the suit and can adequately represent member states interest This may be true, but in a random sample of 265 Article 177 cases where a government agency was a party, the member state filed observations 62% of the time The fact of government agency participation does not seem to be a significant determinant of member state participation Thirdly, member states may not file because the Council, which acts to represent member state interests, has filed an observation in the case Yet in the 129 cases in which the Council filed an observation, member states filed 57% of the time Again, Council filing does not seem to affect member state participation

The last reason Mortelmans suggests for member state failure to file observations is that the case may not involve issues of legal interest An analysis of the cases where no member states filed observations is largely consistent with this interpretation Of the 678 cases where no member states filed observations 60% (410 cases) involve agriculture, customs tariffs, or customs duties See Table 3 These cases often involve rather routine issues of not very broad legal significance²⁴ In Common Customs Tariff cases, a government body (e g , the customs office) is often a party to the case and, given the nature of the legal questions involved, can adequately represent the member state's interests These cases have decided such weighty legal points as should the actual weight or the invoiced weight determine the value of concentrated orange juice for customs purposes²⁵ or can a customs duty exemption still be claimed if a certificate of origin is

garner widespread support among the other member states This proposal was criticized at the time by the Netherlands (see the reply of the Minister of Justice to a written question asked by Vrijlandt Krijnen, Annex to the Reports of the Proceedings of the Lower Chamber, Session 1978-79, No 340) and was never adopted by the Council of Ministers For a further discussion of the U K proposals see "Editorial Comments," Common Market Law Review 16 (1979), pp 3-7

²³In this report on the Article 177 procedure, none of the government representatives (which included France, Germany, Denmark, the Netherlands, Belgium, and even the United Kingdom) cited the time limit as a major problem Henry Schermers, et al , eds Article 177 EEC. Experience and Problems (Amsterdam North Holland 1987)

²⁴Crisham and Mortelmans, supra note 4, at p 55

²⁵Case 91/74, Hauptzollamt Hamburg-Ericus v. Hamburg Import-Kompanie GmbH, [1975] ECR 643

produced over two weeks late²⁶ Agriculture presents a similar situation. It is not at all clear that member states need concern themselves with whether "chocolate in bulk" means chocolate ready for consumption or only semi-finished products of the chocolate industry²⁷ as the customs office could adequately handle such a relatively inconsequential legal point²⁸. In contrast, areas where one would expect member states to show a real interest, for instance free movement of goods and competition law, have relatively high rates of participation. Of the 242 cases in the total sample which involved issues on the free movement of goods, member states filed observations in 206 cases (85%). In competition cases, member states filed observations in 85 of 114 cases (75%). These rates of participation compare with 45% for agriculture (227 out of 501) and 27% for the common customs tariff (54 out of 199). While I do not claim that all of the cases in which no member states file observations involve such trivial matters as the examples given, I would suggest that excluding cases where no member states filed observations from my data is a meaningful method of correctly assessing the degree of member state interest in participating in cases before the Court.

When testing the rate of member state participation on this new sample, participation by member states in their own courts' referrals is well above the 37.5% found by Mortelmans in 1979. From 1972-76, member states participated in their own courts' referrals 77% of the time. See Table 4. This rate of participation continued to grow, with many member states participating in 90-100% of cases referred by their own courts in 1987-91 (France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom). Participation rates by member states in cases referred by another member state's courts has remained fairly low and constant at about 6% since 1971. See Table 5. However, certain member states do show significantly more participation in other member states' court referrals than others. The United Kingdom and Italy have maintained the highest rates of participation with the United Kingdom fairly consistently hovering around the 25% mark while Italy was as high as 30% in 1972-76 but dropped to 17% in 1987-91. France, Germany and, to a slightly lesser extent, the Netherlands also have high rates of participation in other member state referrals. While smaller member states seem to

²⁶Case 231/81, Hauptzollamt Würzburg v. H. Weidenmann GmbH & Co., [1982] ECR 2259

²⁷Case 51/70, Alfons Lutticke GmbH v. Hauptzollamt Passau, [1971] ECR 121

²⁸The cases cited *supra* in notes 24-26 demonstrate that it is not the mere fact that a governmental body is a party which would keep a member state from filing observations. The nature of the case, in addition to the fact that a sub-unit of government is a party to the proceedings, seems to determine the decision whether or not to file

participate at as high a level as the larger member states when it comes to filing in their own courts' referrals, they are noticeably less likely than larger member states to file in other courts' referrals. It would appear from this result that economics may be a factor as smaller member states typically have less staff and funding available to file observations in Article 177 cases.

This revision of the sample of Article 177 cases does not ensure that member state participation is tested on only and all the cases which are of some significance.²⁹ It is merely a first attempt at showing that some account should be taken of the types of Article 177 cases referred, and member state participation should not simply be tested against all Article 177 cases, noted to be low, and left at that. By placing a member state's decision not to file observations in the context of general inattentiveness, the phenomenon of not filing is not of much interest. It is simply part of the general trend. However, if the decision not to file is placed in the context of attentiveness on the part of member states, then not filing becomes a decision of some interest.

General Trends: Short-term Self-interest versus General Interest of the Community

Earlier studies found member state participation to be not only somewhat low, but rather narrowly self-interested in the sense that member states tended to file in cases where their national law or some other interest, e.g., free movement of their goods or people, was involved.³⁰ Later studies have noted a shift away from purely self-interested participation in certain issue areas.³¹ As Everling argues that "[o]f even greater significance as regards the attitude of the Member States towards the Court is, however, their participation in preliminary ruling cases in which they have no specific interest in the result of the main action but in which they are concerned to influence the general evolution

²⁹The *Financial Times* recently surveyed 54 cases assigned to one ECJ judge between March 1992 and March 1995 and found only two cases on "important points of law" and three of "principle." "A Law Unto Many," *Financial Times*, April 3, 1995, p. 15.

³⁰Stein, *supra* note 16, at p. 26; Crisham and Mortelmans, *supra* note 4, at pp. 62-67.

³¹Crisham and Mortelmans, *supra* note 4, at p. 82. They note that in cases concerning the delimitation of powers of the Community and member states in Article 48 (free movement of persons), Article 85 (competition), and Article 199 (social policy) member states show an interest in influencing Community law by a large number of them filing observations in key cases.

of Community law "³² However, the change in member state involvement to a more "principled,"³³ less self-interested kind of participation is difficult to detect

One way to assess whether member states file observations for self-interested reasons or for a broader concern with the development of EC law is to compare a member state's observations in its own court referrals with its observations in referrals by other member state courts. When a member state files in referrals by its own courts, the filing is often seen as motivated by a member state's self interest. This is because Article 177 cases often are directly challenging the validity of national law. This challenge to a national law would be indirect because in Article 177 proceedings the ECJ cannot declare a national law invalid. However, in interpreting Treaty provisions or Community legislation in a certain way, the effect can be to invalidate national legislation. While this method is far from completely accurate, it does provide a first step in assessing the motives for member state participation.

When considering a member state's filing of observations in references made by other member states' courts as a percentage of its total observations filed, one sees a less than unequivocal turn to what Rasmussen wants to argue is a more principled attitude.³⁴ See Table 6. While smaller and newer member states such as Denmark, Spain, Ireland, Greece and Portugal tend to file more than half of their observations in cases referred by other member states, the record for the original member states is less clear. After the initial six years and except for part of the 1980s, Germany and Belgium filed the majority of their observations in cases referred by their own courts. While Germany filed the majority of its observations in referrals by other member states' courts during 1982-86, it reversed that in 1987-91 by filing 52% of its observations in its own courts' referrals. Belgium did not file the majority of its observations in other member state court references until 1987-91, and the margin is slim (only 52% are filed in other member states' courts' referrals). The Netherlands consistently files the majority of its observations in its own courts' referrals. France is less consistent, but from 1982-91, it also filed the majority of its observations in its referrals made by its own courts. The picture is really quite muddy, but if filings in other member states' courts are to be seen as evidence of a more communautaire attitude or an interest in influencing the general direction of Community law, then the smaller and usually the later member states display this trait to a much higher level.

³²Everling, *supra* note 4, at p. 225

³³Rasmussen, *supra* note 4, at p. 287

³⁴*Id.*

Of the larger member states, only the United Kingdom and Italy have a record similar to the smaller member states', but the trend for both is slightly toward increased filings in referrals by their own courts as a percentage of their total observations. Italy is, however, a different case from the United Kingdom, even though the numbers appear to show a similar filing pattern. The Italian example illustrates the importance of analyzing the nature of the cases before arriving at conclusions about member state motivations. After World War II plans for the Italian economic recovery were based in part on emigration, and in the negotiations for the Treaty of Rome Italy placed great emphasis on the free movement of people provisions.³⁵ Thus it is not surprising that initially a large percentage of Italian observations in other member states' courts was in free movement of people cases. However, that percentage dropped steadily from 100% in 1967-71 to 30.99% in 1982-86 with a slight increase to 33.33% in 1987-91. When free movement of people cases are excluded from the Italian observations filed and the comparison between the percentage of observations in their own versus other member state courts is made, the majority of observations filed from 1967-81 changes from being in other member states' courts to Italian courts' referrals. Since 1982, however, Italy has filed the majority of its observations in other member states' courts even without considering free movement of persons cases. While the data suggest that Italy may be moving away from a self-interested and rather heavily weighted toward one issue interaction with the Court, it also emphasizes the need to devise a more sophisticated measure of member state motivations for filing observations than simply the nationality of the referring court.

A better indicator of a desire to influence the general direction of Community law than the nationality of the referring court is the number of cases where multiple member states file observations. When multiple member states file observations, the chances somewhat diminish with the number of observations that all of the participating member states have some specific interest in the outcome of the case. The belief that participation reflects a more general desire to influence Community law is more plausible in these cases than in cases which were simply referred by another member states' court. Table 7 shows the number of cases where more than one member state filed observations along with the percentage of such cases in the original and revised samples. The results show a steady increase in the filings from the early founding period of 1961-66 from 19% to 34% in 1987-91 (33% and 50% in the revised sample, respectively). When filings by at least

³⁵Frederico Romero, "Migration as an Issue in European Interdependence and Integration: the Case of Italy" in Alan S. Milward, et al., The Frontier of National Sovereignty (London: Routledge 1994) at pp. 33-58.

three member states are considered, the same smooth upward trend in the number of multiple observations is visible. See Table 8. However, if the various expansions of the Community are taken into account by requiring one-third of member states to participate, the rate is fairly constant at 9% for 1977-86 (14% in the revised sample) but then there is a noticeable dropping off in the number of cases with multiple filings to 6% in 1987-91 (9% in the revised sample). See Table 9.

Reciprocal Relationship between Politics and Participation

The hypothesis that member states' behavior toward the Court has changed over time to a less self-interested, more communautaire attitude is consistent with the idea of community-building. A competing hypothesis is that member states are not moving toward a greater acceptance of the Court's supranationalism, but that the general tensions in the political setting between member states and the Union is a possible influence on member state participation. Everling draws attention to the need to place the study of the legal order in broader context.

The central problem of the European Community is the tension which exists between it and its Member States. In order to dissolve or at least to alleviate these tensions it is in practice necessary continually to seek a consensus in each individual case. Only the European Court does not fit into this system built on the continuing consensus of the Member States. Consequently the Member States are subject to a decision making authority which follows its own set of rules and which they can no longer control. The relationship of the Member States to the European Court is therefore ambivalent.³⁶

More recently scholars have begun to consider the relationship of member states and the Court in the context of the broader political developments in the European Union.³⁷ Those who take a contextualist view of law and politics see the two as operating in a reciprocal relationship, the situation in one having an effect on the other. Weiler has applied a contextualist interpretation to EC legal developments to argue that

³⁶Everling, *supra* note 4, at pp. 215-16.

³⁷J. H. H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration," *Journal of Common Law Market Studies* 31 (December 1993), pp. 417-446; J. H. H. Weiler, "The Transformation of Europe," 100 *Yale Law Journal* 2403 (1991); Koen Lenaerts, "Some Thoughts About the Interaction Between Judges and Politicians in the European Community," 12 *Yearbook of European Law* 1 (1992).

changes in the political institutional structure (e.g., the introduction of qualified majority voting) will change the pattern of member state acceptance of ECJ's decisions and cause increasing challenges to the Court's legitimacy³⁸

According to Weiler, the Court has been able to actively develop a constitution out of what was an international treaty in large part because of the balance that was achieved between constitutionalism and institutionalism³⁹ In other words, constitutionalism was accepted because the Community's political institutions operated by consensus politics With the Luxembourg Compromise, member states could veto legislation they opposed and, thereby, control the Community's decision-making procedures Because member states retained control over policy-making, the constitutionalization of the Treaty was less threatening to them⁴⁰ However, the Single European Act (SEA) and the move to qualified majority voting in issues concerning the internal market tipped the institutional balance to the disadvantage of member state governments Member states can no longer enforce consensus by preventing the passage of legislation they oppose While this institutional change helped bring an end to the period of Eurosclerosis, it also shifted the institutional equilibrium As Weiler states, "Unlike any earlier era in the Community, and unlike most of their other international and transnational experience, Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders"⁴¹ Weiler argues that with this change in the institutional balance, one can expect to see more challenges to the legitimacy of the Court "The Court will be called upon to adjudicate disputes which inevitably will subject it to public debate of a breadth and depth it is unaccustomed to"⁴²

Weiler does not specify what form these challenges to the Court will take nor does he test the claim empirically While there are many arenas in which these challenges may occur, such as member states failing to comply with adverse Court decisions or increasing attacks on the Court in political debate to name a few, the regular interaction between the Court and member states in Article 177 proceedings provides one forum for testing Weiler's hypothesis In the context of the Article 177 procedure, a possible sign of increasing challenges by member states to the Court would be an increase in overall participation before the Court This is far from a precise indicator, but if, as Weiler

³⁸Weiler (1993) and (1991), *supra* note 37

³⁹Weiler (1991) at p 2456

⁴⁰*Id.* at p 2428-29

⁴¹*Id.*, at p 2462

⁴²Weiler (1993), *supra* note 37, at p 434

claims, member states in the post-SEA era will feel more threatened by the prospect of binding legal interpretations of Community law, one would expect them to take what opportunities they have (e.g., filing observations) to make their positions clear and attempt to influence the Court. As the general trends of member state participation show, there is an increase in the number of observations filed during 1987-91. However, attributing that increase to member state concern with increasing supranationalism in European political institutions is difficult. Member state participation has been steadily increasing over each successive interval studied starting in the 1960s. Even considering the rates of change in participation between the time intervals does not make the case for member state behavior toward the Court noticeably changing post-SEA. See Table 10. Moreover, observing member state participation by year from 1981-91 does not show clear trends toward unusually greater participation post-SEA. See Chart 1. However, not all member states may be equally concerned with increasing supranationalism. Therefore, some might have no reason to change their interaction with the Court. In looking at participation trends by member state by year, some member states do stand out. See Charts 2 and 3. The United Kingdom shows a marked increase in participation from 1988-91 which may warrant more study to see if it is evidence of Weiler's argument. Germany, not typically considered anti-supranationalist but of late showing more criticism of the Court in its political discourse, shows a three-fold increase in observations in 1991 from 15 to 48. That trend does show evidence of continuing. In 1992, Germany filed 28 observations which was a decrease from 1991 but higher than any other year. In 1993, with 104 cases still pending for which I do not have the figures on observations, Germany filed in at least 20 cases. Significant post-SEA trends in other member states' activity are not visible. Thus, on the basis of increases in participation alone, there is not clear support for SEA-prompted changes in member state interactions with the Court. At most, the increasing supranationalism brought about by the SEA may have affected certain member state's dealings with the Court.

Another method of assessing whether member state governments are increasingly challenging the Court's legitimacy are those cases where multiple member states filed observations. In Article 177 cases, the most effective tool for member states to counter perceived Court activism or encroachment on national sovereignty would be to convey unambiguously their view of what Community law is and what its limits are. Rasmussen argues that if member states' strategy before the Court is simply to assert pro-sovereignty positions, then the most effective tactic would be to coordinate drafting and presenting their views before the Court. "[T]he regular presentation by all or most of the States, of similar or identical pro-sovereignty interpretations of the adjudicated provisions of the

Treaty would have erected an important obstacle to a continued EC-judicial creation by judicial fiat of an ever more encompassing law of integration "⁴³ It is true that over time multiple cases with multiple member states filing observations has increased. See Tables 7-9. The percentage of cases with more than one observation has grown from 19% during 1961-66 to 34% in the post-SEA period (to 50% in the revised sample). Referrals with three or more member states filing observations has also risen since 1967 to reach the level of 13% (19% in the revised sample). However, the number of cases where at least a third of member states participated has dropped from 9% in the 10 years prior to 1987 to 6% during 1987-91 (approximately 14% to 9% in the revised sample). Attributing the increase in cases where multiple member states participate to the SEA is problematic not only because the number of cases where at least a third of the member states participated has actually dropped post-SEA but also because the other two measures of multiple filings show a fairly steady increase over time since 1972 and not a dramatic change in the pattern of member state participation after 1987.

Conclusion

This study shows that certain views of member state interaction with the Court need to be re-evaluated. First, member states were not inattentive to the Court initially. Thus, the assumption that the ECJ's early constitutionalization crept up on unaware member states needs to be rethought. Second, the study fails to show a clear change in member state behavior toward less concern with challenges to their own laws and more interest in helping develop Community law. To test this, the methodology of previous studies, which considered filings in a member state's own court to represent self-interest and filings in other member states' courts to represent general interest, was used. However, it is also shown that this method of interpreting member state behavior is especially problematic. New variables, such as the origin of goods or the nationality of people involved in the cases, need to be considered, but also the definitions of what is acting purely in the general interest to influence the development of Community law and what is acting self-interestedly need to be given more vigorous definitions. Finally, the idea that member states will challenge the Court's supranationalism more after the SEA lessened the intergovernmentalism of the Council was not verified through changes in member states' behavior toward the Court after 1987.

⁴³Rasmussen, *supra* note 4, at p. 276

Thus, besides the conclusion that member states' participation has increased, little else can be asserted about member state interaction with the Court. What is also clear from the rather unconnected nature of the hypotheses tested is that there is no prevailing "model" of member state - ECJ interaction. This may be because of the emphasis in the literature on the importance of judicial cooperation in the Community legal order. I do not discount the importance of that piece of the legal integration puzzle. I want to suggest, however, that member states' participation in legal integration is also worthy of study. It is true that the primary vehicle for legal integration is the Article 177 procedure. It is also the case that member states have participated in this procedure from the start and that participation is increasing. Member states are regular actors in the process, pressing their positions on the issues before the Court. If they are ignored by the Court, then they are truly unimportant to the process of legal integration. However, as they continue to file increasing numbers of observations and appear at oral hearings, they certainly do not find their activities fruitless. The neofunctionalist account of legal integration is compelling. Member states have not taken cases before the Court to enforce compliance with Community obligations as they have the right to do under the Treaty. It has been national court cases - where the actors are judges, attorneys and litigants - that have provided the ECJ with the most litigation and the opportunity to develop Community law. However, once those cases are before the European Court of Justice, so too (in most cases) are member states. Their input into this process is part of the dynamic of legal integration.

TABLE 1

| | | 1961-66 | | | | | |
|--------------|------------|----------------|---------------|------------|-------------------------|-----------------------------|--|
| | Obs | Own court | Foreign court | Referrals | Percentage in own court | Percentage in foreign court | |
| Belgium | 4 | 0 | 4 | 0 | 0/0 (0%) | 4/21 (19%) | |
| France | 4 | 0 | 4 | 2 | 0/2 (0%) | 4/19 (21%) | |
| Germany | 7 | 3 | 4 | 4 | 3/4 (75%) | 4/17 (23.5%) | |
| Italy | 1 | 1 | 0 | 2 | 1/2 (50%) | 0/19 (0%) | |
| Luxembourg | 0 | 0 | 0 | 1 | 0/1 (0%) | 0/20 (0%) | |
| Netherlands | 4 | 1 | 3 | 12 | 1/12 (8.3%) | 3/9 (33.3%) | |
| Total | 20 | 5 | 15 | 21 | 5/21 (23.8%) | 15/105 (14.3%) | |
| | | 1967-71 | | | | | |
| | Obs | Own court | Foreign court | Referrals | Percentage in own court | Percentage in foreign court | |
| Belgium | 7 | 6 | 1 | 14 | 6/14 (42.9%) | 1/93 (1.1%) | |
| France | 3 | 1 | 2 | 13 | 1/13 (7.7%) | 2/94 (2.1%) | |
| Germany | 34 | 32 | 2 | 60 | 32/60 (53.3%) | 2/47 (4.3%) | |
| Italy | 5 | 3 | 2 | 8 | 3/8 (37.5%) | 2/99 (2.0%) | |
| Luxembourg | 1 | 1 | 0 | 3 | 1/3 (3.3%) | 0/104 (0%) | |
| Netherlands | 14 | 8 | 6 | 9 | 8/9 (88.9%) | 6/98 (6.1%) | |
| Total | 64 | 51 | 13 | 107 | 51/107 (47.7%) | 13/535 (2.4%) | |
| | | 1972-76 | | | | | |
| | Obs | Own court | Foreign court | Referrals | Percentage in own court | Percentage in foreign court | |
| Belgium | 14 | 9 | 5 | 34 | 9/34 (26.5%) | 5/220 (2.3%) | |
| Denmark | 9 | 1 | 8 | 1 | 1/1 (100%) | 8/253 (3.2%) | |
| France | 21 | 12 | 9 | 27 | 12/27 (44.4%) | 9/227 (4%) | |
| Germany | 48 | 35 | 13 | 114 | 35/114 (30.7%) | 13/140 (9.3%) | |
| Ireland | 8 | 0 | 8 | 1 | 0/1 (0%) | 8/253 (3.2%) | |
| Italy | 55 | 25 | 30 | 36 | 25/36 (69.4%) | 30/218 (13.8%) | |
| Luxembourg | 1 | 0 | 1 | 2 | 0/2 (0%) | 1/252 (0.8%) | |
| Netherlands | 21 | 12 | 9 | 36 | 12/36 (33.3%) | 9/218 (4.1%) | |
| U K | 25 | 3 | 22 | 3 | 3/3 (100%) | 22/251 (8.8%) | |
| Total | 202 | 97 | 105 | 254 | 97/254 (38.2%) | 105/1562 (6.7%) | |
| | | 1977-81 | | | | | |
| | Obs | Own court | Foreign court | Referrals | Percentage in own court | Percentage in foreign court | |
| Belgium | 28 | 18 | 10 | 48 | 18/48 (37.5%) | 10/357 (2.8%) | |
| Denmark | 29 | 7 | 22 | 8 | 7/8 (87.5%) | 22/397 (5.5%) | |
| France | 71 | 28 | 43 | 52 | 28/52 (53.9%) | 43/353 (12.2%) | |
| Germany | 49 | 31 | 18 | 147 | 31/147 (21.1%) | 18/258 (7.0%) | |
| Ireland | 5 | 1 | 4 | 7 | 1/7 (14.3%) | 4/398 (1.0%) | |
| Italy | 81 | 40 | 41 | 47 | 40/47 (85.1%) | 41/358 (11.5%) | |
| Luxembourg | 3 | 1 | 2 | 3 | 1/3 (33.3%) | 2/402 (0.5%) | |
| Netherlands | 56 | 34 | 22 | 66 | 34/66 (51.5%) | 22/339 (6.5%) | |
| U K | 75 | 19 | 56 | 27 | 19/27 (70.4%) | 56/378 (14.8%) | |
| Total | 397 | 179 | 218 | 405 | 179/405 (44.2%) | 218/3240 (6.7%) | |

TABLE 1
(continued)

| | Obs | 1982-86 | | | Percentage in own court | Percentage in foreign court | |
|--------------|------------|------------|---------------|------------|-------------------------|-----------------------------|--|
| | | Own court | Foreign court | Referrals | | | |
| Belgium | 24 | 17 | 7 | 54 | 17/54 (31.5%) | 7/393 (1.8%) | |
| Denmark | 35 | 5 | 30 | 11 | 5/11 (45.5%) | 30/436 (6.9%) | |
| France | 79 | 45 | 34 | 81 | 45/81 (55.6%) | 34/366 (9.3%) | |
| Germany | 67 | 31 | 36 | 140 | 31/140 (22.1%) | 36/307 (11.7%) | |
| Greece | 9 | 1 | 8 | 2 | 1/2 (50.0%) | 8/445 (1.8%) | |
| Ireland | 7 | 3 | 4 | 9 | 3/9 (33.3%) | 4/438 (0.9%) | |
| Italy | 102 | 31 | 71 | 36 | 31/36 (86.1%) | 71/411 (17.3%) | |
| Luxembourg | 4 | 3 | 1 | 4 | 3/4 (75.0%) | 1/443 (0.2%) | |
| Netherlands | 78 | 56 | 22 | 80 | 56/80 (73.7%) | 22/367 (6.0%) | |
| Portugal | 1 | 0 | 1 | 0 | 0/0 (0%) | 1/447 (0.2%) | |
| Spain | 4 | 1 | 3 | 1 | 1/1 (100%) | 3/446 (0.7%) | |
| U K | 93 | 24 | 69 | 29 | 24/29 (82.8%) | 69/418 (16.5%) | |
| Total | 503 | 217 | 286 | 447 | 217/447 (48.6%) | 286/4917 (5.8%) | |
| | | | | | | | |
| | | | 1987-91 | | | | |
| | Obs | Own court | Foreign court | Referrals | Percentage in own court | Percentage in foreign court | |
| Belgium | 40 | 19 | 21 | 64 | 19/64 (29.7%) | 21/490 (4.3%) | |
| Denmark | 21 | 5 | 16 | 14 | 5/14 (35.7%) | 16/540 (3.0%) | |
| France | 103 | 63 | 40 | 83 | 63/83 (75.9%) | 40/471 (8.5%) | |
| Germany | 108 | 56 | 52 | 175 | 56/175 (32.0%) | 52/379 (13.7%) | |
| Greece | 26 | 3 | 23 | 7 | 3/7 (42.9%) | 23/547 (4.2%) | |
| Ireland | 24 | 6 | 18 | 6 | 6/6 (100%) | 18/548 (3.3%) | |
| Italy | 94 | 37 | 57 | 51 | 37/51 (72.6%) | 57/503 (11.3%) | |
| Luxembourg | 10 | 8 | 2 | 11 | 8/11 (72.7%) | 2/543 (0.4%) | |
| Netherlands | 87 | 56 | 31 | 76 | 56/76 (73.7%) | 31/478 (6.5%) | |
| Portugal | 27 | 6 | 21 | 6 | 6/6 (100%) | 21/548 (3.8%) | |
| Spain | 36 | 5 | 31 | 10 | 5/10 (50.0%) | 31/544 (5.7%) | |
| U K | 131 | 48 | 83 | 51 | 48/51 (94.1%) | 83/503 (16.5%) | |
| Total | 707 | 312 | 395 | 554 | 312/554 (56.3%) | 395/6094 (6.5%) | |

TABLE 2
Percentage of cases with observations

| | Referrals | Cases with Observations | Percentage |
|--------------|------------------|--------------------------------|-------------------|
| 1961-66 | 21 | 12 | 57% |
| 1967-71 | 107 | 57 | 53% |
| 1972-76 | 254 | 126 | 50% |
| 1977-81 | 405 | 235 | 58% |
| 1982-86 | 447 | 299 | 67% |
| 1987-91 | 554 | 381 | 69% |
| Total | 1788 | 1110 | 62% |

TABLE 3

| Subjects | Cases with observations | Cases with no observations |
|-----------------------|--------------------------------|-----------------------------------|
| Article 177 | 106 | 50 |
| Competition | 85 | 29 |
| Customs duties | 55 | 17 |
| Common Customs Tariff | 54 | 145 |
| Free mov't of goods | 206 | 36 |
| Internal tax | 68 | 7 |
| Commercial policy | 19 | 10 |
| Free mov't of people | 197 | 144 |
| Agriculture | 227 | 274 |
| Establishment | 64 | 11 |
| Transportation | 28 | 8 |
| Social policy | 73 | 9 |
| Direct effect | 111 | 16 |
| VAT | 67 | 6 |

Each case was coded for all of the subjects that were raised in the case

TABLE 4
Observations filed in own court
Revised Sample

| | 1961-66 | 1967-71 | 1972-76 | 1977-81 | 1982-86 | 1987-91 | Total |
|----------------|------------|-------------|--------------|---------------|---------------|---------------|---------------|
| Belgium | 0% (0/0) | 86% (6/7) | 45% (9/20) | 60% (18/30) | 45% (17/38) | 51% (19/37) | 52% (69/132) |
| Denmark | NA | NA | 100% (1/1) | 100% (7/7) | 56% (5/9) | 63% (5/8) | 72% (18/25) |
| France | 0% (0/0) | 100% (1/1) | 86% (12/14) | 82% (28/34) | 79% (45/57) | 91% (63/69) | 85% (149/175) |
| Germany | 100% (3/3) | 91% (32/35) | 80% (35/44) | 60% (31/52) | 54% (31/57) | 67% (56/83) | 69% (188/274) |
| Greece | NA | NA | NA | NA | 100% (1/1) | 75% (3/4) | 80% (4/5) |
| Ireland | NA | NA | 0% (0/0) | 25% (1/4) | 43% (3/7) | 100% (6/6) | 59% (10/17) |
| Italy | 50% (1/2) | 60% (3/5) | 100% (25/25) | 95% (40/42) | 94% (31/33) | 90% (37/41) | 93% (137/148) |
| Luxembourg | 0% (0/1) | 100% (1/1) | 0% (0/1) | 50% (1/2) | 75% (3/4) | 100% (8/8) | 76% (13/17) |
| Netherlands | 17% (1/6) | 100% (8/8) | 67% (12/18) | 76% (34/45) | 85% (56/66) | 90% (56/62) | 81% (167/205) |
| Portugal | NA | NA | NA | NA | 0% (0/0) | 100% (6/6) | 100% (6/6) |
| Spain | NA | NA | NA | NA | 100% (1/1) | 71% (5/7) | 86% (6/7) |
| United Kingdom | NA | NA | 100% (3/3) | 100% (19/19) | 92% (24/26) | 96% (48/50) | 86% (94/98) |
| Total | 42% (5/12) | 89% (51/57) | 77% (97/126) | 65% (151/231) | 73% (217/299) | 82% (312/381) | |

TABLE 5
Observations filed in foreign court
Revised Sample

| | 1961-66 | 1967-71 | 1972-76 | 1977-81 | 1982-86 | 1987-91 | Total |
|----------------|-------------|-------------|----------------|----------------|---------------|----------------|---------------|
| Belgium | 33% (4/12) | 2% (1/50) | 5% (5/106) | 5% (10/205) | 3% (7/261) | 6% (21/344) | 5% (48/978) |
| Denmark | NA | NA | 7% (9/125) | 13% (29/228) | 12% (35/290) | 6% (21/373) | 9% (94/1016) |
| France | 33% (4/12) | 4% (2/56) | 8% (9/112) | 21% (43/201) | 13% (34/254) | 13% (40/318) | 14% (132/953) |
| Germany | 44% (4/9) | 9% (2/22) | 16% (13/82) | 10% (18/183) | 15% (36/242) | 17% (52/298) | 15% (125/836) |
| Greece | NA | NA | NA | NA | 3% (6/298) | 6% (23/377) | 5% (31/675) |
| Ireland | NA | NA | 6% (8/126) | 2% (4/231) | 1% (4/292) | 5% (18/375) | 3% (34/1024) |
| Italy | 0% (0/10) | 4% (2/52) | 30% (30/101) | 21% (41/193) | 27% (71/266) | 17% (57/340) | 21% (201/962) |
| Luxembourg | 0% (0/11) | 0% (0/56) | 1% (1/125) | 1% (2/233) | 0 3% (1/295) | 1% (2/373) | 1% (6/1093) |
| Netherlands | 50% (3/6) | 12% (6/49) | 8% (9/108) | 12% (22/190) | 9% (22/233) | 10% (31/319) | 10% (93/905) |
| Portugal | NA | NA | NA | NA | 0 3% (1/299) | 6% (21/375) | 3% (22/674) |
| Spain | NA | NA | NA | NA | 1% (3/298) | 8% (31/374) | 5% (34/672) |
| United Kingdom | NA | NA | 18% (22/123) | 26% (56/216) | 26% (69/273) | 25% (83/331) | 24% (230/943) |
| Total | 25% (15/60) | 5% (13/285) | 11% (106/1008) | 12% (225/1880) | 9% (291/3301) | 10% (400/4197) | |

TABLE 6
Percentage of Member State Total Observations
by Court

| | 1961-66 | | 1967-71 | |
|----------------|----------------|---------------|----------------|---------------|
| | Own court | Foreign court | Own court | Foreign court |
| Belgium | 0% | 100% | 86% | 14% |
| France | 0% | 100% | 33% | 67% |
| Germany | 43% | 57% | 94% | 6% |
| Italy | 100% | 0% | 60% | 40% |
| Luxembourg | 0% | 0% | 100% | 0% |
| Netherlands | 25% | 75% | 57% | 43% |
| Total | 25% | 75% | 80% | 20% |
| | | | | |
| | 1972-76 | | 1977-81 | |
| | Own court | Foreign court | Own court | Foreign court |
| Belgium | 64% | 36% | 64% | 36% |
| Denmark | 11% | 89% | 24% | 76% |
| France | 57% | 43% | 39% | 61% |
| Germany | 73% | 27% | 63% | 37% |
| Ireland | 0% | 100% | 20% | 80% |
| Italy | 45% | 55% | 49% | 51% |
| Luxembourg | 0% | 100% | 33% | 67% |
| Netherlands | 57% | 43% | 61% | 39% |
| United Kingdom | 12% | 88% | 25% | 75% |
| Total | 48% | 52% | 45% | 55% |
| | | | | |
| | 1982-86 | | 1987-91 | |
| | Own court | Foreign court | Own court | Foreign court |
| Belgium | 71% | 29% | 48% | 52% |
| Denmark | 14% | 86% | 24% | 76% |
| France | 57% | 43% | 61% | 39% |
| Germany | 46% | 54% | 52% | 48% |
| Greece | 11% | 89% | 12% | 88% |
| Ireland | 43% | 57% | 25% | 75% |
| Italy | 30% | 70% | 39% | 61% |
| Luxembourg | 75% | 25% | 80% | 20% |
| Netherlands | 72% | 28% | 64% | 36% |
| Portugal | 0% | 100% | 22% | 78% |
| Spain | 25% | 75% | 14% | 86% |
| United Kingdom | 26% | 74% | 37% | 63% |
| Total | 43% | 57% | 44% | 56% |

The numbers used to figure the above percentages appear in Table 1

TABLE 7
Multiple Observations

| | Two | Three | Four | Five | Six | Seven | Eleven | Total |
|--------------|------------|------------|-----------|----------|-----------|----------|----------|------------|
| 1961-66 | 0 | 4 | 0 | 0 | 0 | NA | NA | 4 |
| 1967-71 | 3 | 2 | 0 | 0 | 0 | NA | NA | 5 |
| 1972-76 | 37 | 5 | 1 | 0 | 3 | 2 | 0 | 48 |
| 1977-81 | 58 | 19 | 10 | 2 | 5 | 0 | 0 | 94 |
| 1982-86 | 87 | 35 | 11 | 2 | 2 | 0 | 0 | 137 |
| 1987-91 | 116 | 39 | 24 | 5 | 1 | 1 | 3 | 189 |
| Total | 301 | 104 | 46 | 9 | 11 | 3 | 3 | 477 |

Percentage of Cases
with Multiple Observations

| | Original Sample | Revised Sample |
|--------------|-----------------|----------------|
| 1961-66 | 19% | 33% |
| 1967-71 | 5% | 9% |
| 1972-76 | 19% | 38% |
| 1977-81 | 23% | 40% |
| 1982-86 | 31% | 46% |
| 1987-91 | 34% | 50% |
| Total | 27% | 43% |

TABLE 8
Multiple Observations
(three or more)

| | >2 Obs | Original Sample | Revised Sample |
|--------------|------------|-----------------|----------------|
| 1961-66 | 4 | 19% | 33% |
| 1967-71 | 2 | 2% | 4% |
| 1972-76 | 11 | 4% | 9% |
| 1977-81 | 36 | 9% | 16% |
| 1982-86 | 50 | 11% | 17% |
| 1987-91 | 73 | 13% | 19% |
| Total | 176 | 10% | 16% |

TABLE 9
Multiple Observations
(1/3 Member States Participating)

| | Cases | Original Sample | Revised Sample |
|--------------|------------|-----------------|----------------|
| 1961-66 | 4 | 19% | 33% |
| 1967-71 | 5 | 5% | 9% |
| 1972-76 | 16 | 6% | 13% |
| 1977-81 | 36 | 9% | 15% |
| 1982-86 | 42 | 9% | 14% |
| 1987-91 | 34 | 6% | 9% |
| Total | 137 | 8% | 12% |

TABLE 10
Rate of change in participation

| | 1967-71 | 1972-76 | 1977-81 | 1982-86 | 1987-91 |
|----------------|----------------|----------------|----------------|----------------|----------------|
| Belgium | 75% | 100% | 100% | 14% | 67% |
| Denmark | | | 222% | 21% | -40% |
| France | -25% | 600% | 238% | 11% | 30% |
| Germany | 386% | 41% | 2% | 37% | 61% |
| Greece | | | | | 190% |
| Ireland | | | -38% | 40% | 243% |
| Italy | 400% | 1000% | 47% | 26% | -8% |
| Luxembourg | 0% | 100% | 0% | 200% | 150% |
| Netherlands | 250% | 50% | 167% | 39% | 12% |
| United Kingdom | | | 200% | 24% | 41% |

CHART 1

**Member State Observations
over time**

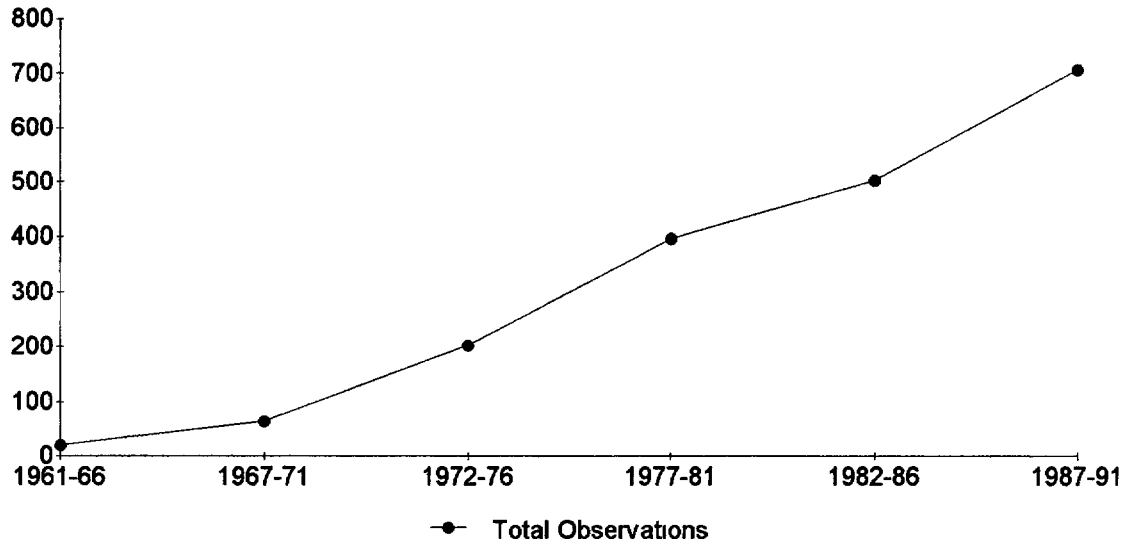


CHART 2

Original Member State Observations
over time

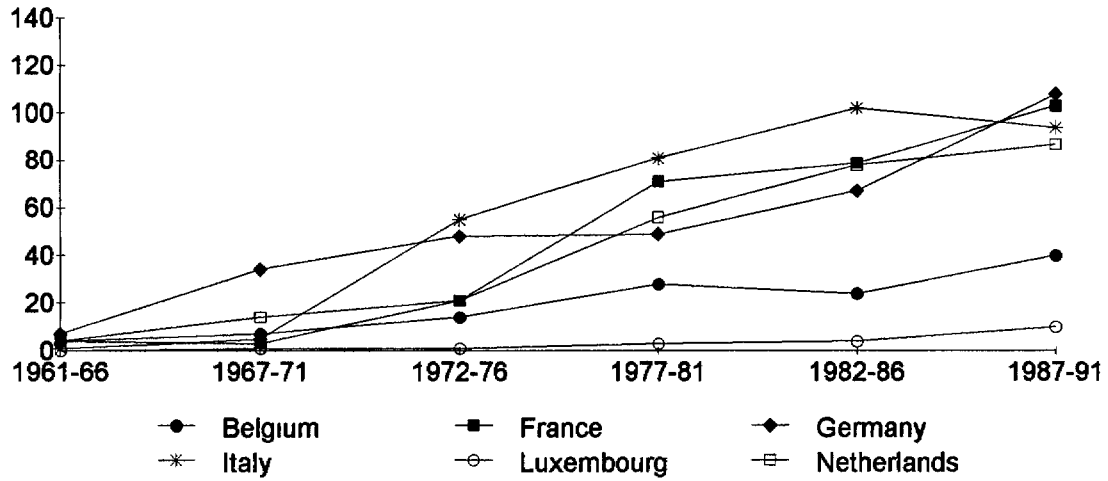


CHART 3

Added Member State Observations
over time

