A STUDY OF ARTICLE 23 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE: EXPERIENCE OF THE UNITED KINGDOM

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
EUROPEAN STUDIES

SEPTEMBER 2005

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ABSTRACT

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September 2005, 75 pages

This thesis describes the system of submitting observations envisaged in Article 23 of the Protocol on the Statute of the European Court of Justice. The thesis seeks to illustrate and criticize the utilization of the system enshrined in Article 23 by the member states of the European Union. The experience of the United Kingdom is analyzed by examining the preliminary ruling judgments that the government of the United Kingdom has submitted observations in order to describe the system and demonstrate its application by a member state of the European Union.

Keywords: European Court of Justice, the ECJ, Preliminary Ruling, Article 23, Observation

ÖZ

AVRUPA TOPLULUKLARI ADALET DIVANI'NIN
STATÜSÜNE İLİŞKIN PROTOKOL'ÜN 23. MADDESI
ÜZERINE: İNGILTERE TECRÜBESI

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Tez Yöneticisi: Yrd. Doç. Dr. Gamze Öz

Eylül 2005, 75 sayfa

Bu çalışma, genel anlamda, Avrupa Toplulukları Adalet Divanı'nın Statüsüne İlişkin Protokol'ün 23. maddesinde yer alan gözlem koyma ile ilgili sistemi incelemiştir. Özelde, bu çalışma içerisinde, 23. maddede öngörülen sistemin Avrupa Toplulukları'na üye devletler tarafından nasıl kullanıldığı gösterilmektedir. İngiltere hükümetinin gözlem koyduğu ön karar davaları irdelenerek gerçekleştirilen İngiltere uygulamasının incelenmesi yoluyla, sistemin Avrupa Toplulukları üyesi bir devlet tarafından uygulanışı gösterilmiştir.

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INTRODUCTION

Article 23 of the Protocol on the Statute of the Court of Justice (hereinafter referred as the "**Article 23 Procedure**") provides the Member States with a tool to influence the European Court of Justice (hereinafter referred as the "**ECJ**") by enabling them to submit observations in preliminary rulings. The aim of the present thesis is to examine whether the Article 23 Procedure has been serving to the above sated aim. Additionally, this study aims to achieve a better understanding of the relationship between the ECJ and the Member States of the Community by the examination of the conducts of the Member States concerning the utilization of the mentioned tool by the Member States.

The role of the ECJ in the European integration process is one of the most debated topics in the doctrine of European studies. Arguments on the role and the methodology of the ECJ are to some extent connected with the topic of this study, since the Article 23 Procedure provides a way of interaction between the ECJ and its Member States. Answers of the questions, "in what extend the Member States of the Community use the mentioned tool?" and "what is the attitude of the Court itself while processing the observations submitted pursuant to Article 23 by the Member States?" are highly related to the discussions on the role of the ECJ in the Article 23 Procedure and the reactions of the Member States to the Court.

The issue also boils down to two questions, which are identical but formulated in different ways. First, does the ECJ, as a supranational institution, pursue its own interest within a politically isolated sphere

from its Member States?[1] Second, is the conduct of the ECJ consistent with the interests of Member States that keep the Court under control?[2] In this regard, analysis of the conducts of the Member States concerning the Article 23 Procedure contributes to the debate between the neo-rationalists and neo-functionalists on the role of the ECJ.[3] Neo-functionalists assert that the ECJ has been the locomotive of the European integration and the governments have passively obeyed the leading decisions of the Court.[4] In contrary, neo-rationalists argue that the Court does not have an autonomous power to impose constraints on the Member States.[5] The attitudes of the Member States will illustrate if they abide by the approach of the ECJ in their in-court behaviors and this paper will examine if such attitudes may be accepted as obedience.[6]

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[1] Robert Keohane and Stanley Hoffmann, *Conclusions: Community Politics and Institutional Change* in William Wallace, ed., The Dynamics of European Integration, London, Pinter, 1990, p. 281.

[2] Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, International Organization 46, 1992, p. 557.

[3] *See* the following articles for the debate between two theories; Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, International Organization 49, 1, winter, 1995, pp.171-81; Anne-Marie Burley and Walter Mattli, *Law and politics in the European Union: a reply to Garrett*, International Organization 49, 1, Winter1995, pp. 183-90.

[4] Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, International Organization, 47, 1, Winter, 1993, pp. 58-60.

[5] Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, International Organization, 46(Spring), pp. 556-557 and also *see* Goeffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union,* International Organization, 52, 1, winter 1998, pp 149-151.

[6] Examination of the theoretical discussions is far beyond this paper. For more information on relevant theories *see* Paul Taylor, *The limits of European Integration*, Columbia University Press, New York, 1983; Stuart A. Scheingold, *The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community*, Occasional Papers in International Affairs, no. 27, Harvard University, Cambridge, 1971; Stuart Mackenzie, *The European Communities and the Rule of Law*, Stevens, London, 1977; G. Frederico Mancini, *The Making of a Constitution for Europe*, C.M.L.R., vol. 26, 1989, pp. 595-616.

The substance of the thesis divided into two chapters. The first chapter discusses the procedure enshrined in the Article 23 Procedure and the conducts of the Member States, the ECJ and the Commission regarding the mentioned procedure. In order to illustrate the conduct of the UK and test the arguments presented in the previous chapter cases in which the UK government has acted between the years 1999 and 2002 will be examined.

It is crucial to mention here that this study is not only aiming to explain how the system works. The goal of this study is to examine the whole application of the Article 23 Procedure by deducting the results out of an intense statistical research on the practice of the governments of the UK and Ireland.

Descriptive method is the first method to be utilized for the purposes of this thesis since the first chapter of this dissertation will consists of the analysis of the legal texts, concepts and institutions of the system enshrined in Article 23. Secondly, quantitative method will be used in the second chapter where a statistical research will be conducted in order to prove the arguments set froth in chapter one. As for the conclusion; for the assessment of the data that will be deducted from the statistical analysis descriptive and quantitative method will be used.

The following hypothesis will be tested via the utilization of the above mentioned methods.

Hypothesis 1: The Member States of the EC are not aware of the principal aim of procedure envisaged in Article 23. Due to this lack of awareness they fail to utilize the mentioned tool to influence the ECJ. Therefore, the ECJ, as a supranational institution, pursue its

own interest without the interventions of the Member States via submitting observations.

Hypothesis 2: The out-court and in-court behaviors of the Member States of the EC are not consistent.

The libraries of Boğaziçi University, Istanbul University, Marmara University, Galatasaray University, Bilgi University, Sabancı University, Yeditepe University, ODTU, Bilkent University, Koç University and Biritish Council and electronic data bases, online journals are used to provide the relevant literature. The statistical analysis on the precedents of the ECJ will be conducted through Celex and Eurolex.

CHAPTER I

1. Tools Provided With the Member States to Influence the Supranational Institutions

The founding fathers of the European Communities were aware of the need to have an institutional balance between the supranational institutions and the Member States who delegated their powers to the institutions. Moreover, the Members States were aware of the fact that supranational institutions might gradually take on new roles that were not foreseen at the time of their creation. As a consequence, the functions of such institutions might not reflect the intentions of their principals.[7] As a result, creators of the European Communities provided several tools in the system to give the chance to the Member States to influence the institutions. Eventually, they were aiming to prevent the side effects of the delegation of their powers to the institutions.[8]

Member States adopted various administrative procedures *ex ante* defining the scope of the activities of the Community institutions and the procedures they must follow. Additionally oversight procedures were adopted to give the Member States a possibility *ex post* to monitor the behaviors of the institutions and influence them through sanctions.[9] Judicial review of the Commission's acts, comitology procedure, and

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[7] Mark A. Pollack, *Delegation, Agency, and Agenda Setting In the European Community*, International Organization, 51, 1, winter, pp99-134, 1997, p. 107.

[8] "Delegation… entails side effects that are known… as agency losses. There is almost always some conflict between the interests those who delegate authority(principals) and the agents to whom they delegate it. Agents behave opportunistically, pursuing their own interest subject only to the constraints imposed by their relationship with the principal." Roderick D. Kiewiet, and, Matthew D. Mc.Cubbins, *The Logic of Delegation: Congressional Parties and the Appropriation Process*, University of Chicago Press, Chicago, 1991, p. 5.

[9] Pollack, *supra* note 7, p. 109.

the possibility to amend the constitutive treaties of the EC are the examples of the monitoring tools provided to the Member States.

One of those control mechanisms, worth mentioning here, is the one that furnishes the Member States with a privileged standing before the European Court. Article 230(2) of the EC Treaty gives the right to the Member States to bring an action for annulment against the Community acts. Moreover, according to the ECJ, the Member States have access to this tool without being obliged to prove any specific interest;[10] nevertheless proving personal interest is a requirement for the private parties to bring an annulment action.[11] According to Nuffel, the privileged standing of Member States illustrates the objective of the Member States to preserve for themselves to be the gatekeepers who ensure that the EC institutions do not overstep the powers the Member States agreed to surrender.[12]

The control instruments, which can be used against the ECJ are quite limited. Even though the Member States are the ones who are appointing the judges, this cannot be considered as an effective way of influencing the Court. However, examination of all of these control mechanisms is beyond the scope of this paper. This paper will focus on the one that is envisaged in Article 23 of the Protocol on the Statute of the ECJ.[13]

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[10] Case 131/86, United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities, [1988] ECR 905, para. 6.

[11] Case 85/82, Bernhard Schloh v. Council of the European Communities, [1983] ECR 2105, para. 14.

[12] Piet Van Nuffel*, What's In A Member State? Central And Decentralized Authorities Before The Community Courts*, C.M.L.R., 38, 871–901, 2001, p. 875.

[13] For more information on the control mechanisms *see* Pollack, *supra* note 7.

2. Article 23 of the Statute of the Court as a Tool to Control the ECJ

Article 23 of the Protocol on the ECJ, envisages a procedure aiming to enable the Member States to juridify their policy prerogatives before the ECJ. Under Article 23, the governments are able to influence the outcomes of the preliminary rulings by submitting observations in the cases before the Court.

2.1 Formal Aspects of the Procedure

Article 23 of the Protocol on the Statute of the Court reads:

> In the cases governed by Article 35(1) of the EU Treaty, by Article 234 of the EC Treaty and by Article 150 of the EAEC Treaty, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and also to the Council or to the European Central Bank if the act the validity or interpretation of which is in dispute originates from one of them, and to the European Parliament and the Council if the act the validity or interpretation of which is in dispute was adopted jointly by those two institutions.
>
> Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank, shall be entitled to submit statements of case or written observations to the Court.
>
> In the cases governed by Article 234 of the EC Treaty, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance

> Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.[14]

The court or tribunal of a Member State shall notify the ECJ its decision to suspend the proceedings and refer the case to the Court of Justice. Afterwards the Registrar of the Court who receives the mentioned decision of the national court or tribunal shall notify the parties, the Member States, the Commission, and the Council and also the Council or the European Central Bank.[15]

2.1.1 Written Procedure

The written procedure begins with the notification of the Registrar of the Court of Justice of the decision of the national courts that suspends the proceedings before them to the actors who have the right to be notified pursuant to Article 23. Parties of the main action, the Member States,

[14] Following the entry into force of the Treaty of Nice amending the Treaty on European Union, (OJ 2001 C 80 of 10 March 2001, p. 1), the Protocol on the Statute of the Court of Justice has been repealed and replaced by the Statute on the Court of Justice annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community.

[15] After the Council Decision amending the Article 20 of the Statute of the Court of Justice, 2002/653/EC of 12 July 2002 (OJ 2002 L 218, of 13 August 2002, p. 1), non-member states are also entitled to submit observations. ”Where an agreement relating to a specific subject-matter, concluded by the Council and one or more non-member States provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member State concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations”.

the Commission and the Council are the actors who are notified by the Registrar.[16]

The term “parties” in Article 23 refers to the parties to the case pending before the national court and they are only allowed to state their claims within the legal limits drawn by the referral of the national court.[17] Also the parties intervening in the main action are covered by this term according to the case law of the Court of Justice.[18] Moreover the decisive law on the legal capacity for participating in the proceedings is the national laws of the Member States.[19]

De Cicco and *Costa* are the landmark cases in which the ECJ indicated the scope of the term parties by stating that it would be pointless if the right to submit observations according to the special provision of Article 20(now Article 23) was expanded to all persons interested. Therefore the European Court ruled that there were no grounds for allowing a third party, which is not involved in the action before the court asking for a preliminary ruling.[20]

The governments of the Member States have the right to submit observations. The Registrar of the Court translates the decision of the national court to refer into the official languages of the European Communities and forwards it to the Member States. After this stage

[16] Koen Lenaerts; *Procedural Law of the European Union*, London, Sweet & Maxwell, 1999, p. 417.

[17] Case 62/72, Bollmann v. Hauptzollamt Hamburg-Waltershof, [1973] ECR 269.

[18] Case 2/74, Reyners v. Belgium, [1974] ECR 631.

[19] Case 9/74, Casagrande v. Landeshauptstadt Munchen, [1974] ECR 773.

[20] Case 19/68, De Cicco v. Landesversicherungsanstalt Schwaben, 1968] ECR 473; Case 6/64, Costa v. Enel, [1964] ECR 585.

handling the process of submitting observations is a matter of domestic procedural rules. Therefore the Member States must decide which institution or organ may submit observations.

In practice, the Member States has assigned one institution to deal with this important process and centralized the right to submit observations. In the United Kingdom, the Treasury solicitor's Department, established at the time of the U.K.'s accession to the European Community, is responsible for submitting observations.[21]

When it comes to the question whether other institutions or agencies of the Member States are allowed to submit observations on their own or with the government, the answer is no. Although in Article 226 EC cases other national institutions may submit observations, in preliminary rulings they are not allowed even if they are concerned. The ECJ decided that in Article 226 cases, the liability of the Member State arises whatever the agency of the State who infringes the EC Treaty.[22]

The Registrar also notifies the Commission and the Legal Service of the Commission is responsible for submitting observations. The procedure and the way in which the Commission handles the procedure will be discussed below.

The Registrar also automatically informs the Council on the decision of the national court. The wording of Article 23 seems to be giving a

[21]John Collins, *Representation Of A Member State Before The Court Of Justice Of The European Communities: Practice In The United Kingdom*, E.L.R., 27(3), 2002, p. 360. Also *see* Chapter II below.

[22]Kamiel J. M. Mortelmans, *Observations in the Cases Governed by the Article 177 of the EEC Treaty: Procedure and Practice*, C.M.L.R, 1979., p. 560. Also *see* case 77/69, Commission v. Belgium.

limited opportunity to the Council to submit observations by providing “if the act the validity or interpretation of which is in dispute originates from *it*”.[23] The practice of the Council indicates that it has a broad understanding of the term ”act”, therefore has submitted observations concerning the Council Resolutions, the Treaty and its protocols besides submitting observations when a regulation or a directive was at stake.[24] Moreover, the Court has never refused the observations of the Council, or the Commission or the other parties seem to have alleged the inconformity of the observations with the Article 23 Procedure.

According to Article 23, the European Parliament is only entitled to submit observations, if the act, the validity or interpretation of which is in dispute, was adopted jointly by the Parliament and the Council.

2.1.2 Submission of Written Observations

One should bear in mind that submission of written observations is not mandatory.[25] The parties, the Member States, the Commission and the Council and the Parliament are entitled to submit statements of case or written observations. The reason of the distinction made by the Statue between “statements of case” and “written observations” is not clear. According to some scholars the former are the statements, which the parties to the main case submit while the later refers to the observations made by the Member States, the Council, and the Commission.[26]

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[23]Article 23 of the Protocol On The Statute Of The Court Of Justice (emphasis added).

[24] Mortelmans, *supra* note 22, p. 561.

[25] Ulrich Everling, *The Member States of the European Community before their Court of Justice*, E.L.R., vol. 9, 1984, p. 224.

[26] Mortelmans, K., *supra* note 22, p. 562.

Within two months after the notification by the Registrar, interested parties must have submitted their observations. The ECJ does not accept written observations, which arrives to the Court after the expiry date of the mentioned time limit. The interest of the parties to the main action who are waiting for the outcome of the case and the interest of the Member States and the institutions entitled to submit observations are in conflict regarding strict application of the time limit. The attitude of the ECJ illustrates the willingness of the Court to decide on the issue raised by a preliminary ruling as soon as possible, because there is a national court waiting for the outcome of the preliminary ruling.

The Member States are entitled to submit observations in one of their own national languages and the Registrar deals with the translation of the documents received to the language of the case. The Parties, The Commission and the Council are obliged to submit in the language of the case, according to Article 29 of the Rules of Procedure, that is the language of the national court referring the case to the Court.

2.1.3 Procedural and Legal Consequences of Submissions

First of all, the submission of written observations has an important legal consequence envisaged in Article 95(1) 3 of the Rules of Procedure. This provision states that ”a case may not be assigned to the Chambers if … a Member State has exercised its right to submit … written observations unless the state concerned has signified that it has no objection, or if an institution expressly requests in its observations that the case be decided in plenary session.” According to this article a Member State who does not submit observations will not be able to

object to the decision of the Court assigning the Chambers for a particular case.[27]

Secondly, there are no rules indicating the submission of written observations only once. A Member State or an institution, which has given its observations within the time limit, has the possibility to answer the arguments of the other parties by submitting supplementary observations. Whilst, in practice the parties are submitting observations close to the end of the time limit which makes the answer of the others impossible.[28]

Finally, when it comes to the oral procedure it is not possible for a Member State or an institution to submit any other documents without the permission of the President, unless the Member States or the institutions has been submitted written observations within the time limit.

2.2 Oral Procedure

2.2.1 Who is Entitled to Submit Oral Observations?

According to Article 18 of the Statute, during the oral procedure is the Judge Rapporteur presents the report giving a summary of the facts and the written observations submitted to the Court where in practice rather than reading, the Rapporteur presents it to the parties before the oral procedure.[29] Afterwards the President allows oral observations by the parties, the Member States, and the Commission.

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[27] Koen, *supra* note 16, p. 419.

[28] Mortelmans, *supra* note 22, p. 563.

[29] Henry G. Schermers, Judicial Protection in the European Communities, Kluwer, Deventer, 1976, p. 364.

The Member States or the institutions that have not submitted written observations are also entitled to make oral observations. According to Mortelmans, the procedure regarding oral observations has not been regulated clearly and related to paragraph 1 of the Article 103 in relation with the articles following Article 55 of the Rules of Procedure. As a consequence, since the concept of "parties" in Article 57 refers all Member States, the Commission and the Council, the term has a broader aspect than the one mentioned in Article 23.[30]

2.2.2 Consequences of Submitting Oral Observations

Firstly, oral observations give the chance to the parties, the Member States or the institutions that have submitted written observations to stress on the important arguments before the Court. Also it is an opportunity for them to lay down counter arguments against the claims of the other actors.

Secondly, the Member States or the institutions, which have not submitted written observations have the opportunity to state their opinions regarding the case in oral proceedings. Sometimes a case may not appear to be important for an actor who is entitled to submit written observations[31] or a Member State may miss the deadline of

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[30] Mortelmans, *supra* note 22, p. 566.

[31] Court Of Justice Of The European Communities, Information Note On References By National Courts For Preliminary Rulings, cited in: http://curia.eu.int/en/instit/txtdocfr/autrestxts/txt8.pdf, visited February 2003; *see* also Crisham, C.A., Mortelmans, K.J.M., *Observations of Member States in the Preliminary Rulings Procedure before the Court of Justice of the European Communities*, Essays in European Law and Integration, David O'Keeffe and Henry G. Schermers, Kluwer, 1982, p. 43.

submitting written observations because of some organizational problems.[32]

Finally, giving only oral observations is a weaker tool compared to the written observations. Moreover many risks of incorrect translation may occur during the simultaneous interpretation of oral observations of an agent of a Member State or an institution. Especially Schermers states that written observations are carefully translated by the relevant departments of the Court while the oral ones may be totally misunderstood by the Judges because of an unprepared interpreter or a lawyer speaking very quickly.[33] Contrary to this argument Mortelmans argues that the issue is exaggerated by Schermers and listening to the arguments of the parties orally makes it possible to understand a case in a better way after reading the written documents.[34]

2.3 Costs

Who is obliged to pay the costs incurring from submitting observations? The ECJ refused to deal with the issue of costs of the parties of the main action by stating that the decision regarding costs was a matter for the national court that refers the case to the European Court.[35] The Courts ruling that declares the costs of the governments of the Member States and the institutions submitting observations not recoverable, were also consistent with its approach to this issue in general[36]

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[32] Everling, *supra* note 25, p. 225.

[33] Schermers, *supra* note 29, p. 364

[34] Mortelmans, *supra* note 22, p. 566.

[35] Case 62/72, Bollman, *supra* note 17.

[36] Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, [1962] ECR 45.

3. Application of the Procedure

This section will cover the examination of the application of the procedure by the Member States and the Commission. The conduct of the Member States is important for the aim of this paper and it is beneficial to understand the problems regarding their conduct by comparing the attitude of the Commission in preliminary rulings.

3.1 Conduct of the Commission

The Legal Service of the Commission, composed of lawyers from all the Member States and familiar with all Community legal systems and all Community working languages, is assigned for this duty.[37] The Commission is the only actor that submits observations in every case. This attitude of the Commission demonstrates that it does not distinguish the cases according to their legal subject matter, category or geographical origin. According to Mortelmans this conduct is an outcome of the role given to the Commission by the Treaty to ensure the proper functioning and development of the common market.[38] Besides being assigned in such a way, submitting observations consistently is a political choice adopted by the Commission, which, according to its policy prerogatives, finds it beneficial to describe the cases in Community context.

The Commission also enjoys a more advantageous situation than the Member States thanks to the composition of its Legal Service, which

[37] See the web site of the Legal Service http://www.europa.eu.int/comm/dgs/legal_service/rolsj_en.htm, visited in April 2005.

[38] He is mainly stressing on the Article 155 of EC Treaty, Mortelmans, K., *supra* note 22, p. 566.

gives the chance to assign agents who has the same nationality with the case referred.[39] Therefore most of the difficulties encountered by the Member States while submitting observations to the cases originating from another legal system cannot even considered as difficulties in the case of the Commission.[40]

As a consequence the Commission is capable of intervening to the cases in which not only the validity of its own acts are at issue but even when a very detailed national legislation of a Member State is at stake. In some cases the Commission also provides with the Court a comprehensive summary of the relevant legislation of the Member States, which is beneficial for the Court to understand and evaluate the issue in question.[41] In this aspect, the observations of the Commission becomes concomitant of a vigorous judgment since they supply the ECJ with profound information *vis-à-vis* the national legislations of the Member States and their application.

3.2 Conducts of the Member States

The conduct of the Member States in preliminary rulings is an important indicator of their understanding of the Article 23 Procedure. The Member States furnished themselves with various tools to influence the supranational institutions of the European Communities and created a privileged role for themselves. This privilege conferred upon the

[39] See the web site of the Legal Service http://www.europa.eu.int/comm/dgs/legal_service/rolsj_en.htm, visited in 2005.

[40] Crisham and Mortelmans, *supra* note 31, p. 52.

[41] E.g. Case 45/76, Comet BV v Produktschap voor Siergewassen, [1976] ECR 2043.

Member States confirms their pivotal role within the Community system.[42]

The procedure in Article 23 of the Statute of the ECJ is also designed to serve for the masters' of the Treaties in order to give them the chance to protect their interests by influencing the European Court's case law.

There are very few studies that examine the Article 23 Procedure and the motivations behind the decisions of the Member States to submit or not to submit observations. Most of those try to deduce from some statistical works the motives that influence the conduct of the Member States on whether submitting or not.[43] In the following part the attitudes of the Member States regarding the Article 23 Procedure will be examined in occasional basis.

Statistical analysis show that the Member States exercise their right to submit observations under Article 23 regarding a) admissibility b) interpretation c) validity and d) the foundations of the Community legal order.[44]

3.2.1 Observations Regarding Admissibility

As a very well known fact, admissibility is a discussion takes place in the beginning of the judgments of the ECJ especially when the question concerning the issue is raised by *amicus curiae*. According to some

[42] Nuffel, *supra* note 12, p. 874.

[43] *See* Kamiel J. M. Mortelmans, *The Role of Government Representatives in the Proceedings: Statistical Data on the Observations of the Member States in Preliminary Proceedings,* in Article 177 EEC: Experiences and Problems*,* Henry G. Schermers, Christiaan W.A. Timmermans(ed.), T.M.C. Asser Instituut, The Hague, 1987; also *see* Everling, *supra* note 25.

[44] Crisham and Mortelmans, *supra* note 31, p. 49.

scholars the framework provided by the Treaty of Rome was skillfully exploited by the Court of Justice and because of this development on the preliminary rulings procedure the tendency of the Member States to put forward admissibility claims were increased.[45] By the admissibility claims, the Member States has been aiming to prevent the ECJ to access to the cases before their own national courts and to impede the judicial activism of the European Court.

When the admissibility question is at stake, the European Court will observe the grounds of its jurisdictions and decide on the issue of admissibility before proceeding further. Admissibility issues may be categorized as: i. Manifest inadmissibility, where it is apparent that the ECJ has no jurisdiction to take an application into consideration, it may declare the application inadmissible.[46] ii. No genuine dispute, which arose for the first time in the cases Foglia I and Foglia II where an Italian Court referred questions regarding the conformity of the French legislation with the Community law on the taxation of wine. Nevertheless the ECJ did not accept to answer the question of the Italian court by taking the view that the dispute had an artificial character.[47]iii. The concept of court of tribunal is another issue concerning admissibility in which the ECJ has taken a broad understanding of the terms “courts or tribunals of Member States” within the context of Article 234 EC. iv. Limits of Community law is also a question regarding admissibility because in several cases the

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[45] Anthony Arnull, *Judicial Architecture Or Judicial Folly? The Challenge Facing The European Union*, E.L.R., 24, 1999, p. 518-519.

[46] According to Article 92 of the Rules of Procedure. Also *see* Case 138/80, Conseil De L ' Ordre Des Avocats A La Cour De Paris)-Jules Borker, [1980] ECR 1975.

[47] Case 104/79, Pasquale Foglia v Mariella Novello, [1980] ECR 745. Case 244/80, Pasquale Foglia v Mariella Novello, [1981] ECR 3045.

discussion boiled down to the problem that the Community law did not cover questions of the national courts.[48]

3.2.2 Observations Regarding Interpretation

When the question of the national court concerns the interpretation of the Community law, the Member States will submit observations if they find the issue important for their policy concerns. According to Crisham and Mortelmans, the Member States more likely submit observations when the matter boils down to the competences of the Community and the Member States and prefer to stay passive in the cases concerning other issues such as custom tariffs or social security unless they are not directly involved.[49]

Additionally, even though the ECJ does not have such a power, it may find itself in a position in which interpretation of the national law is unavoidable.[50] The Member States, whose national laws are under scrutiny before the ECJ, are most likely the only ones submitting observation.

The Member States are choosing to submit observations by evaluating their interests on the outcome of a certain case. The most natural and common reaction of the Member States is submitting observations if they consider that they have direct individual interest on the issue regarding the case.

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[48] Case 175/78, La Reine v Vera Ann Saunders, [1979] ECR 1129.

[49] Crisham and Mortelmans, *supra* note 31, p. 49.

[50] Formulation of the questions by the national judges is one of the reasons that will make the European Court to interpret the national law.

3.2.3 Observations Regarding Validity

National courts may refer questions concerning the validity of a measure of Community legislation where the Member States usually prefer to not to submit observations and leave the ground for the institutions whose measure has been challenged.[51]

Additionally, preliminary rulings have been always an arena where the national legislations and the Community legislation clashed and the conformity of the latter with former discussed. The European Court ruled that it does not enjoy the power to declare the incompatibility of a measure of national law with the Community law but provided the national courts with criteria enabling them to decide on the compatibility issues.[52] In such cases observations are submitted by the Member States whose national laws are challenged and the other Member States usually remain silent unless they have the same interest or they are indirectly concerned.[53]

3.2.4 Observations Regarding the Foundations of the Community Legal Order

In the case law of the European Court there have been many cases in which the foundations of the Community legal order was build up by the Court. Such cases referred by the national courts of the Member States has given the chance to the ECJ to interpret the Treaties of the European Community in a constitutional form rather than adopting the traditional international law lines.[54] The important judgments where the

[51] Mortelmans, *supra* note 22, p. 578.

[52] Joined Cases 97-98/79, Kefer and Delmelle, [1980] ECR 103.

[53] Crisham and Mortelmans, *supra* note 31, p. 59.

[54] Arnull, *supra* note 45, p. 520.

Court has reached to constitutional principles such as the principles of direct effect[55], supremacy[56], and the liability of the Member States[57] were the cases based on the questions sent by the national court under Article 234 EC.

The importance of the mentioned cases also dragged the attentions of the scholars to the conduct of the Member States who had the chance to intervene to the process of "constitutionalization of the Treaties" by submitting observations. Although all governments have the right to be notified and to state their views, very few of them have used this right and preferred to use it in cases where their national law or interest was directly challenged.[58] For example, in *Costa* only Italian government submitted observations and regardless of the significance of the case the other governments remained silent. As already examined and considered as "illustrations of a policy decision of unclear motivation" by Stein, absence of the French government was unexpected because of its general attitude against the Community.[59]

4. Problems Regarding the Article 23 Procedure

4.1 Lack of Joint Action in the In-court Behaviors of the Member States

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[55] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, [1963] ECR 1.

[56] Case 6/64, Flaminio Costa v E.N.E.L., [1964] ECR 585.

[57] Case C-479/93, Andrea Francovich v Italian Republic, [1995] ECR I-03843.

[58] Mortelmans, *supra* note 43, p. 258.

[59] Stein, Eric, *Lawyers, Judges, and Making of a Transnational Constitution*, American Journal of International Law, 75(1) p1-27, 1981. p. 26. Also *see* this article for the conduct of the Member States and the Institutions of the Community in the landmark judgments of the ECJ.

The Member States always want to have a word in the development of the European Community and therefore it is very normal to expect them to utilize every way to influence the case law of the ECJ.[60] The issue boils down to the existing tension between the Community institutions and the Member States.[61] Since it is out of question to intervene directly before an independent court in the European legal culture, the procedure laid down in Article 23 is the only tool for the Member States to perform a legitimate intervention.[62]

The Member States are concerned about the general interest of the Community and their special interests during the proceedings before the ECJ. The Member States and the Community institutions define general interest of the Community in very different ways and therefore the mentioned tension between the institutions and the Member States arises as a result. If the Member States have their own positions regarding the general interest, it is logical to expect them defending such positions in their in-court briefs. Especially, if it is assumed that the Member States have common positions among each other, it is certainly the most effective way for them to adopt a joint action during drafting and presenting their views before the Court. According to Rassmussen there are no evidences that illustrates a joint action, moreover even it is impossible to observe formulation of common attitudes on an *ad hoc* basis.[63] In contrary, Everling states that the

[60] Everling, *supra* note 25, p. 218.

[61] Everling, *supra* note 25, p. 215.

[62] Appointment of the judges is also proved to be an unsuccessful method in this regard. Everling, *supra* note 25, p. 218.

[63] Rassmussen, *supra* note 9, p. 276.

representatives of governments are communicating by phone or sharing their ideas at special meetings when important cases are at stake.[64]

At this point two different perspectives among political science theories are worth mentioning. On the one hand, neo-functionalists support the idea that the European Court has its independent position and pursuing its own interest as a driver of the European integration process like other supranational institutions.[65] According to their view the Member States can never influence the ECJ even they defend the same arguments via their representatives before the Court. From a neo functionalist point of view one might assume that the joint action taken by the Member States while submitting observations would not influence the decisions of the ECJ. On the other hand, neo-rationalists argue that the European Court does not enjoy any autonomous power and therefore the decisions of the Court should be consistent with the interests of the Member States.[66] They emphasize that if there is a development in legal integration, it is because of this development is in the interests of the Member States. As a result neo rationalists approach would suggest that the joint action would be influential but since the Member States has not been stated their objections jointly, their interests are consistent with the Court rulings.

In my opinion, the adoption of a joint attitude, in an important case before the European Court, by all of the representatives of the Member States will definitely influence the outcome of the case. Nevertheless,

[64] Everling, *supra* note 25, p. 227.

[65] Mattli and Burley**,** A., *supra* note 15, p. 63.

[66] Geoffrey Garrett and Barry Weingast,. *Ideas, Interests, and Institutions: Constructing the EC's Internal Market,* in Judith Goldstein and Robert Keohane (eds.) Ideas and Foreign Policy. Ithaca NY: Cornell University Press, 1993, p. 200.

this does not mean that I agree with the neo rationalist idea on the consistency of the interests of the Member States and the Court. I simply believe that the Member States were not aware of the importance of the Article 23 Procedure by which they can intervene effectively to the decisions of the Court. Contrary to the arguments stated by Rasmussen, I strongly believe that the governments are not considering the usefulness of aligning arguments in their briefs submitted to the Court.[67]

4.2 Out-court and In-court Behaviors of the Member States

The Member States have had contradictory, at least different, arguments in their out-court and in-court conducts even on the identical issues. For example despite of their pro-integrationist out-court attitudes as small states which are dependent on effective Community law in their relationships with powerful members of the Community, Belgian and Dutch governments submitted observations against the integrationist view which was in line with their policy concerns and interests in *van Gend*.[68] Another example is already given in the previous parts of this paper regarding the absence of the French government in *Costa*. It was highly expected from France to submit observations in such a case where the out court attitudes of the French government were illustrating its sensitivity concerning the issue.

Abovementioned conducts prove that the Member States are benefiting from the Article 23 Procedure only to defend a piece of national legislation rather than setting forth their own general views on European Integration. I believe that the Member States are not considering the

[67] Rassmussen, *supra* note 9, p. 276.

[68] Stein, *supra* note 59, p. 27.

Article 23 Procedure as a tool to defend their views on the general interest of the Community.

4.3 Domestic Institutions Assigned to Submit Observations

Assigning domestic institutions, incapable of defending national interest other than submitting observations to defend short-term interests, to deal with submitting observations is another problem concerning the Article 23 Procedure. It is already mentioned that the Member States have the chance to defend their individual interests and the general interests of the Community by submitting observations. The issue of defending individual interests arises when the validity of national provisions or important political matters at the national level are at stake before the national court in the main action on the basis of Community law.[69] The conduct of the Member States illustrates that they are submitting observations mostly when the dispute originates from their own national courts, since the individual interests are at stake.[70] Also the governments prefer not to intervene to the cases even though they originate from a court established in their territory, if none of their national interest is affected.[71]

When it comes to the general interests of the Community, it is not very common to see government briefs including opinions on the general interests of the Community. I believe that the reason is the nature of the national institutions assigned for submitting observations in preliminary rulings. Stein described the problem by arguing "…it may be too much to expect a national lawyer-bureaucrat… to preside with any degree of

[69] Mortelmans, *supra* note 22, p. 581.

[70] Mortelmans, *supra* note 51, pp. 287-289.

[71] Mortelmans, *supra* note 22, p. 57.

enthusiasm over a steady erosion of national power and his own vested career interests."[72] The bureaucratic nature of the institutions and their agents creates an environment where short-term individual interests of the Member States prevail over the general and long-term plans on the Community. The governments prefer to defend their broad perspectives concerning long-term interests of their state outside the court, in the arenas such as the Council meetings.

4.4 The ECJ and the Article 23 Procedure

The case law of the ECJ illustrates that the Court emphasizes the particular importance of the procedure envisaged in Article 23 of the Statute of the Court of Justice. The sensitivity of the ECJ, regarding the procedure, can be observed in cases which are declared inadmissible where the legal and factual background of the dispute were not explained by the referring national court clearly.[73]

In *Saddik*, the European Court emphasized the importance of the clear explanation of the legal and factual context of the questioned referred by stating two reasons. First of all, the necessary information about the background of the questions is crucial for the ECJ to arrive at an interpretation of Community law, which will be helpful to the national court.[74] Secondly, "information provided in decisions making references not only enables the Court to give helpful answers but also enables the

[72] Stein, *supra* note 59, p. 27.

[73] Case C-458/93, Criminal proceedings against Mostafa Saddik, [1995] ECR I-0511; Case C-116/00, Criminal proceedings against Claude Laguillaumie, [2000] ECR I-04979; Case C-422/98, Colonia Versicherung AG Zweigniederlassung München and Others v Belgian State, [1999] ECR I-01279.; Joined cases C-320 to 322/90 Telemarsicabruzzo v Circostel [1993] ECR I-393, para. 6, the order in Case C-157/92 Pretore di Genova v Banchero [1993] ECR I-1085, para. 4, and the order in Case C-378/93 La Pyramide [1994] ECR I-3999, para. 14.

[74] Case C-458/93, Saddik, para. 12.

Governments of the Member States and other interested parties to submit observations pursuant to the Article 23 Procedure. It is the Court's duty to ensure that the opportunity to submit observations is maintained, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties."[75]

Especially the second part of the reasoning of the European Court regarding the Article 23 Procedure demonstrates the awareness of the Court that the compliance with the procedure is an important prerequisite for the legitimacy of the decisions of the ECJ.[76] In other words, the European Court considers it necessary to have an access to the policy inputs related to the issues raised by the national courts in order to reach to healthy judgments. The opinions of the intervening Member States constitute the substructure of the final decision of the Court, since the Court mostly include quotations from the observations of the Member States in its judgments.

Despite of this awareness it is also claimed that the Court is not giving a proper consideration to the interests of the Member States, which they state in their observations. According to Stein, the Court, thanks to its pro-integrationist attitude, developed an independent legal order for the EC by landmark judgments rendered in front of the Member States that clearly stated their resistance to the integrationist approach by submitting observations.[77] Therefore it has been claimed the Court does

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[75] Case C-458/93, Saddik, para. 13; Joined Case C-141, 142, and 143/81, Gerrit Holdijk and others, [1982] ECR 1299, para. 6.

[76] Tridimas, Takis, *Knocking On Heaven's Door: Fragmentation, Efficiency And Defiance In The Preliminary Reference Procedure*, C.M.L.R., 40, 2003, p. 25.

[77] Stein, *supra* note 59, p. 25.

not feel under political pressure even the representatives of all of the Member States present the same arguments in their observations.[78]

First of all, I do not believe that the Member States have taken convincing attitudes in their in court briefs to avoid the Court to arrive at pro-integrationist judgments. As a result, we are lack of such information to test above-mentioned ideas on ignorant Court. Secondly, since the main bodies of the judgments of the ECJ usually include the arguments stated by the Member States in their observations submitted, it is obvious that the Court even takes the arguments of the individual governments into consideration.

Finally, it is an undeniable fact that pro-integrationist approach of the ECJ has been always dominant but also it is not possible to claim that ignorance against the arguments of the Member States emphasized such an attitude. The reluctant behaviors of the Member States in putting forward their policy concerns before the Court in the preliminary rulings left a huge area for the Court and there has been always another integrationist, the Commission, who has never missed the chance to submit observations in preliminary rulings.[79]

4.5 Difficulties Arising form the Procedure Itself

Although existence of various defects of the Article 23 Procedure were claimed and discussed between the Member States, amendments regarding the claimed defects have not taken place. The arguments

[78] Everling, *supra* note 25, p. 227.

[79] Stein's article demonstrates the close alliance between the Court and the Commission in the landmark cases. He further argues that such an alliance solved some of the concerns of the Court regarding he legitimacy and acceptance of its judgments. Stein, *supra* note 59, p. 26.

mainly focused on the issues such as the time limit for submitting observations, and the difficulties for the Member States to understand the background of the cases that does not originate from their own national courts.

First of all, two months envisaged in Article 23 of the Statute claimed to be very short to prepare observations.[80] Especially the focus were the difficulties arising from the nature of the government that requires consensus between different organs of the bureaucracy to decide on whether submitting and to prepare a brief approved by all of them.[81] Nevertheless a preliminary ruling means that there is a case pending before the national court and waiting for the answers of the questions to be rendered, so that extension of the two months limit will slow down the legal process that may discourage the national courts to refer questions to the ECJ. Moreover, the time limit also applies for the Commission that has never failed to submit observations even though it is also obliged to follow a similar bureaucratic process to in order to prepare and submit observations.

The second criticism set forth is that the Member States are having difficulties to identify and understand the background of the cases that are originating from the legal systems other than their own. The existence of certain difficulties is undeniable and it is also the fact that the Commission does not encounter such difficulties thanks to its organization consists of personnel coming from different kinds of legal backgrounds.

[80] The U.K. Government's proposals for amendments of the procedure, E.C Bulletin 10/78.

[81] Everling, *supra* note 25, p. 226.

I believe that submitting or not submitting observations is a political choice regardless of the time pressure and other difficulties. As it is argued above, the main problem concerning the system is the Member States themselves who do not have the political motivations to submit observations and who are not aware of the importance of the procedure under Article 23 of the Statute of the ECJ.

CHAPTER II

1. Systematic Presentation And Evaluation Of The Cases In Which The Uk Government Has Acted Between The Years 1999 And 2002

In this chapter the, conduct of the United Kingdom (U.K.) government under Article 23 of the Statute will be portrayed according to the statistical data obtained by the analysis of the case law of the ECJ in preliminary rulings between the years 1999 and 2002.

The first part provides introductory information on the representation of the UK before the ECJ by describing the organizational set up in the UK for dealing with submitting observation under the Article 23 Procedure. The second part deals with the examination of the mentioned statistical data by the help of the Tables created according to it. The attitude of the U.K. government will be examined in detail by considering the origin, and the legal subject matter of the cases.

1.1 The Organizational setup in the UK

Treasury Solicitor's Department, acting independently within the Government Legal Service, is mainly assigned to cope with submitting observations on behalf of the UK government in the preliminary rulings.[82]

Particularly, the European Division of the Treasury Solicitor's Department is in charge of acting before the ECJ when it comes to submitting observations pursuant to Article 23 of the Statute. The

[82] *See* http://www.treasury-solicitor.gov.uk/default.htm, visited in April 2005.

European division consists of two sections, Advisory and Litigation, and established during the accession of the UK to the European Community and supervised by the Cabinet Office Legal Adviser on European Union.[83]

On the one hand, the Advisory Section of the division is under the duty to give advice to the Cabinet Office on the issues related to Community law. On the other hand, the role of the Litigation Section is to assure consistency in the observations submitted by the UK and harmonize the position to be taken when more than one Departments of the government have their own opinions. The address of the notifications of the Registrar of the ECJ about the references under Article 234 is the Litigation Section that distributes the copies of the cases, to the departments that have close interest concerning the legal subject matter of the case.[84]

The decision on whether submitting or not submitting observations in a certain case is given, after receiving the response of the interested departments, in the regular meetings of the European Division and depends on the fact that the issue concerns or interests the UK.[85]

1.2 Analysis of the Statistical Data

1.2.1 General Outlook of the Conduct of the UK

[83] *Supra.*

[84] *Supra* note 82.

[85] John Collins, *Representation of a Member State Before the Court of Justice of the European Communities: Practice in the United Kingdom*, European Law Review, 27(3), pp. 360-361. Collins also states: “Naturally the UK takes part in references involving a government department…”

Table 1 illustrates the total number of judgments and the observations submitted by the UK in each year covered by this research. The term observations refer to any kind of intervention foreseen under Article 23 such as submitting only written or oral observations and also submitting both oral and written observations.[86]

TABLE 1: Total Number of Observations Submitted by the United Kingdom Government in Cases Rendered between 1999 and 2002.

Years	***1999***	***2000***	***2001***	***2002***	***TOTAL***
Total Number of Judgments concerning UK	136	152	113	131	**532**
Observations Submitted by the UK	50	45	37	33	**165**
%	36.76	29.61	32.74	25.19	**31.02**

[86] See Chapter two for a detailed information on the type of observations that can be submitted.

1.2.2 Geographical Factors

Table 2 shows the number of observations submitted by the UK government in cases originating form the courts of the United Kingdom whereas Table 3 demonstrates the number of observations in cases originating from the courts situated in other Member States. Tables 2 and 3 underline the fact that like other Member States, geographical origin of the cases is a very important factor for the UK to submit or not to submit observations.

According to Table 2, the UK government submitted observations to almost all of the cases originating from its own courts. On the other hand, the situation in Table 3 shows that the percentage of the observations in cases originating from a court situated in another Member State is rather low. Moreover, head of the Litigation Section, John Collins as one of the lawyers entitled to represent the UK before the ECJ, states that it is natural that the UK takes part in references originating from its own courts.[87]

The UK only failed to intervene to four cases that were referred to the ECJ by its own courts.[88] Three of those cases are on the trade marks

[87] Collins, *supra* note 85, pp. 367.

[88] Case C-206/01, Arsenal Football Club plc v Matthew Reed, [2002] ECR 00001; Joined Cases C-414 to 419/99, Zino Davidoff SA v A & G Imports Ltd and Levi Strauss & Co. and Others v Tesco Stores Ltd and Others, [2001] ECR I-08691; Case C-143/00, Boehringer Ingelheim KG, Boehringer Ingelheim Pharma KG, Glaxo Group Ltd, The Welcome Foundation Ltd, SmithKline Beecham plc, Beecham Group plc, SmithKline & French Laboratories Ltd and Eli Lilly and Co. v Swingward Ltd and Dowelhurst Ltd., [2002] ECR I-03759; Case C-253/00, Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd., [2002] ECR I-07289.

directive[89] while the other one, *Superior Fruiticola*,[90] is on the interpretation of Council Regulation on the common organization of the market in fruit and vegetables.[91] Superior Fruiticola was a Spanish grower of a variety of grapes. Two British growers marketed the same variety of grapes, but under different names. Superior alleged that this was a breach of the Regulation 2200/96 and complained to the British Horticultural Marketing Inspectorate (HMI) assigned to make the checks referred to in Regulation No 2200/96. HMI did not take action. Consequently, Superior commenced proceedings in the UK courts, which asked to the ECJ if compliance with the provisions of the Regulation 2200/96 on quality standards must be capable of enforcement by means of civil proceedings instituted by a trader against a competitor. European Court ruled that for EU quality standard rules to be effective, it must be possible to enforce obligations by means of civil proceedings. None of the Member States were present in *Superior Fruiticola*, which was decided in plenary session. The UK government did not act in the mentioned case simply because neither a national legislation nor a decision of an institution was challenged.

Another point, which is worth to mention is the conduct of the UK government in cases where a UK agency is part of the main proceedings before the national court. It is normal to observe that a Member State prefers not to submit observations if one of the parties of the main action is a state agency of their own, since the agencies already are deemed to be their voices before the Court.[92] However,

[89] Joined Cases C-414 to 419/99, Case C-206/01, Case C-143/00 *supra.* These cases will be discussed below.

[90] Case C-253/00, *supra* note 88.

[91] Reg. 2200/96 [1996] OJ L 297/1.

[92] Mortelmans, *supra* note 22, p. 578.

analysis of cases where a UK agency involved illustrates that the Treasury Solicitor's Department is the only institution, which submits observations.[93] For instance in cases *Standley and Others*[94] and *British Agrochemicals*[95], Ministry of Agriculture, Fisheries and Food were part of the main proceedings before the High Court of Justice of England and Wales that made a reference to the ECJ. The Ministry were not represented while the UK government were represented by the Treasury Solicitor's Department's lawyers who were assisted by the lawyers from the Ministry of Agriculture

[93] Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., [2002] ECR 00000 ;Case C-304/00, Regina v Ministry of Agriculture, Fisheries and Food, ex parte W.H. Strawson (Farms) Ltd and J.A. Gagg & Sons, [2002] ECR 00000 ;Case C-267/00, Commissioners of Customs and Excise v Zoological Society of London, [2002] ECR I-03353 ;Joined Cases C-27/00 and C-122/00, Omega Air, [2002] ECR I-02569 ;Case C-101/99, The Queen v Intervention Board for Agricultural Produce, ex parte British Sugar plc., [2002] ECR I-00205 ;Case C-235/00, Commissioners of Customs & Excise v CSC Financial Services Ltd, [2001] ECR I-10237 ;Case C-235/99, The Queen v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova, [2001] ECR I-06427 ;Case C-63/99, The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk, [2001] ECR I-06369 ;C-409/98, Commissioners of Customs & Excise v Mirror Group plc, [2001] ECR I-07175 ;C-108/99, Commissioners of Customs & Excise v Cantor Fitzgerald International, [2001] ECR I-07257 ;Case C-192/99, The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, [2001] ECR I-01237 ;Case C-173/99, The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), [2001] ECR I-04881 ;C-380/98, The Queen v H.M. Treasury, ex parte The University of Cambridge, [2000] ECR I-08035 ;C-100/96, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: British Agrochemicals Association Ltd, [1999] ECR I-01499 ;Case C-293/97, The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others, [1999] ECR I-02603 ;Case C-94/98, The Queen, ex parte Rhône-Poulenc Rorer Ltd and May & Baker Ltd v The Licensing Authority established by the Medicines Act 1968, [1999] ECR I-08789 .

[94] Case C-94/98, *supra*.

[95] Case C-106/01, *supra* note 93.

TABLE 2: Total Number of Observations Submitted between 1999 and 2002 by the United Kingdom Government in Cases Originating from the Courts Situated in the United Kingdom.

Years	***1999***	***2000***	***2001***	***2002***	***TOTAL***
Number of Judgments Originating from the UK	16	15	18	17	66
Observations Submitted by the UK	16	15	17	14	62
%	100	100	94.44	82.35	93.94

TABLE 3: Total Number of Observations Submitted between 1999-2002 by the United Kingdom Government in Cases Originating from the Courts Situated outside the United Kingdom.

Years	***1999***	***2000***	***2001***	***2002***	***TOTAL***
Number of Judgments Originating from the other Member States	120	137	95	114	466
Observations Submitted by the UK	34	30	20	29	113
%	28.33	21.90	21.05	25.44	24.25

12.2.1 Judgments Regarding the Sixth Council Directive

The motives for the UK to submit or not to submit observations are very much reflected by the judgments regarding Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes reflect the conduct of the UK while submitting observations. When there were questions from its own courts on the mentioned directive, UK government had never missed the chance to submit observations. In contrast the UK submitted observations only in one case referred by a court situated in another Member State concerning the same directive.[96] The explanation of this conduct may be the issues arising from the mentioned directive are relating to the complex national tax laws of the Member States. The governments other than the one whose national tax legislation is at stake prefer not to intervene, since they are not interested by the outcome of the case. Therefore this conduct is not special for the UK.

The only situation where the UK submitted observations concerning the Sixth Council Directive (77/388/EEC) in a case originating from another Member State, Austria, was not an extraordinary one. It was about a fee for a genetic test carried out by a medical expert appointed by the court dealing with a paternity dispute. The Austrian court asked to the ECJ if the Sixth Council Directive was granting an exemption for value added tax ('VAT) for the mentioned fee paid for the doctor. Despite of the observations submitted by the UK, Austria and Netherlands claiming that the certain fee should be exempted, the European Court followed

[96] Case C-384/98, D. v W., [2000] ECR I-06795.

the arguments of the Commission and the Advocate General by finding the exemption not applicable.[97]

On the other hand there are groups of cases where the UK government acted regardless of their geographical origin. If a government submits observations consistently to a group of case arising from the same legal matters, it means that the government has interests in influencing the outcome of the cases in line with its own policy concerns. Consistently submitting observations to identical cases also illustrates that the government is aware of the fact that it may affect the outcome of the certain cases by utilizing the tool provided in Article 23. Therefore examination of the legal subject matter of the judgments that the UK government has acted regardless of their geographical origin, lays down the issues, which are considered as important for the policy prerogatives of the UK. Also not taking part in cases concerning a legal subject matter that normally interests the government will point out that the government somehow missed the chance to submit observations because of reasons such as organizational fallacies.

1.2.2.2 Cases Regarding the Brussels Convention

Cases on the Brussels Convention on Jurisdiction and Enforcement[98] are worth mentioning as the cases where the UK has acted not considering the court of origin. Rather than illustrating a unique undeviating policy choice, mentioned conduct is a consequence of the characteristics of the Brussels Convention itself and common for almost all of the Member States. The Convention consists of legal terms and

[97] *Supra.*

[98] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters dated 1968.

concepts that might have dissimilar meanings in the Member States having different legal cultures. Consequently the national courts refer questions on the 1968 Convention in order to ascertain if the concepts and words has their own independent meaning common to all the Member States or the national rules of conflict of laws are applicable to the cases before the national courts.[99] Therefore the Member States have an interest in submitting observations to put forward their own interpretations on the concepts at stake. Additionally as a country that has the common law tradition of legal development through the cases, the UK is having difficulties to apply the Convention written in civil law technique.[100] As a result, the UK government has submitted observations to the 13 of the 18 cases, related to the Brussels Convention between the years 1999 and 2002, even though they were not originating from the courts situated in the UK.[101] Analysis of the

[99] Case C-260/1997, Unibank A/S v Flemming G. Christensen, [1999] ECR I-03715.

[100] For further information on the Convention and its application in UK *See* Kaye, Peter, Civil Jurisdiction and Enforcement of Foreign Judgments: The Application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982, Professional Books Limited, London, 1987.

[101] Case C-159/97, Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA, [1999] ECR I-01597; Case C-99/96, Hans-Hermann Mietz v Intership Yachting Sneek BV, [1999] ECR I-02277; Case C-260/97, Unibank A/S v Flemming G. Christensen, [1999] ECR I-03715; Case C-267/97, Eric Coursier v Fortis Bank and Martine Coursier, née Bellami, [1999] ECR I-02543; Case C-440/97, GIE Groupe Concorde and Othes v The Master of the vessel "Suhadiwarno Panjan" and Others, [1999] ECR I-06307; Case C-420/97, Leathertex Divisione Sintetici SpA v Bodetex BVBA, [1999] ECRI-06747; Case C-8/98, Dansommer A/S v Andreas Götz, [2000] ECR I-00393; Case C-7/98, Dieter Krombach v André Bamberski, [2000] ECR I-01935; Case C-38/98, Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento, [2000] ECR I-02973; Case C-412/98, Group Josi Reinsurance Company SA v Universal General Insurance Company , [2000] ECR I-05925; Case C-387/98, Coreck Maritime GmbH v Handelsveem BV and Others, [2000] ECR I-09337; Case C-271/00, Gemeente Steenbergen v Luc Baten, [2002] ECR 00000; Case C-334/00, Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH, [2002] ECR I-07357; Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, [2002] ECR I-08111; Case C-96/00, Rudolf Gabriel, [2002] ECR I-06367; Case C-80/00, Italian Leather SpA v WECO Polstermöbel GmbH & Co, 2002 ECR I-04995; Case C-37/00, Herbert Weber v Universal Ogden Services Ltd, [2002] ECR I-02013; Case C-256/00, Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH

cases lack of British intervention demonstrates that the UK did not submit observations to the cases on the interpretation of Article 27 of the Brussels Convention without one exception where the national court requested a general interpretation on Article 27.[102] In contrast rest of the cases on Article 27 in which the UK did not submit observations were covering very specific issues of national laws such as intellectual property rights relating to vehicle body parts and public policy.[103]

1.2.2.3 Judgments Regarding the Citizenship of the European Union

The Maastricht Treaty introduced new phenomena into community primary law – the citizenship of the European Union. The article 17 (ex-art. 8) says:

> Citizenship of the Union is hereby established. Every citizen holding the nationality of the Member State shall be a citizen of the Union. (Maastricht version) Citizenship of the Union shall complement and not replace national citizenship. (Amsterdam amendment)

In general, Articles 18-22 EC (ex-art. 8a-8e) specifies the rights and obligations emerge from the citizenship of the EU. In particular, the catalogue of rights consists of the right to free movement and residence (Art. 18), active and passive electoral rights in the municipal elections and elections into the European Parliament (Art. 19), right for diplomatic protection (Art. 20), petition rights to the European Parliament and right to refer matters to Ombudsman (Art. 21). Furthermore, the Treaty provides the Council of Ministers with a mechanism enabling the

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& Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog), [2002] ECR I-01699.

[102] Case C-80/00, *supra*.

[103] Case C-38/98, and Case C-7/98, *supra* note 101.

Council to strengthen or supplement aforesaid catalogue, on proposal from the Commission, in co-decision with the European Parliament (Art. 22).[104]

Citizenship of the European Union has been one of the most sensitive issues for the UK who is well known for its Euro-skepticism. Despite of this fact, the United Kingdom was the country, where the ratification of the Maastricht Treaty, which included the introduction of the citizenship of the EU, did not encounter major difficulties and the UK adopted the Maastricht Treaty without any constitutional review or referendum.[105].

Inclusion of the concept of the EU citizenship into British legal system encountered only insignificant difficulties in the UK for the fact that the community law has not regulated whether an individual has nationality of a member state.[106] The scale of debate connected with the citizenship issue was radically lower than debate connected with other issues raised by the Maastricht Treaty – such as parliamentary sovereignty, Common Defense and Foreign Policy or Economic and Monetary Union.[107]

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[104] *See* J.H.H. Weiler: *The Constitution Of Europe*, Cambridge University Press 1999, pp324-356.

[105] Edward Best, The United Kingdom and the Ratification of the Maastricht Treaty, in Laursen F. and Vanhoonacker S.(eds.), The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications, Maastricht: EIPA; Nijhoff, Dordrecht, 1994. p. 245.

[106] Which was the most important aspect of the British approach to the citizenship of the EU.

[107] Best, *supra* note 105, p. 245. (with reference to the whole paragraph).

On the other hand, in-court behaviors of the UK government in cases regarding the European citizenship illustrate another fact.[108] The UK has been the only state that consistently submitted observations opposing to any kind of broad interpretation of the provisions concerning the citizenship of the EU. *María Martínez Sala v. Freistaat Bayern* was one of the cases where the scope *ratione personae* of the provisions of the Treaty on the European citizenship.[109] The appellant in the main proceedings was a Spanish national who obtained a residence permit from German Authorities but her application concerning a raising allowance for her child was rejected by the State of Bavaria. Despite of opposition from the Member States intervened, the UK was one of them who submitted only oral observations, the ECJ followed the arguments of the Commission and stated that "…a citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty(now Article 12) in all situations which fall within the scope *rationemateriae* of Community law…"

In *Grzelczyk*, was a case concerning the decision of the Belgian authority to stop payment of the minimum subsistence allowance to a French national for the reason that he was not able to satisfy the legal requirements, the nationality requirement, for the grant of such allowance.[110] The Belgian court asked to the ECJ if it was contrary to the principles of European citizenship enshrined in Article 6 and 8 of the

[108] Case C-85/96, María Martínez Sala v Freistaat Bayern, [1998] ECR I-02691; Case C-224/98, Marie-Nathalie D'Hoop v Office national de l'emploi, [2002] ECR I-06191; Case C-413/99, Baumbast and R v Secretary of State for the Home Department, [2002] ECR I-07091; Case C-192/99, The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, [2001] ECR I-01237.

[109] C-85/96, *supra*.

[110] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

Treaty establishing the European Community to entitle to a non-contributory social benefit, to be granted only to nationals of the Member States. The UK submitted both written and oral observations emphasizing that although Mr. Grzelczyk was suffering discrimination on the grounds of his nationality provisions of the Treaty on citizenship did not apply to his situation because any discrimination against him was outside the scope of the Treaty.[111] Despite of the oppositions the ECJ ruled that Articles 6 and 8 of the EC Treaty (now Articles 12 EC and 17 EC) preclude entitlement to a non-contributory social benefit from being made conditional on the ground of nationality.

The issue boiled down to the scope *ratione personae* of the provisions of the Treaty on the European citizenship in *Marie-Nathalie D'Hoop v. Office national de l'emploi* where a Belgian national was refused to get her unemployment benefits provided by Belgian legislation because of the reason that she had been completed her secondary education in France[112]. The national court made a reference to the ECJ in order to ascertain whether Community law precludes a Member State from refusing a grant to one of its nationals on the sole ground that that the student completed her secondary education in another Member State. The UK who submitted only oral observations was the only Member State, other than Belgium, that intervened even though the case was not originated from its own courts. Moreover, the UK government was the only one claiming that "…the simple fact of lawfully residing in another Member State does not enable a Community national to invoke the Treaty provisions on citizenship of the Union."[113]

[111] Case C-184/99, *supra* para 24.

[112] Case C-224/98, *supra* note 108.

[113] Case C-224/98, *supra* note 108, para. 22.

Additionally, there were two cases on the same issue that originated from the UK courts.[114] In *Manjit Kaur,* the national court referred questions asking whether a British Overseas Citizen who is not entitled to enter or remain in the United Kingdom was considered a person holding the nationality of a Member State and therefore is a citizen of the Union for the purpose of Article 8 of the EC Treaty.[115] The ECJ followed the arguments of the UK government, submitted both written and oral observations, and followed its case law on the matter by stating that it was for each Member State to lay down the conditions for the acquisition and loss of nationality.[116]

In another case, *Baumbast*, the ECJ were asked, by a British judge, if a citizen of the European Union who no longer enjoys a right of residence in the host Member State could enjoy a right of residence there, as an EU citizen, by direct application of Article 18(1) EC.[117] The UK submitted observations arguing that the answer of the question was to be negative. However, according to the Court of Justice a citizen of the Union had the right to stay in the host Member State even though the residence permit was expired.

1.2.2.4 Cases on External Relations

Also in the cases regarding the EEC-Morocco Cooperation Agreement and the cases concerning the WTO agreement, motives behind the conduct of the UK government cannot be explained by the origin of the

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[114] Case C-413/99, and Case C- 192/99, *supra* note 108.

[115] Case C-192/99, *supra* note 108.

[116] Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, para. 10.

[117] Case C-413/99, *supra* note 108.

cases referred to the ECJ.[118] The UK submitted observations to two cases where the national judges, not British, directed questions about the jurisdiction of the ECJ and the direct effect of the Article 50 of the TRIPs.[119] In both cases the European Court did not follow the arguments of the governments including the ones claimed by the UK.

When it comes to the cases regarding the EEC-Morocco Cooperation Agreement, it is also the case that the UK government had submitted observations despite of the fact that references were made by the courts situated outside the UK. Particularly, UK acted in two cases about EEC-Morocco Cooperation Agreement despite of the fact that only one of them was originating from its own courts.[120]

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[118] Case C-416/96, Nour Eddline El-Yassini v Secretary of State for Home Department, [1999] Page I-01209; Case C-262/96, Sema Sürül v Bundesanstalt für Arbeit, [1999] ECR I-02685; Case C-179/98, Belgian State v Fatna Mesbah, [1999] Page I-07955; Case C-340/97, Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg, [2000] Page I-00957; Case C-102/98, Ibrahim Kocak v Landesversicherungsanstalt Oberfranken und Mittelfranken, [2000] ECR I-01287; Case C-329/97, Bundesverwaltungsgericht – Germany, [2000] Page I-01487; Case C-37/98, The Queen v Secretary of State for the Home Department, [2000] ECR I-02927; Case C-65/98, Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg, [2000] ECR I-04747; Case C-300/98, Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV, [2000] ECR I-11307; Case C-33/99, Hassan Fahmi and M. Esmoris Cerdeiro-Pinedo Amado v Bestuur van de Sociale Verzekeringsbank, [2001] ECR I-02415; Case C-89/99, Schieving-Nijstad vof and Others v Robert Groeneveld, [2001] ECR I-05851; Case C-63/99, The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk, [2001] ECR I-06369; Case C-235/99, The Queen v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova, [2001] ECR I-06427; Case C-257/99, The Queen v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik, [2001] ECR I-06557; Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, [2001] ECR I-08615; Case C-188/00, Bülent Kurz, né Yüce v Land Baden-Württemberg, [2002] Page 00001, Case C-162/00, Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer, [2002] ECR I-01049; Case C-251/00, Ilumitrónica - Iluminação e Electrónica Ldª v Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa, and Ministério Público, [2002] ECR 00001.

[119] Case C-300/98 and Case C-89/99, *supra*.

[120] Case C-416/96 and Case C-33/99, *supra* note 118.

In contrast, analysis of the mentioned case law regarding association agreements demonstrates that for the UK, the motives behind submitting or not submitting observations were highly related to the geographical origins of the courts referring the questions. The UK government did not submit observations to the cases related to the association agreements if the courts situated outside the UK were referring the questions.[121] However it did not miss the chance to intervene to the identical cases about the association agreements originating from its own courts.[122]

1.2.2.5 Cases Regarding the Trade Marks Directive

Conduct of the UK government in cases concerning the Trade Marks Directive[123] illustrates a different fact, since the UK did not intervened in three cases, originated from its own courts, related to the mentioned directive neither written nor orally.[124]

Chancery Division (patent court) of the High Court of Justice of England and Wales directed questions on the trade marks directive in proceedings between Arsenal Football Club plc and Mr. Reed, concerning the selling and offering for sale by Mr. Reed of scarves marked in large lettering with the word `Arsenal', a sign which is registered as a trade mark by Arsenal FC for those and other goods.[125]

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[121] E.g. Case C-188/00, Case C-162/00, and Case C-251/00, *supra* note 110.

[122] E.g. Case C-63/99, Case C-235/99, Case C-257/99, and Case C-37/98, *supra* note 110.

[123] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), as amended by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

[124] Case C-206/01, Case C-143/00, Joined Case C-414-419/99, *supra* note 88.

[125] Case C-206/01, *supra* note 88.

Contrary to its general conduct the UK government did not submit any observations despite of the fact that the case was originating from a court situated in the UK.

The government of the United Kingdom disregarded the other reference, also from the Chancery Division (patent court) of the High Court of Justice of England and Wales, on the same directive.[126] Contrary to *Arsenal FC* case, the court directed a wide range of questions and requested clarification on various issues covered by the Trade Mark Directive, but the United Kingdom was not among the five governments who intervened.

Written and oral observations submitted by the EFTA Surveillance Authority are the only similarity between the two cases nevertheless making a remark out of this fact would be not more than speculative.[127] Somehow the UK did not find any interest to intervene to the mentioned cases referred by a court situated in its own territories.

Finally, the third case on Trade marks Directive 89/104/EEC was about exhaustion of the rights conferred by the trade mark regarding pharmaceutical products.[128] Chancery Division (patent court) of the High Court of Justice of England and Wales directed questions on the parallel importation by repackaging of the trade-marked products, mainly by asking if it is possible to derogate from the fundamental

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[126] Joined cases Zino Davidoff, *supra* note 88.

[127] According to Article 23 of the Statute of the Court of Justice, parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority may submit observations where one of the fields of application of that Agreement is concerned.

[128] Case C-143/00, *supra* note 88.

principle of free movement of goods where the proprietor of a mark relies on the mark to oppose the repackaging of pharmaceutical products imported in parallel. The UK government did not find an interest in submitting observations to the mentioned case despite of the fact that it was originated from a British court.

However, the UK took part in the referrals concerning re-packaging of trade-marked pharmaceutical goods was an issue, which the ECJ encountered several times and established a case law based on its own findings.[129] *Hoffman-La Roche* was the first case concerning re-packaging where the European Court found that prevention of the re-packaging of trade-marked products would constitute a disguised restriction on trade between member states within the meaning of the second sentence of Article 36 of the Treaty unless certain conditions were fulfilled.[*130*] Consequently in cases subsequent to *Hoffmann-La Roche*, in particular *Bristol-Myers Squibb and Others* and *Upjohn* the Court clarified what may constitute artificial partitioning of the markets between Member States.[131] The UK government considered the mentioned cases important and submitted observations to all of them in order to affect the outcome of the cases.

Although the UK government submitted observations to the precedents of the case *C-143/00*, it did not intervene to such a case originated from its own courts related to the same issue. This conducts shows whether the issue lost its importance for the government or the government

[129] *See* Cases; C-102/77 *Hoffmann-La Roche* [1978] ECR 1139, Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457 and Case C-379/97 *Upjohn* [1999] ECR I-6927.

[130] Case C-102/77, *supra*.

[131] Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457 and Case C-379/97 *Upjohn* [1999] ECR I-6927.

thought that it would be impossible to convince the ECJ to overrule its established case law.

1.2.2.6 Cases Regarding the Directive 90/314/EEC on package travel, package holidays, and package tours

Between the years 1999 and 2002 four cases referred to the ECJ from the national courts of the Member States on the interpretation of the Directive 90/314/EEC on package travel, package holidays, and package tours.[132] None of the national courts referring questions were situated in the United Kingdom, and despite of this fact the government acted in two of the mentioned cases.

In case Hofmeister and Others v Austria, on the one hand, Austrian court referred questions related, on the one hand, to the scope of the concepts covered by the Directive 90/314/EEC such as package travel, package tour. On the other hand, state liability arising from partial transposition of the directive was another group of questions directed by the national court.[133]

The conduct of the UK government in the mentioned case was similar to the position taken in the previous cases regarding state liability such as *Dillenkofer*.[134] Despite of the importance of the cases, a few governments submitted observations.

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[132] Case C-400/00, Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viagens Ldª., [2002] ECR I-04051; Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, [2002] ECR I-02631.

[133] Case C-140/97, Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich, [1999] ECR I-03499.

[134] Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland, [1996] ECR I-04845.

Additionally, the observations of the UK government in *Hofmeister* also contained arguments related to the question whether directive itself applies to trips, which are offered by a daily newspaper as a gift exclusively to its subscribers. In contrast with the situation on the questions referred on the state liability issue, arguments of the UK regarding the scope of the concepts were favored by the ECJ and were in line with the arguments of the Commission, and were against the ones put forward by the Austrian government.

AFS Finland is another case on the same directive where the Finish judge asked if a student exchange the purpose of which, is not a holiday or tourism but to attend an educational establishment in a foreign country fall within the scope of Council Directive 90/314/. The UK argued, accepted by the European Court, that student exchange programs were out of the scope of the directive and it was the only Member State submitting observations besides Finland, the origin of the case.[135]

When it comes to the other two cases on Directive 90/314/EEC, the UK government decided not to submit observations although the national courts directed similar questions, with the ones directed in aforementioned cases, on the interpretation of the concepts used in the directive.[136]

In *Club-Tour*[137], the national court asked questions regarding the definitions of 'package travel' and 'pre-arranged' and five Member

[135] Case C-237/97, AFS Intercultural Programs Finland ry., [1999] ECR I-00825.

[136] Cases C-400/00 and C-168/00, *supra* note 118.

[137] C-400/00, *supra* note 132.

States submitted observations but the UK. On the other hand in *Simone Leitner*[138], the question referred was on the consumers rights to compensation for non-material damage resulting from failure to perform or the improper performance of the obligations inherent in the provision of package travel within the meaning of Article 5 of the directive. The UK did not find any interest in submitting observations to the mentioned cases. Such an inconsistency in the conduct of the UK shows that the government does not have clear policy choices about the issue or missed the chance to submit observations because of domestic bureaucratic problems.

1.2.2.7 Cases where only oral observations were submitted by the UK

It is already mentioned in Chapter One that Member States have the right to submit only oral observations regardless of being submitted written observations.[139]

Submission of only oral observations by a Member State indicates two things; either the state missed the chance to submit written observations within the time limit foreseen in Article 23 or the case did not appear to be of importance for that state at first sight to submit written observations.

Examination of the cases shows that the UK used the possibility to submit only oral observations when the case did not appear at first sight to be important according to its policy choices because 14 cases where the UK government submitted only oral observations are the ones

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[138] C-168/00, *supra* note 132.

[139] See Chapter one.

originating from foreign courts.[140] Apparently, the late action of the UK government took place after getting more information about the mentioned cases, which the government was less informed in the beginning of the process.

1.2.3 Plenary or Chambers

Table 4 illustrates the number of the judgments rendered by the ECJ sitting in plenary and Table 5 shows the number of judgments given by the chambers. Such a distinction between assigning the chambers and deciding in plenary session arises from the Article 95 of the Rules of Procedure of the Court of Justice, which reads as follows:

> 1. The Court may assign any case brought before it to a Chamber in so far as the difficulty or importance of the case or particular circumstances are not such as to require that the Court decide it in plenary session.
> 2. The decision so to assign a case shall be taken by the Court at the end of the written procedure upon consideration of the

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[140] Case C-320/95, José Ferreiro Alvite v Instituto Nacional de Empleo (Inem) and Instituto Nacional de la Seguridad Social (INSS), [1999] ECR I-00951; Case C-360/97, Herman Nijhuis v Bestuur van het Landelijk instituut sociale verzekeringen, [1999] ECR I-01919; Case C-61/98, De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam, [1999] ECR I-05003; Case C-375/97, General Motors Corporation v Yplon SA, [1999] ECR I-05421; Case C-81/98, Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr, [1999] ECR I-07671; Joined Cases C-376 and 369/96, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, [1999] ECR I-08453; Case C-285/98, Tanja Kreil v Bundesrepublik Deutschland, [2000] Page I-00069; Case C-166/99, Marthe Defreyn v Sabena SA, [2000] ECR I-06155; Case C-262/97, Rijksdienst voor Pensioenen v Robert Engelbrecht, [2000] ECR I-07321; Case C-150/99, Svenska staten (Swedish State) v Stockholm Lindöpark AB, [2001] ECR I-00493; Case C-215/99, Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter, [2001] ECR I-01901; Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne, [2002] ECR I-07213; Case C-224/98, Marie-Nathalie D'Hoop v Office national de l'emploi, [2002] ECR I-06191; Case C-115/00, Andreas Hoves Internationaler Transport-Service SARL v Finanzamt Borken, [2002] ECR I-06077.

> preliminary report presented by the Judge-Rapporteur and after the Advocate General has been heard. However, a case may not be so assigned if a Member State or an institution of the Communities, being a party to the proceedings, has requested that the case be decided in plenary session. In this subparagraph the expression 'party to the proceedings' means any Member State or any institution which is a party to or an intervener in the proceedings or which has submitted written observations in any reference of a kind mentioned in Article 103 of these Rules. The request referred to in the preceding subparagraph may not be made in proceedings between the Communities and their servants.
>
> 3. A Chamber may at any stage refer a case back to the Court.[141]

According to Article 95 the difficulty or importance of the case is the decisive factor to assign the chambers. Cases decided in plenary session indicate that the ECJ or an intervener such as a Member State has considered such cases as important either, since the Court may assign any case to a chamber unless a Member State or a Community institution has objected.

The UK government submitted observations to 52.5% of the cases rendered in plenary session while the percentage of observations submitted is 23.06 in cases decided by chambers. One may deduct two things from the mentioned fact, first it may be the case that the UK government prefers to intervene to the cases found important or difficult by the ECJ or second the UK objected the decision of the Court on the assignment of the chambers in cases considered as important for its own policy choices.

[141] Article 94 of the Rules of Procedure of the Court of Justice of the European Communities.

TABLE 4: Number of Observations Submitted by the United Kingdom Government between 1999 and 2000 in Judgments Rendered in Plenary Sessions.

Years	***1999***	***2000***	***2001***	***2002***	***TOTAL***
Judgments (Plenary)	45	42	24	37	148
Observations Submitted by the UK	22	20	17	17	76
%	48.89	47.62	70.83	45.95	51.35

TABLE 5: Number of Observations Submitted by the United Kingdom Government between 1999 and 2000 in Judgments Rendered before the Chambers.

Years	***1999***	***2000***	***2001***	***2002***	***TOTAL***
Judgments (Chambers)	91	110	89	94	384
Observations Submitted by the UK	28	25	20	17	90
%	30.77	22.73	22.47	18.09	23.44

1.2.4 Type of Observations

As already mentioned the Article 23 Procedure enables Member States to submit only written observations, or only oral observations or written and oral observations. Such a distinction between the observations submitted by a Member State may also indicate a few important facts about the attitude of that state.

Submitting only written observations to a case means that the Member State do not believe that it is vital to mention its arguments regarding the case once more before the Court. If a member state considers a case important it would definitely benefit all the chances given to influence the outcome of the case. Therefore submitting both written and oral observations to the same case indicates the level of importance dedicated to a case by the intervener.

When it comes to submitting only oral observations, it is usually the case that at the first sight certain cases may not be seen so important for a Member Sates. During the proceedings the Member States may realize the significance of the outcome of such cases and decide to intervene where the deadline of submitting written observations already has been expired. Therefore the Member States submit only oral observations to the cases during the oral proceedings.

Table 6 illustrates the observation type chosen by the UK while intervening to the cases originating from the national courts situated in its own territory. Examination of the mentioned statistical data shows that the UK government preferred to submit both written and oral observations in cases originating from its own courts in order to influence the decision of the ECJ.

On the other hand, Table 7 has been formed by the examination of the conduct of the United Kingdom in cases originating from the courts situated outside the UK. Examination of Table 7 in contrast with Table 6 demonstrates the fact that the UK government considers it more important to influence the outcome of the cases referred by its own court than the cases originating from the other Member States.

TABLE 6: Type of Observations Submitted by the United Kingdom Government. (Cases Originating from the UK Courts).

Years	***Only Written Observations Submitted by the UK***	***Only Oral Observations Submitted by the UK***	***Both Written and Oral Observations Submitted by the UK***
1999			16
2000	1		14
2001			17
2002			14

TABLE 7: Type of Observations Submitted by the United Kingdom Government. (Cases Originating from the Courts Outside the UK).

Years	***Only Oral Observations Submitted by the UK***	***Only Written Observations Submitted by the UK***	***Both Written and Oral Observations Submitted by the UK***
1999	9	6	19
2000	10	3	17
2001	9	2	9
2002	5	3	11

2. Assessment Of The Article 23 Procedure From The Point Of View Of Current Situation Of The Relationship Between The Republic Of Turkey And The European Union

2.1 Is the Republic of Turkey Entitled to Submit Observations?

The relationship between Turkey and the European Union can be examined under two different aspects namely:

- The partnership status arising from the Agreement establishing an Association between the European Economic Community and Turkey dated 12 September 1963 which is known as the Ankara Agreement,[142]

[142] As quoted in the web site of the Delegation of the European Commission to Turkey, http://www.deltur.cec.eu.int/default.asp?lang=1&ndx=12&mnID=3&ord=2&subOrd=0, "*The Ankara Agreement which took effect in 1963 envisioned three phases for completing the customs union between Turkey and the EU. After the first five-year-long preparation period, with the adoption of an Additional Protocol on 1 January 1973, a transition period to last 22 years was officially started. While the EU completely removed customs duties on industrial goods of Turkish origin from the very beginning of the transition period, Turkey's removal of customs duties on the EU'S industrial goods was to be made gradually, and 22 years was foreseen for the complete implementation of the customs union.*

The Customs Union Agreement which determined the necessary conditions for the completion and the continuation of the Turkey-EU Customs Union was signed at the Turkey-EEC Association Council Meeting of 6 March 1995. As a result, the 22-year-long transition period, which was halted a few times, ended on 1 January 1996, and the last phase of the Ankara Agreement has begun.

The Turkey-EU Customs Union consists of the mutual removal of all customs duties, tariffs and all barriers to trade in bilateral trade and the application of a common external tariff for third countries. It also covers the harmonization with new conditions developed on the basis of the General Agreement on Tariffs and Trade (GATT) regulations in global trade and the fundamentals of the Community's Common Trade and Common Competition Policies in the framework of single market applications that were put into effect by the EU in 1992. This includes the harmonization of legislation in the areas of the protection of intellectual, industrial and commercial property rights, competition, state aid, public procurement and taxation, as well as settlement rights and services.", visited in May 2005.

- Candidate status was granted to at the Helsinki Summit in December 1999 upon the European Commission's proposal that Turkey be given a membership perspective in its Second Regular Report announced on 13 October 1999.[143]

Despite of the abovementioned status of the Republic of Turkey, Turkey does not have the right to submit observations within the meaning of Article 23 of the Protocol on the Statute of the Court of Justice neither as a partner nor as a candidate country.

Nevertheless, due to the Council Decision amending Article 20 of the Statute of the Court of Justice, 2002/653/EC of 12 July 2002 (OJ 2002 L 218, of 13 August 2002, p. 1), non-member states such as Turkey are also entitled to submit observations. Pursuant to the amended text of Article 23, where an agreement relating to a specific subject-matter,

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[143] As quoted in the web site of the Delegation of the European Commission to Turkey, http://www.deltur.cec.eu.int/default.asp?lang=1&ndx=12&mnID=3&ord=3&subOrd=0, "... *[T]he European Commission prepared proposals that would form the basis of its enlargement strategy; these were announced on 16 July 1997 in the report entitled "Agenda 2000." The report foresaw the membership of the CEECs and Cyprus in the 2000s in two waves.*

Poland, Hungary, the Czech Republic, Slovenia and Estonia, which were considered to have higher capacities to harmonize with these criteria, were in the first wave, whereas the Slovak Republic, Lithuania, Latvia, Bulgaria and Romania, which were lagging behind, were in the second. Cyprus was included within this enlargement process under a previously taken decision. This wave system was later abandoned, and a single framework covering all the candidate countries was applied. Due to its economic and political problems, Turkey was not included within the scope of this enlargement.

The EU's pre-accession strategy for Turkey was built on the European Strategy developed upon the request of the Luxembourg European Council in 1998, and several proposals were made to Turkey. These proposals included the deepening of the Customs Union, extension of the Customs Union to include the agriculture and services sectors, and cooperation in various fields.

In its Second Regular Report announced on 13 October 1999 the European Commission proposed that Turkey be given a membership perspective, and at the Helsinki Summit in December 1999 Turkey was accepted as a candidate country for EU full membership.", visited in May 2005.

concluded by the Council and one or more non-member States provide that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement. The application of the abovementioned provision inserted to Article 23 does not exist within the time periods covered by this thesis.[144]

Therefore, as per the last paragraph of Article 23 Turkey is only entitled to submit observations in cases regarding an agreement with a specific subject matter existing between the Council and Turkey and such agreement shall envisage the submission of observations by Turkey.

Including the Ankara Agreement, none of the agreements signed by the Republic of Turkey and the European Communities include a provision entitling Turkey to submit observations in compliance with Article 23 of the Protocol on the Statute of the Court of Justice.

2.2 Paving the Way to the European Union and Preparation of the Institutional Framework for Submission of Observations Under Article 23 of the Protocol on the Statute of the Court of Justice

As a candidate country with who the negotiation talks are planned to be held on 3 October 2005, the Republic of Turkey must initiate a project to structure and organize an institutional framework for the Article 23 Procedure. No initiative has been informed up to the date of this thesis in relation to the mentioned procedure.

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[144] *Supra,* note 15.

The first phase of the project for preparation must consist of examination of the practice of the current member states of the European Union. The ministries of foreign affairs of the current members are assigned to fulfill the task of submitting observations under Article 23 of the Protocol on the Statute of the Court of Justice except for the United Kingdom. As mentioned above in Chapter Two of this paper, rather than the Ministry of Foreign Affairs, the Treasury Solicitors Department is assigned in the United Kingdom.

In case of the Republic of Turkey, structuring of a separate body under the Legal Department of the Ministry of Foreign Affairs would be more accurate since the mentioned department has an experience in litigating before various international courts.[145]

The staff for the organization to be responsible with the fulfillment of the task arising from Article 23 shall be well trained on the European Union law and the sensitive subjects that the benefits of the Republic of Turkey requires the submission of observations such as Common Agriculture Policy, European Citizenship etc.

Finally, the mentioned body to be establishes under the legal department of the Ministry of Foreign Affairs should be entitled to request information and cooperation from the other state institutions such as the prime ministry, ministries, General Secretariat for the EU etc. in relation to the procedure for submitting observations in compliance with Article 23.

[145] Please see the web site of the Ministry of Foreign Affairs at http://www.mfa.gov.tr/, visited in May 2005.

3. Conclusion

The Member States' conducts regarding the Article 23 Procedure so far have proved that the procedure is not serving to its aims. The Member States are not aware of the importance of the Article 23, which gives them the chance to juridify their policy concerns and influence the outcome of the cases dealt by the Court. The facts that lead to this conclusion are the lack of joint action in the in-court behaviors of the Member States, contradictions and differences between their out-court and in-court behaviors, and assigning domestic institutions, which are not capable of defending national interest other than submitting observations to defend short-term interests, to deal with submitting observations.

There have been some arguments on the problems of the procedure itself mainly as time limit, which is claimed to be the difficulties for the Member States to submit observations deliberately. Nevertheless, none of those arguments are valid excuses for failing to intervene in cases referred to the Court, since time-constraints might be handled easily by allocating more manpower and other resources. Taking part in a preliminary ruling is a political choice and it has been observed that the Member States have managed, despite of the time pressure and other difficulties, to intervene in cases that they consider important. Narrowness of the political motivations of the Member States is the main problem concerning the Article 23 Procedure. This conclusion can be depicted from the attitudes of the Member States who are not aware of the importance of the procedure under Article 23 of the Statute of the ECJ. Institutions that lack of foresight on the issues related to European integration in a broad context have been assigned to perform the task to prepare observations and present their states before the Court of

Justice. Consequently, the Member States mostly have had the chance to submit observations in cases concerning their national matters, which does not comprehend to Community level.

Additionally, the attitude of the ECJ concerning the Article 23 Procedure is also problematic. Even though there is a crucial relationship between the legitimacy of the decisions of the Court and the observations submitted by the Member States, in most of the cases the ECJ has preferred not to follow the arguments of the Member States. The Court favors the pro-integrationist arguments of The Commission instead of the observations of the Member States.

On the other hand, not taking part in the preliminary rulings by not submitting observations does not mean that the Member States consider the ECJ a trustful mitigator of incomplete contracting problems and comply with the decisions of the Court. As mentioned by the neo-functionalists, the Court of Justice has been shaping the European legal system by using the preliminary rulings despite of objections from the Member States. Nevertheless, it is solely about the places and the occasions where the opinions on the evolution of the European legal system have been presented. The Member States have not considered the Article 23 Procedure as a tool enabling them to participate in the shaping of the future of the Community and prefer to reflect their opinions against the activism of the ECJ outside the Court.

Analysis in chapter two confirms the aforementioned arguments by illustrating that the conduct of the UK government in submitting observations has been also based on the defense of the short term interest rationale. The percentage of the observations that submitted in cases originating from the UK courts is significantly higher than in cases originating from foreign courts. However, a different performance can

not be expected from the Treasury Solicitor's Department, which is designed as an institution to deal with technical legal issues and not the politics of European integration.

In conclusion, national positions of the Member States are not formulated in a proper way before the ECJ in preliminary ruling cases constructing the European legal system piece by piece. Moreover, there are no hints on any kind of evolution in the understanding of the Member States regarding the Article 23 Procedure. This means that the mechanism intended to provide the Court with policy inputs from its Member States in order to reach to healthy decisions is not working properly. Basically not the system enshrined in the Article 23 but the organizations and approaches of the Member States to the legal issues of the Community needs reparations.

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