

Summary

The Netherlands Ministry of Justice and Dutch interventions before the ECJ

In the period September 2007 until June 2008, by order of the WODC (the Dutch abbreviation for Wetenschappelijk Onderzoek- en Documentatiecentrum, in English: Research and Documentation Centre) of the Netherlands Ministry of Justice, research was conducted into the involvement of the Netherlands Ministry of Justice (hereinafter: Ministry of Justice) in Dutch interventions before the Court of Justice of the European Communities. The research was conducted by a team of lawyers assigned to the Faculty of Law (sub department Constitutional and Administrative Law) of Leiden University.

Research intention and research sources

By means of the analysis of interventions and non-interventions, the research intended to gain an insight into the current intervention policy of the Ministry of Justice and to use that insight in order to make that intervention policy as effective as possible. The above mentioned analysis has mainly been achieved by means of examining records and databases. Moreover, within the scope of the research, in all nine key figures were interviewed.

52 interventions and 26 non-interventions were found

52 cases were found which didn't begin before 1 January 2000 and in which a judgement was given before 1 October 2007, in which (partly) because the Ministry of Justice deemed it to be expedient, the Netherlands submitted to the Court written or oral observations; fifty times that happened in a preliminary procedure and two times there was an intervention in a direct action.

Although it turned out to be quite difficult to trace non-interventions, 26 cases – sixteen preliminary procedures and ten direct actions – were found which didn't begin before 1 January 2000 and in which a judgement was given before 1 October 2007, concerning one of ten by the 'accompanying committee' determined policy areas under the authority of the Ministry of Justice and in which the Netherlands didn't submit to the Court written or oral observations. Incidentally, intervention by the Netherlands in all these 26 cases wouldn't by definition have been expedient from the viewpoint of the Ministry of Justice.

Organisation of interventions within the Ministry of Justice

With regard to the organisation of interventions within the Ministry of Justice, it can be concluded that there are two options:

- 1) To make no (fundamental) alterations in the current system. As a consequence, the civil servants made responsible for Court cases within the Ministry of Justice, will probably still be forced to continue to work above their capacity (now and then). The choice for this option will presumably also mean that for want of capacity within the Ministry of Justice, (occasionally,) in some cases the Netherlands won't be able to

submit to the Court written or oral observations whereas as far as the Ministry of Justice is concerned, intervention is all in all required, or – if the Netherlands are intervening – the interest of the Ministry of Justice won't be promoted whereas the promotion of that interest is all in all required, or the Ministry of Justice won't be able to go into a full consideration of the subject matter.

- 2) To (slightly) alter the current system. In this respect, first of all, the burden of those made responsible for Court cases within the Ministry of Justice could be lightened by offering more support on a central level within the Ministry of Justice, like (at administrative level) keeping overviews up to date, filing documents and so on. Within this framework, the Ministry of Justice might also consider more structural, substantive consultations and guidance with regard to Court cases.

In order to – if the civil servant which is usually made responsible for Court cases within the Ministry of Justice on a certain policy area because of, for example, other urgent duties or absence is not able to attend to a Court case – prevent as much as possible that the question of expediency is mixed with the questions of priority and capacity, it might as well be worth considering whether the Ministry of Justice should establish with respect to interventions some sort of 'pool' consisting of civil servants with no duties but to draw up observations for the benefit of interventions cases or to enter into an agreement on distribution of the workload and records and to record this agreement, for instance in a manual.

Furthermore, the Ministry of Justice might consider to further protocol its intervention policy, for example by following other ministries in drawing up a manual in which the intervention policy of the Ministry of Justice is stated and in which especially the criteria concerning the expediency of interventions from the ICER manual (ICER 2002/56) are specialised towards the Ministry of Justice. As it happens, since the criteria from this ICER manual are quite spaciouly worded, in some cases they don't give something to hold on to.

The intention of an intervention in relation to its effectiveness

Roughly, the present research bade us to map the numbers of interventions and non-interventions, the determination of the expediency of interventions, the organisation and co-ordination of interventions (particularly within the Ministry of Justice), the investment of time involved and the effectiveness of interventions. Although the research results give a picture of all those facets, it turned out to be quite difficult to interconnect them. Therefore, one wasn't quite able to pronounce upon the effectiveness of interventions or the effects of non-interventions. That's particularly because within the Ministry of Justice, the intervention objectives aren't systematically put in writing; whereas within the Ministry of Justice, the objective of an intervention isn't recorded, it's quite difficult to decide whether or not an intervention has been effective. To give an impression of the effectiveness of the interventions found anyway, the subject matter of the written or oral observations submitted to the Court by the Netherlands has been point of

departure. In this context, it can be observed that the Netherlands cq. the Ministry of Justice in a lot of cases – not those concerning free movement of persons and external relations – all in all before the Court fairly achieved that which was – according to the written or oral observations – to be achieved (the *ne-bis-in-idem* cases can in this context serve as an example). In addition to what in this respect can be called ‘primary effectiveness’ – the Court in its judgement (partly) adopts the Dutch (Ministry of Justice) reasoning –, intervention can, of course, be effective in another way too. One has in mind particularly cases in which the Advocate General to the Court in his opinion – different from the Court in its judgement – (partly) adopts the Dutch (Ministry of Justice) reasoning and – continuing this line of argument – cases in which indeed neither the Court nor the Advocate General to the Court (partly) adopts the Dutch (Ministry of Justice) reasoning, but this reasoning (partly) corresponds to the reasoning of another intervener (like other Member States and the Commission). Even in those cases in which neither the Court nor the Advocate General to the Court (partly) adopts the Dutch (Ministry of Justice) reasoning and this reasoning doesn’t also (partly) corresponds to the reasoning of another intervener, an intervention can be considered a success since because of this, a contribution is made to the Court’s case law. Regarded from this angle, interventions are actually always effective.

It might be considered to send a memorandum to the Member of Cabinet responsible and the official top of the Ministry of Justice in which the objective of an intended intervention is stated and to send later on to that Member of Cabinet and official top in response to the Court’s judgement a second memorandum about the effect of the intervention. Apart from the quite important fact that those memoranda can contribute to the official support for spending capacity on interventions – especially when in that second memorandum it can be stated, as the occasion arises, that the objective of the intervention is (partly) achieved –, a specific moment will be created in which the civil servants which are made responsible for Court cases within the Ministry of Justice will by definition be forced to reflect upon the effectiveness of the intervention as well as upon the way in which interventions can be made (even more) effective in de future. If, in addition, in the case file copies of those memoranda will be included, the intervention’s objective will emerge from that.

Furthermore, the Ministry of Justice might, when the occasion arises, consider to make it clear from the case file why from the viewpoint of the Ministry of Justice, submitting written or oral observations to the Court by the Netherlands in a certain case is regarded to be not expedient (whereas, with regard to direct actions, such case files aren’t composed, that’s, of course, not possible).

The fact that within the Ministry of Justice, the intervention objectives aren’t usually put in writing and – in a more general sense – within the Ministry of Justice, case files and overviews of Court cases aren’t always systematically kept up to date, makes vulnerable in some other ways too. Firstly, there’s the problem of transferability; when – owing to, for instance, ill health – the civil servant which is made responsible for a certain Court case within the Ministry of

Justice is no longer able to deal with the case assigned to him, the fact that the case file isn't systematically kept up to date complicates the transfer of the case.

Secondly the fact that Court cases aren't always systematically kept up to date is quite a problem from an organisational point of view as well; it weakens the institutional memory within the Ministry of Justice. Within the Ministry of Justice, after all a department managed in accordance to a more or less decentralised model, it's quite difficult anyway to pursue a intervention policy and to organise interventions in an administrative way; within the Ministry of Justice, in by far the better part of the cases, the decision whether or not an intervention is expedient is left to individual civil servants (in fact those made responsible for Court cases). They often decide whether or not an intervention will take place and if so, what for. The research results show that within the Ministry of Justice, at present both those made responsible for Court cases and executive officials haven't a clear overall picture of the number of interventions, the capacity (costs!) involved, the effectiveness of interventions and the effects of non-interventions. At this rate, the Ministry of Justice won't be able to 'learn' on a higher level than that of the individual civil servant and to tailor its investment to the desired results. If the determination of the expediency of interventions, the objectives of interventions and the time spent are clearly recorded and communicated, it will be possible for any civil servant to easily follow the Court case. Furthermore, on a higher level than that of the individual civil servant, it will then be possible to pursue a policy on the organisation of interventions and the capacity needed.

Cooperation with other ministries and interveners

It's important for the Ministry of Justice to retain the good cooperation with other ministries involved with interventions and to intensify this cooperation if possible. In this respect, the Ministry of Justice might bear in mind the sensitivities of those other ministries.

It's of relevance to the Ministry of Justice to continue with the attempts to attune the subject matter of the observations to be submitted by the Netherlands to other interveners and to extend those attempts to a larger number of cases if possible. The fact is that the experience shows one that there's a good chance that such an attempt is successful and, as the saying goes, united we stand, divided we fall.