



UNIVERSITY OF GOTHENBURG

MASTER THESIS IN
EUROPEAN STUDIES

The Member States and the Court of Justice

Why do Member States participate in preliminary
reference proceedings?

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19 May 2015
Amount of words: 19911

Abstract

The aim of this thesis is to make a first attempt to establish why Member States decide to send observations to the Court of Justice of the European Union (CJEU or Court) in the preliminary reference procedure. There is a strong debate in the academic literature about the degree to which the CJEU can further European integration, independent of the preferences of the Member States. Earlier research has conceptualised the observations that Member States submit in proceedings before the Court as threats from the Member States to override the Court or to not comply with its ruling. The debate is about how credible these threats are. In contrast, legal scholars believe that the observations can have an influence based on the soundness of the arguments they use.

This thesis will turn the focus away from the Court and toward the Member State governments. This will enhance the understanding of the complex relationship between the EU Member States and the Court of Justice, thus informing the theoretical debate. The analysis is based on interviews with civil servants in the Netherlands and Sweden.

The empirical finding of this thesis is that Member States submit observations to defend national interests, legislation, and policies. Moreover, the civil servants have a very lawyerly view of the whole process. They talk about 'winning' cases, some describe themselves as barristers, and they believe legal argumentation and legally relevant information are the main channels through which the Court can be influenced.

Acknowledgements

I would like to express my gratitude to my supervisors, Andreas Moberg and Daniel Naurin. Their encouragement and their wise advice have been invaluable.

I am also deeply thankful to the interviewees for making some of their valuable time available and sharing their experience and expertise.

Floris van Stralen
Gothenburg, 19 May 2015

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1. Introduction

In European integration studies the Court of Justice of the European Union (hereinafter CJEU or Court) has often been portrayed as a mighty institution pushing European integration ever further.¹ In this telling, the Court can push through its preference for deeper integration independently of the wishes of the Member States. However, recently a fierce academic debate² has broken out over the degree to which the Court has leeway to do this. The main empirical question in this debate is to what extent the written observations that Member States submit in proceedings before the Court affect the Court's decisions. In short, the question is whether the preferences of the Member States, as expressed in their written observations, restrict the Court's room for manoeuvre. Thus, these scholars have tried to figure out how the Court reacts to the observations of the Member States and why it does so. In contrast, the question why Member States choose to submit these observations has received scant attention. It is this gap in the literature that this thesis seeks to contribute to filling. However, before getting to that, it is necessary to explain the debate referred to above a little further.

The debate on the degree of autonomy of the Court reached a new level of intensity with the publication of Carruba, Gabel, and Hankla (2008). Carruba, Gabel, and Hankla studied all CJEU cases between 1987 and 1997 and concluded that the observations of the Member States systematically influence the Court's rulings. They propose two theoretical explanations for this finding: legislative override and noncompliance. Legislative override means that the Member States would undo the effects of a ruling with new legislation. Similarly, one or more Member States could simply not comply with the Court's ruling. The Court fears such an open confrontation with the Member States, the theory goes, as this would harm its legitimacy and reverse its decision. Nevertheless, it has not been studied whether civil servants in the Member States also see their actions as part of a larger legal-political strategy in which the observations are a first step that can be followed by legislation.

In response to Carruba, Gabel, and Hankla, Stone Sweet and Brunell argue³ that the CJEU is not constrained by the Member States in its decision-making. In their view,

¹ E.g. Weiler (1991)

² See especially Stone Sweet and Brunell (2012); and Carruba, Gabel, and Hankla (2012)

³ Stone Sweet and Brunell (2010)

the Member States will never manage to override the Court because of the many veto players and consensus requirements in the European legislative process. There will almost always be enough Member States that support the Court's ruling to prevent an override. Moreover, Stone Sweet and Brunell argue that Member State noncompliance is not possible because the other Member States will coalesce to punish the noncompliant Member State, and because national courts will not accept the governments' noncompliance with EU-law. So, even though the observations can be conceptualised as threats of override or noncompliance, these threats are not credible and thus ineffective. Therefore, the Court is free to further European integration as it sees fit.⁴ However, if the observations of the Member States have no impact, why would the Member States spend time and energy on writing and submitting them? This question remains unanswered.

A third perspective on the role of the Court in European integration comes from legal scholarship. In a simple version of this perspective, the Court is motivated by a desire to find the correct solution to the cases before it and not by any political agenda.⁵ Grimm⁶ presents a more sophisticated view. He argues that rationalism is not universal and that the rationalism that is at work in political processes is different from that in law. In other words, the context of the law determines which arguments are valid, not actors' interests or political preferences. In this view, the observations mainly have influence through the soundness of their legal arguments. Moreover, Member States are 'repeat players' that are regularly before the Court. Therefore, they have an interest in long-term rule change, as opposed to just the outcome of an individual case. The relevant question for this thesis is whether the civil servants in the Member States see argumentation and persuasion as the main channels through which the Court can be influenced and whether they behave according to the repeat player model.

The questions presented above with regard to the different theoretical approaches have not been answered in literature. There has been little research into these issues, and the answers that have been presented are rather vague and broad. For instance, Granger states that: "One can distinguish between three types of motivations for governmental policies in preliminary reference proceedings: the defence of domestic or national interests, the promotion of national visions of Europe and the furthering of

⁴ Stone Sweet and Brunell (2012)

⁵ Larsson, Naurin, Derlén, and Lindholm (2014),

⁶ Grimm (2011); and Grimm, (2012)

EU interests.”⁷ However, what counts as a domestic or EU interest worth defending is not specified. This thesis will seek to address this gap in the literature.

1.1. Aim and research question

Consequently, the aim of this thesis is to make a first attempt to establish why Member States decide to send observations to the CJEU in the preliminary reference procedure. This will enhance the understanding of the complex relationship between the EU Member States and the Court of Justice, thus informing the theoretical debate.

Unfortunately, it is not possible in this thesis to study all 28 EU Member States. Therefore, a selection has to be made. This thesis studies two Member States: the Netherlands and Sweden. This choice is explained in the methodology chapter below. This selection leads to the following research question: *Why do civil servants in the Swedish and Dutch governments decide to submit observations to the CJEU?* To help answer this question, the following sub-questions need to be answered:

1. How is the decision-making about submitting observations to the CJEU organised in Sweden and the Netherlands?
2. What factors are considered by the Dutch and Swedish civil servants when they have to decide about submitting observations to the CJEU?
3. What are the objectives that Swedish and Dutch civil servants seek to achieve with their observations and what do they believe their effect is on the rulings of the Court?

The main method used in this thesis to find an answer to these questions is face-to-face semi-structured interviews. In addition, some documents will be used for triangulation purposes. The main reason for using interviews is that the questions in this study deal with the perspectives of individual civil servants. The most straightforward way to find out what these perspectives are is simply to ask the civil servants concerned. Therefore, interviews are the best method for answering the questions this thesis poses.

In the next chapter an overview will be given of the previous literature and theory relevant to this thesis. This chapter will situate this Master’s thesis in the broader field of European studies and explain its contribution to the existing literature.

⁷ Granger (2004), 10

2. The Court and European Integration: Previous Research and Theory

In this chapter the theories that are most relevant for this thesis will be outlined. Moreover, the preliminary reference procedure, which is central to this thesis, will be explained. Finally, an overview of the previous literature that deals with the subject matter of this thesis will be given.

2.1. European integration theory

The two schools of thought that have dominated the study of European integration are neofunctionalism and intergovernmentalism. These theories differ strongly on why European integration happens and which actors are the most important in the process. Understanding these theories is important to understand the debate about the role of the CJEU in European integration and its relationship with the Member States. However, this chapter is not intended to be a detailed review of the vast body literature in this field, but rather as a brief explanation of the core elements of both theories. For reasons of clarity, neofunctionalism and intergovernmentalism will be discussed in turn.

Neofunctionalism was first presented in 1958 by Haas.⁸ According to Haas and later neofunctionalists European integration happens because of the unforeseen consequences of earlier steps. More specifically, they posit that integration in one sector leads to 'spillover effects' in sectors that are closely related to the sector that was integrated first. The spillover effects create incentives for integration in the related sectors. Thus, the scope of integration keeps expanding from one sector to the next. A recent example of this can be found in the Eurozone crisis. Integration of monetary policy led to spillover effects in the fields of banking and budgetary policy. These policy areas were integrated more deeply in response.

However, this process of spillover effects leading to more integration is not seen as automatic by neofunctionalists. Rather, it is pushed forward by supranational actors, such as the Commission and the CJEU, who are the engines of the integration process. Supranational actors are able to play this role because they operate in a technocratic sphere, isolated from everyday politics. The theory is that politicians are not very concerned with technical issues and are focussed on the short term because they want

⁸ Haas (1958)

to be re-elected. In contrast, the supranational actors use the space that this disinterest of the politicians creates to further integration in the long run. Furthermore, the supranational institutions choose to play this role as engines of integration because more integration gives them more power. In addition, the supranational actors can find allies in subnational actors, such as business groups. These groups feel the spillover effects and have an interest in integration. Together, the supranational and subnational actors can pull unwilling national governments along on the road to further integration.

Intergovernmentalism offers an entirely different explanation for European integration. This theory was introduced by Hoffmann⁹ and was most notably developed by Moravcsik.¹⁰ In this theory, the Member States foresee the consequences of the treaties they sign, so there are no unforeseen spillover effects. Rather, integration happens when the economic interests of the Member States in a specific policy area converge. An additional explanatory factor is the issue-specific relative bargaining power of the Member States. In short, Germany can demand more concessions from Belgium than vice versa, and a State that wants something very badly is prepared to compromise in other areas in order to get it. Therefore, the most important actors are the Member State governments.

In this theory, the supranational institutions are set up to ensure compliance of the Member States with their Treaty obligations. In addition, the Treaties cannot cover all issues in detail, so the supranational institutions also can have a role in working out the details. However, these institutions have no independent power to further integration beyond what the Member States are willing to accept. To return to the example of the Eurozone crisis, an intergovernmentalist argument would be that the interests of the Member States converged on the formation of a Banking Union. The Member States with large financial sectors had a strong interest in the negotiations and shaped the architecture of the Banking Union. The European Central Bank was then appointed as the regulator and supervisor to ensure compliance and to develop the precise regulations. Intergovernmentalists would argue that the CJEU fulfils a similar role in the EU, helping to ensure compliance with the Treaties, but not able to push integration beyond what Member States are willing to accept.

⁹ Hoffmann (1966)

¹⁰ Moravcsik (1998)

2.2. The preliminary reference procedure in European law

Before we turn to the debate about the role of the Court in European integration, a short outline of the preliminary reference procedure¹¹ is necessary. The core of this procedure is that national courts can, and in some cases must, refer questions about the interpretation of European law to the CJEU. In other words, if a question of European law arises before a national court, the national court stays the proceedings, sends questions to the CJEU, and waits for the answer before making a final ruling in the case. This procedure is intended to ensure unity in the interpretation of European law within the Union. The questions that Member State courts refer often concern the compatibility of a specific national rule with EU law. In theory, the CJEU only explains how the relevant rules of EU law should be interpreted. However, as Craig and De Búrca point out, the Court often gives a ruling that leaves the national court little discretion and thus effectively strikes down national legislation.¹² In addition, the CJEU has developed some of the most important principles of EU law in cases in the preliminary reference procedure. For this reason, legal scholars often regard this procedure as of “seminal importance for the development of EU law.”¹³

This combination of the CJEU striking down national rules and simultaneously developing important principles of EU law serves to make the preliminary reference procedure very important for the Member States. Conveniently, the Member States can submit observations in preliminary reference cases before the Court.¹⁴ This means that in every case every Member State has the possibility to tell the Court how they think the case should be decided. To enable Member States to do that, the Court notifies them of incoming cases. The deadline for submission of Member State observations is two months after the notification by the Court. What the effect of these observations is on the Court’s decisions is the subject of a strong academic debate.

2.3. The Court and the Member States

There are broadly speaking three schools of thought on the role of the Court in European integration, and its relationship with Member State governments. Two of these are basically sub-theories of neofunctionalism and intergovernmentalism and one, referred

¹¹ Article 267 Treaty on the Functioning of the European Union (TFEU)

¹² Craig and De Búrca (2011), 442

¹³ *Ibid*, 474

¹⁴ Article 23, Statute of the Court of Justice of the European Union

to here as legalism, comes from legal scholarship. All three theories come under various names while the core ideas remain the same, for instance intergovernmentalism is sometimes referred to as “neo-realism,”¹⁵ or the “separation of powers model,”¹⁶ and neofunctionalism is also referred to as “supranationalism,”¹⁷ or the “attitudinal model.”¹⁸ For the purpose of terminological consistency, this thesis will use neofunctionalism, intergovernmentalism, and legalism for the Court-specific theories.

Neofunctionalism and intergovernmentalism share some basic assumptions about the Court that legalism does not share. These assumptions are that the Court is a unitary, rational, and political actor.¹⁹ In other words, the Court as such has a policy agenda, namely further European integration, and is trying to advance this agenda as far as possible. The basic point of contention between neofunctionalism and intergovernmentalism is how much latitude the Court has to pursue this agenda. This is in principle an empirical question: can the Member States constrain the Court?²⁰

2.3.1. Intergovernmentalism

Intergovernmentalist scholars argue that the Member States have both the ability and the will to systematically constrain the CJEU. The idea is that the Court is not just a policy-seeking actor, but also concerned with its own legitimacy. For that reason, the Court is reluctant to engage in open confrontation with the Member States. Garrett explains that the Court’s actions “are fundamentally political in that they anticipate the possible reactions of other political actors in order to avoid their intervention.”²¹ These ‘reactions’ and ‘interventions’ can come in three different forms. First of all, the Member States can change the Treaties in order to limit the power of the Court or undo its ruling. However, this is very difficult as it requires unanimity of the Member States. Therefore, this is very much the “nuclear option – exceedingly effective, but difficult to use – and is therefore (...) relatively ineffective and noncredible.”²²

Secondly, the Member States could, in their role as legislators in the Council, change the underlying directive or regulation to undo the undesired effects of a ruling.

¹⁵ Alter (1998), 122

¹⁶ Carruba, Gabel, and Hankla (2008), 449

¹⁷ Andreas Grimm (2011)

¹⁸ Larsson and Naurin, forthcoming

¹⁹ For a critical discussion of these assumptions, see Grimm (2012)

²⁰ Pollack (1997)

²¹ Garrett (1992), 558

²² Pollack (1997), 118-119

This process of changing the legislation that the Court based its ruling on to undo the effects of that ruling is generally called '(legislative) override.'²³ A third option open to one or more Member States is to simply not comply with the ruling. The noncomplying Member State(s) could avoid punishment, intergovernmentalists argue, if the other Member States agree with its opposition to the Court's ruling.²⁴ The Court wants to avoid override and noncompliance, because they damage its institutional legitimacy and reverse its preferred policy. Therefore, the Court will not push integration further than the Member States are willing to accept. However, this line of argument requires that the Court knows what the preferences of the Member States are.

This is why the observations of Member States play a crucial role in intergovernmentalist thinking. The observations should be seen as signals of what the preferences of the Member States are. As such they can be conceptualised as implicit threats of override and noncompliance. The strength of these threats is determined by the amount of Member States that agree with each other and the decision-making rules by which an override would have to take place. Proving this argument had been attempted earlier,²⁵ but the most famous empirical study supporting this argument was made by Carruba, Gabel, and Hankla.²⁶ They created a dataset of all cases decided by the CJEU between 1987 and 1997 and coded the positions of all the active Member States. Carruba, Gabel, and Hankla found "systematic evidence that judges at the [CJEU] are sensitive to"²⁷ the threats of override and noncompliance.

An implicit assumption in Carruba, Gabel, and Hankla's explanation and in intergovernmentalist approaches generally, is that the Member State governments are unitary actors. Moreover, intergovernmentalist thinking requires that Member States are willing to follow through with their threats of override and noncompliance and thus see their observations before the Court as a first step in a larger legal-political strategy that can later be followed by legislative steps. This implies that there is coordination within national governments between the actors dealing with the Court and those dealing with European legislation. This thesis will look into whether the officials in the Swedish and Dutch governments who are responsible for submitting observations see

²³ E.g. Naurin and Cramér (2009)

²⁴ Carruba, Gabel, and Hankla (2012)

²⁵ E.g. Garrett, Kelemen, and Schulz (1998)

²⁶ Carruba,(2008)

²⁷ Ibid, 449

their actions as part of a larger strategy that can include changes to European legislation. In addition, the degree of coordination between the officials dealing with the Court and those dealing with EU-legislation will be examined.

In conclusion, intergovernmentalists argue that the Court can be effectively constrained by the Member States, if many Member States oppose a certain ruling. The observations function as threats of override and noncompliance that limit the Court's ability to further integration.

2.3.2. Neofunctionalism

By contrast, in the neofunctionalist telling, the Court is an "unsung hero"²⁸ of European integration. It has accomplished a "transformation of Europe,"²⁹ by converting an international treaty into a constitution. The Court is the quintessential technocratic institution of Haas' theory: powerful, operating in a technical area where the 'mask' of the law cloaks the effects of its rulings from politicians, and institutionally well-protected against political pressure.³⁰ Moreover, individuals and companies, pursuing their own interests and agendas, help the Court by bringing cases that enable the Court to develop European legal principles.³¹ A further subnational constituency of the Court is found in the national courts, which refer questions to the CJEU, enabling the development of EU law. More importantly, national courts have accepted the supremacy of EU law over national law and therefore enforce rulings of the CJEU against their own governments.³² A way of summarising the neofunctionalist view is that the CJEU is better seen as a trustee of the Treaty system than as an agent of the Member States.³³

Alter³⁴ presents another factor that she argues insulates the Court from retaliation of the Member States. In short, the argument is that the Court has a different time horizon than politicians. Politicians, being focussed on their re-election, are interested in short term successes and for that reason care more about the outcome in the specific case than about the development of legal principles. Alter argues that the CJEU satisfies the Member States by giving them their desired outcome in specific cases

²⁸ Burley and Mattli (1993), 41

²⁹ Weiler (1991)

³⁰ Burley and Mattli (1993)

³¹ Alter and Meunier-Aitsahalia (1994)

³² Alter (1998)

³³ Alter (2008)

³⁴ Alter (1998)

while developing important principles that further integration beyond what the Member States would prefer. This is an empirical question: do Member States care more about the outcome in the specific case or about the underlying principles? This is an aspect that will come back in the empirical chapter of this thesis.

The fact that the Court represents such an ideal case for neofunctionalist thinking on supranational institutions makes the debate about the autonomy of the Court very important for neofunctionalism broadly. The empirical study of Carruba, Gabel, and Hankla thus presented a serious challenge to this theory. That is why neofunctionalist scholars Stone Sweet and Brunell reacted strongly.³⁵ They argue that the Member States cannot constrain the Court with threats of override and noncompliance. The argument is that in the case of important rulings, the Member States will be divided amongst themselves and thus not able to override a decision of the Court.³⁶ Moreover, the Court is not constrained by a threat of noncompliance because the Member States will encourage the punishment of the noncompliant Member State. In addition, national courts play a role in keeping noncompliant governments in check.³⁷ Stone Sweet and Brunell argue that the ineffectiveness of the threats of override and noncompliance is proven by Carruba, Gabel, and Hankla's own dataset.³⁸ As a result of the inability of the Member States to constrain the Court, the Court is in charge of its own zone of discretion.³⁹

In conclusion, in the neofunctionalist view, Member States' observations are not decisive because the Member States cannot credibly threaten to override the Court or to not comply with its rulings. However, that leaves unanswered a question that is relevant for this thesis: why would Member States bother to spend time and energy writing observations in cases before the Court if they do not have influence?

2.3.3. Legalism

Legal scholars have a very different conceptualisation of the Court and its relationship with the Member States than neofunctionalist and intergovernmentalist scholars. In a simple version of legalism, the Court is seen as first and foremost a legal actor, motivated by a desire to find the correct interpretation of the law, not by any political or

³⁵ See Stone Sweet and Brunell (2012); and Stone Sweet and Brunell (2010)

³⁶ Stone Sweet and Brunell (2012)

³⁷ Stone Sweet and Brunell (2010)

³⁸ Stone Sweet and Brunell (2012)

³⁹ Stone Sweet (2010)

personal preferences.⁴⁰ A more sophisticated view is presented by Grimmel.⁴¹ He argues that neofunctionalism and intergovernmentalism simply transfer assumptions developed for political processes to the legal field, without paying attention to the idiosyncrasies of the legal profession. A particular point Grimmel emphasises is that, in his view, rationalism should not be seen as universal, but rather dependent on context. Grimmel argues that European law is a distinct space of reasoning, where political and policy arguments do not play a role. "In short, legal reasoning is not political law-making. The context of law, not the interest of actors, tells which claims and arguments are legitimate and which have to be refused."⁴² Therefore, the rationalism of politics (strategically furthering one's policy preferences) does not apply in the legal field.

As a consequence, legal scholars see the observations mainly as tools Member States can use to persuade the Court of their position.⁴³ In other words, it is the legal soundness of the arguments that matters, rather than the Member States' political force. Moreover, persuasion is seen by legal scholars as more effective than extra-legal means of influencing the Court such as override and noncompliance. This argument is strengthened if the Member States are conceptualised as 'repeat players.' The core idea of the repeat player theory⁴⁴ is that there are two kinds of litigants: repeat players and 'one-shotters'. One-shotters are actors that litigate only very rarely and are interested in the outcome of a single case; examples could be consumers or tax payers. Repeat players are actors who often engage in the same kind of cases; examples could be insurance companies or tax agencies. Repeat players are not merely interested in the outcome in individual cases, but also in long-term rule change. Repeat players might even have policies to seek out cases that will help change the rules in their favour. They also have experience with litigating, in-house specialists, and larger resources. This explains why repeat player can use litigation to change the rules of the legal system over time.

In the context of European law, the Member States are important repeat players. As such, they should be able to influence the direction of the development of EU law over time by being active in cases before the Court. They could learn which arguments work and which do not. They could use their resources to their advantage. However, a

⁴⁰ Larsson, Naurin, Derlén, and Lindholm, (2014)

⁴¹ Grimmel (2011); and Grimmel (2012)

⁴² Grimmel (2011), 8-9

⁴³ Granger (2004)

⁴⁴ Galanter (1974)

problem with this perspective is that the Member States have no say in which cases come before the CJEU, in the context of the preliminary reference procedure. They cannot settle out of court if they think the case might be damaging to their long-term goals. It is inherent in the procedure that they have a reactive posture, responding to cases as they arise. Nevertheless, the idea that persuasion is the most effective way in which Member States can influence the Court is a very lawyerly one. As most government officials dealing with cases before the CJEU are likely to be lawyers, it might be expected that some of them will share this view. It will be investigated in the empirical chapter below whether that is the case.

It deserves emphasis that the purpose of this thesis is not to adjudicate between the neofunctionalism, intergovernmentalism, and legalism. However, it will be examined whether the officials in the Dutch and Swedish governments believe their observations have an effect on the Court's decision-making and why (not). This should not be construed as conclusive evidence on the question whether the observations have an impact, but it can enrich the understanding of this question to know what actors involved in the process think. Another way in which this thesis contributes to existing research is that the previous studies have mainly been based on quantitative methods, while this thesis uses qualitative methods.

Moreover, nearly all of the scholars cited in this chapter sought to explain why the CJEU does what it does. In contrast, this thesis will add to the literature by focussing on the other side of the Court-Member State relationship, namely the Member State governments. The questions of why Member States submit observations, what their intent is in doing so, and how the drafting of the observations is organised in the Member States, have received little attention in the literature.⁴⁵ However, some work in this field has been done. An overview of that literature will be presented below.

2.4. Member states' decision-making processes

There is only one study that has looked at all the issues studied in this thesis: Granger (2004). The article touches on all the important issues, but often stays rather superficial. For instance, the article spends only one short paragraph on each of the questions what factors are considered in deciding whether or not to submit an observation and what the

⁴⁵ Granger (2004)

Member States' objectives are in submitting observations. The method used in the article consists of a combination of statistical analysis with analysis of governmental documents, interviews, questionnaires, and reports by governments' agents involved in EU litigation.⁴⁶ However, these documents, interviews, questionnaires, and reports are not cited extensively to build the argument. Especially the interviews and answers to the questionnaires, which in all likelihood contained the perspectives of the government officials, are scarcely used.

Despite these shortcomings the article presents some interesting findings. By looking at ten Member States, the article presents a good general picture of the way decision-making about observations is organised, what Member States take into account, and what their goals are. Granger distinguishes three categories of motivations for sending observations: "the defence of domestic or national interests, the promotion of national visions of Europe and the furthering of EU interests."⁴⁷ However, these categories are not explained much further. The interesting question is what counts as a national or EU interest that should be furthered or defended. The only thing the article contains on this question is that if national policy or legislation is directly or indirectly at stake, that counts as a national interest.

A similar level of generality can be found in the description of the considerations in the decision-making process. These are: "the variety of interests at stake, the need for explanation or justification of national laws, policies or practices, the existence or absence of established case law, the importance or sensitive nature of the issues, the political or legal opportunity, the "creativity" potential of the reference or the likely positions of other parties."⁴⁸ Again, the interesting question is when something is politically or legally opportune, which interests are balanced, how they are balanced. All this remains open. In contrast, much more attention is paid to how things are organised in the different Member States. However, because the article looks at ten Member States, it cannot describe the process in much detail. Rather, it paints a picture in broad strokes of how things are organised in the different Member States.

This thesis will seek build upon the work of Granger by looking in more detail into two Member States, as opposed to ten. The goal is that this leads to a more detailed

⁴⁶ Ibid, endnote 5

⁴⁷ Ibid, 10

⁴⁸ Ibid, 20

analysis of the considerations, the process, and the objectives of the Member States regarding their observations to the CJEU. Moreover, whereas Granger focussed more on the decision-making processes in the Member States, this thesis will also give a lot of attention to the considerations and objectives of the civil servants. Accordingly, there will be more attention to the perspectives of the interviewees on these issues. In addition, the categories that Granger described in very general terms will be fleshed out in more detail, and illustrated with examples. Moreover, new categories of considerations and objectives will be added.

In addition to Granger's article, there are several other studies that are relevant here. They deal with part of the subject under study in this thesis or with issues that are related to it. Firstly, Adam et al.⁴⁹ study annulment proceedings, a different type of cases than are the focus of this thesis. They argue that domestic political factors can play a role in the decision of the Member States to sue the Commission. They argue that Member State governments can get an immediate populist-political reward for the act of suing, as they will be seen as fighting for the national interest against the bureaucrats in Brussels. This is an incentive to sue regardless of the chance of success. It might even be so, Adam et al. argue, that governments want to lose the case because it will give them a stronger hand to force through unpopular reforms. This idea, that political considerations can play a decisive role in decisions about the actions of Member State governments in European courts, speaks to the second sub-question in this thesis and will therefore come back in the empirical part of this thesis.

When it comes to the organisation of the decision-making around and drafting of the submissions an interesting study is a report commissioned by the Dutch Ministry of Justice.⁵⁰ The researchers report that in a majority of cases "the decision whether or not an intervention is expedient is left to individual civil servants"⁵¹, and also note that "within the Ministry of Justice, the objective of an intervention isn't recorded."⁵² This would make it hard for the observations to be part of a legal-political strategy and thus seem to go against intergovernmentalist theory. However, this was a study of just one ministry in one Member State and it is hard to draw generalised conclusions from that.

⁴⁹ Adam, Bauer, and Hartlapp (2015)

⁵⁰ Huson, Habib, and Voermans (2008)

⁵¹ Ibid, 73

⁵² Ibid, 71

In conclusion, this thesis will seek to contribute to the existing literature by turning the focus on the activity of the Member State governments instead of that of the Court. As outlined above, earlier research has sought to explain how the CJEU reacts to observations from the Member States, and why it does so. In contrast, the question of the how and why of Member State behaviour has received fairly scant attention. This is the gap in the literature this thesis seeks to fill. Therefore, the aim of this thesis is to make a first attempt to establish why Member States decide to send observations to the CJEU in the preliminary reference procedure. The idea is that this will lead to a better understanding of the complex relationship between the CJEU and the EU Member States and thus inform the theories described in this chapter. A further contribution of this thesis lies in the fact that this thesis will analyse the processes in two selected Member States in depth as opposed to comparing many different Member States on a very general level.

3. Methodology: Interviews

This chapter will explain the choice for semi-structured interviews as the method of this thesis. In addition, the selection of Sweden and the Netherlands as well as the selection of the ministries that are included in this study will be justified. Moreover, the limitations of this method will be discussed.

The aim and research question of this thesis concern the considerations and objectives of government officials. The most straightforward way to find out what these considerations and objectives are is simply to ask the people concerned. After all, it is hard to know what someone is thinking if one does not talk to them. However, in theory there could be very strict guidelines that stipulate when and why observations should be submitted. In fact, as will later be seen, some guidelines do exist. These guidelines will be used as tools for triangulation and to support the empirical analysis. However, guidelines can never fully capture the complexity of making the kinds of case-by-case assessments that are central to the topic under study here. Furthermore, it is always a question to what extent the guidelines are followed in practice. Therefore, interviews are the best method for finding an answer to the questions this thesis poses.

However, it should be noted that this line of reasoning is grounded in a positivist worldview. The idea is that people's objectives and considerations are facts that are simply "out there," waiting to be found.⁵³ As this thesis deals with fairly rational and institutionalised decision-making processes, and does not focus on individuals' feelings and emotions, this positivist view fits the subject of this thesis well. On the other hand, a weakness of this approach is that interviewees might not be willing to share all that they know or believe. However, this potential weakness is mitigated by the fact that the decision whether or not to submit observations is generally not very controversial politically.

Nevertheless, one issue on which there was a reluctance to answer was the question concerning on-going cases, i.e. cases in which the decisions about the observation were not final yet. Originally, the idea was this thesis would follow the decision-making process on a few individual cases in both Sweden and the Netherlands. However, after a few interviews it became clear that this was not feasible as the civil

⁵³ Silverman (2011), 170-174

servants were not willing to discuss ongoing cases. For that reason the topic was not included in later interviews. As a result, the interviews stuck to the decision-making on a general level, with the addition of examples provided by the interviewees.

Finally, the interviews were semi-structured, as opposed to rigidly structured or fully open. The benefit of semi-structured interviews is that they stick to predefined topics and questions that are necessary to answer the research question, while simultaneously allowing for “openness to changes of sequence and question forms in order to follow up the answers given.”⁵⁴ In addition, an advantage of the live interview format over written questionnaires is that it allows for follow-up questions if answers are unclear. The full interview guide can be found in Appendix 1.

3.1. The preliminary reference procedure

This thesis will only focus on the decision-making around observations of Member States in the preliminary reference procedure and thus exclude the interventions of Member States in other cases. There are three reasons for this. The first is that concentrating on one specific procedure enables clearer analysis because the procedure, and the role of the Member States, is slightly different in different procedures. For instance, in infringement proceedings the case is always that the Commission sues a Member State. Such differences would serve to confuse the analysis if the different procedures would all be included in this thesis.

Secondly, the preliminary reference procedure is seen by legal scholars as extraordinarily important for the development of EU law, as outlined in the theory chapter. This should make the procedure important to the Member States, especially since the compatibility of national laws with EU law is often at stake. Furthermore, the preliminary reference procedure is by far the biggest source of cases for the Court. According to the Court’s latest annual report, references for a preliminary ruling represented between 61 and 69 percent of new cases each year between 2010 and 2014.⁵⁵ The third reason for choosing the preliminary reference procedure is that some of the earlier literature is also focussed on this procedure.⁵⁶ This will enable the comparability of this thesis’s results with the earlier literature. Furthermore, this earlier

⁵⁴ Kvale (2007), 65

⁵⁵ Court of Justice of the European Union (2015), 94

⁵⁶ E.g. Granger (2004); and Larsson and Naurin, forthcoming

literature provides statistical information that is relevant for the selection of the Member States.

3.2. Case selection I: The Netherlands and Sweden

Since it is impossible in a Master's thesis to interview civil servants in all the Member States, a selection has to be made. First the Member States should be selected, and then a choice has to be made about which civil servants within those countries to interview, those issues will be discussed in turn.

Naturally, two Member States can never fully represent all 28 Member States. However, it is worth remembering that this thesis seeks to take a first in-depth look at the internal processes that determine whether or not Member States submit observations in preliminary reference cases. This thesis argues that Sweden and the Netherlands represent an interesting puzzle that is a good place to begin that analysis. The main argument for this is that these Member States are similar in many ways, but behave significantly differently in submitting observations to the Court. In other words, the patterns that seem to explain the variation in the level of activity of the Member States generally, cannot explain the difference in activity between Sweden and the Netherlands.

There are two ways in which to gauge how active Member States are in submitting observations. One way is simply to count the total number of observations submitted by the Member States. Naurin et al.⁵⁷ present a figure outlining the number of observations each Member State submitted in the period 1997-2008 (see Figure 1 below). One should note that some Member States only joined the EU in 2004 or 2007. That is why the red led line represents the share of the preliminary reference cases in which the countries submitted observations during the time that they have been Member States.

⁵⁷ Naurin, Cramér, Larsson, and Moberg, forthcoming

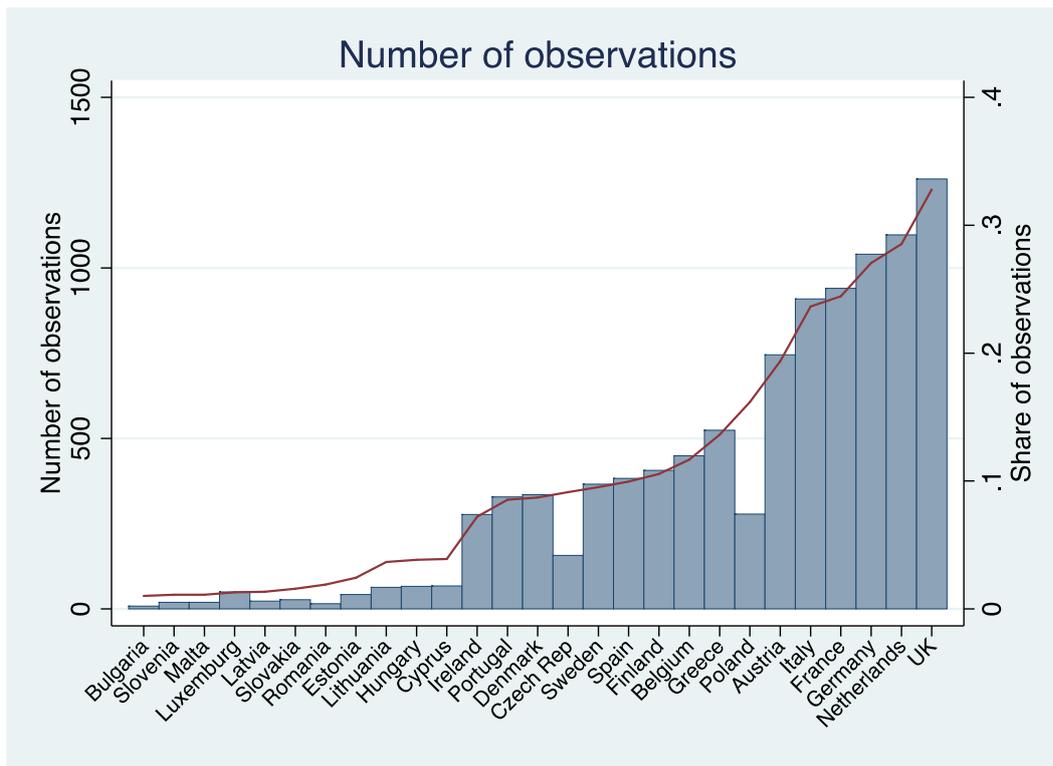


Figure 1. Number of observations 1997-2008. Source: Naurin et al.

It is clear from Figure 1 that the Netherlands is very active when it comes to submitting observations, with only the UK being more active. In contrast, Sweden ranks in the middle. However, as Naurin et al. point out, Member States are more likely to submit observations on cases coming from their own country. This is logical as the Member State from which the case arises is most directly affected by its outcome. Therefore, part of the explanation might lie in the fact that Dutch courts submit many more questions for preliminary ruling than Swedish courts do.⁵⁸

For that reason, a second way to gauge the level of activity of the Member States is to look at the frequency with which they submit 'external observations', i.e. observations in cases arising in another Member State. This is presented in Figure 2, also taken from Naurin et al.. Again the Netherlands ranks among the most active Member States. Sweden, in contrast, is the least active old Member State, barring Luxembourg.

⁵⁸ Ibid, see also Broberg and Fenger (2013)

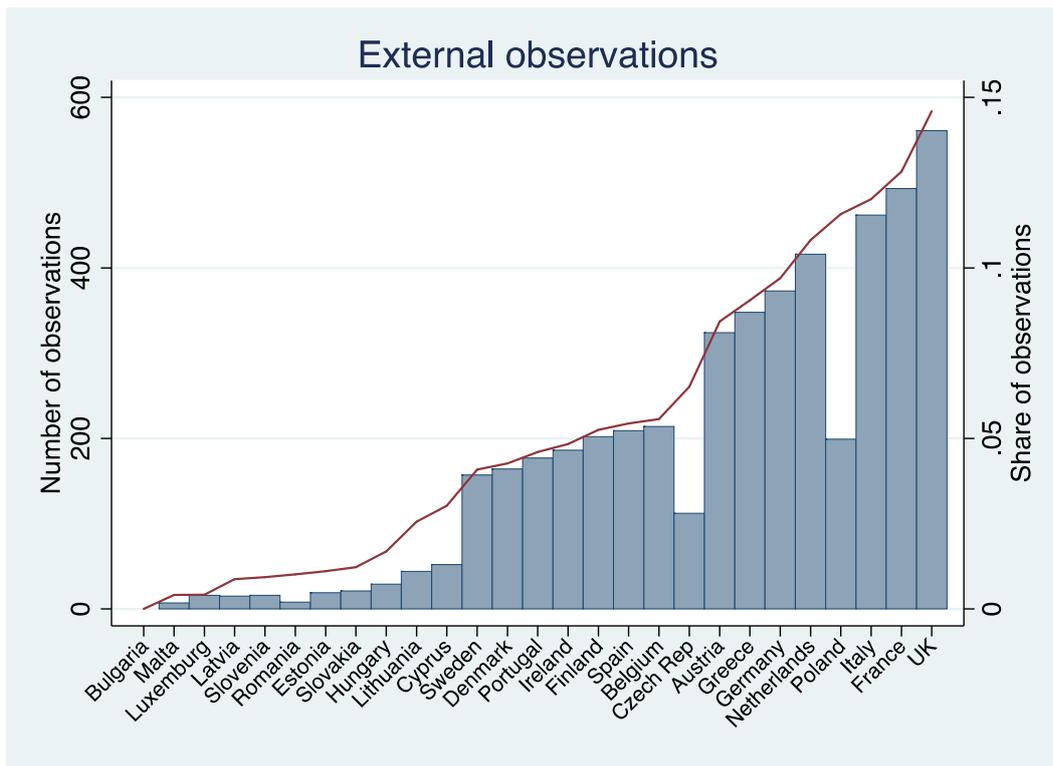


Figure 2. Number of external observations 1997-2008. Source: Naurin et al.

As can be gauged from the two figures above, there are some factors that seem to explain some of the variation in the level of activity of the Member States. Firstly, bigger Member States are generally more active than smaller Member State. This might be a consequence of the amount of resources that are available. Additionally, bigger Member States represent bigger markets. This makes it more worthwhile for companies to sue for the removal of trade barriers, which leads to more references from those countries and thus more observations.⁵⁹ A second pattern is that older Member States are generally more active than newer ones. However, these patterns cannot explain the differences between Sweden and the Netherlands, as they are similar in both those respects. The Netherlands and Sweden are both medium-sized Member States, respectively ranking eighth and fourteenth in population size,⁶⁰ and seventh and eighth in GDP.⁶¹ Furthermore, Sweden and the Netherlands are both old Member States, in the sense that they were part of the EU before the enlargement of 2004.

Based on those patterns, the Netherlands and Sweden could have been expected to submit roughly the same amount of observations. However, as is clear from the

⁵⁹ Broberg and Fenger (2013)

⁶⁰ Eurostat, "Population on 1 January"

⁶¹ International Monetary Fund, "Report on Selected Countries and Subjects"

figures above, this is not the case. The Netherlands submits more observations than might be expected, while Sweden submits less than expected. This is why Sweden and the Netherlands are contrasting cases and thus suitable Member States for this thesis.

3.3. Case selection II: The ministries

There are normally several ministries involved in the deciding on, and writing of the observations. The Foreign Affairs ministry is involved in every case, as is the ministry or ministries to whose policy area the specific case belongs.⁶² In the process, civil servants at the Ministry of Foreign Affairs play the role of agents of the Member States, officially submitting the observations and arguing at the oral hearings. This means that they have a lot of knowledge about their Member State's dealings with the Court. The ministry or ministries whose policy areas are affected by the case are mainly responsible for deciding if the Member State should get involved and defining what the government's position in the case should be. These different perspectives are both relevant for this thesis. Therefore, it is necessary to interview civil servants at both the Ministry of Foreign Affairs and other ministries, in both Sweden and the Netherlands.

The question then is which ministries besides the Ministry for Foreign Affairs should be included in this thesis. Naturally, it should be the same ministries in Sweden and the Netherlands, to ensure comparability. As referenced earlier, the original idea was to follow some ongoing cases and talk to all actors involved in those cases. However, as this proved impossible, a different way of selecting the other ministries became necessary. In the event, the first interviews were conducted at the Ministry for Foreign Affairs in Sweden. The other ministries were selected by asking the first interviewees which Swedish ministries had recently been relatively active in the submitting of observations and which policy areas this activity concerned. The answer was that this had been the Ministry of the Environment and Energy with environmental issues and the Ministry of Finance as it relates to taxation.⁶³ Consequently, interviews were also conducted with civil servants at the corresponding ministries in the Netherlands. In total, eleven civil servants were interviewed for this thesis. Figure 3 presents the number of interviewees for each ministry.⁶⁴

⁶² Granger (2004)

⁶³ Interviewee 1, Ministry for Foreign Affairs, Sweden

⁶⁴ One interviewee asked that her workplace not be listed to insure anonymity.

Ministries by Member State	Number of interviewees
<i>Sweden</i>	
Ministry for Foreign Affairs	4
Ministry of the Environment and Energy	1
Ministry of Finance	1
<i>The Netherlands</i>	
Ministry of Foreign Affairs	2
Ministry of Infrastructure and the Environment	1
Ministry of Finance	1

Figure 3. Number of interviewees per ministry

To ensure their cooperation, the interviewees were guaranteed anonymity. Therefore, they will be referred to in this thesis simply as ‘interviewee’ followed by a number and the ministry at which they work. A full list can be found in Appendix 2. Moreover, all interviewees, regardless of their gender, will be referred to with female personal pronouns. An important caveat is that the views expressed by the interviewees are their personal opinions, not the positions of their respective governments or ministries. The interviews in the Netherlands were conducted in Dutch and those in Sweden in English.

All interviews but one were recorded and transcribed, which contributes to the reliability of the data and validity of the results.⁶⁵ The validity of some of the results is further supported by using official documents as tools for triangulation. The documents included in this thesis are guidelines that outline the role that different parts of the government play in the process and what the criteria are for submitting observations. However, it should be noted that the guidelines used in the Netherlands are much more detailed and extensive, as will be seen in the empirical chapters. Therefore, the triangulation referred to above is less possible in the case of Sweden.

3.4. Analytical approach

In analysing the transcripts of the interviews and the government documents two things will be constantly looked for. Firstly, as was outlined above, the Netherlands and Sweden behave significantly differently and it is not immediately obvious why. Therefore, one aspect that will be looked for in the data is whether there are differences between Sweden in the Netherlands in the way the process of drafting observations is organised, or in the way that Swedish and Dutch interviewees see the observations.

⁶⁵ Silverman (2011), 369-371

Furthermore, there might also be differences between the different ministries, across Member States. Those differences will also be analysed.

Secondly, it will constantly be analysed how the answers of the interviewees relate to the theories. For instance, neofunctionalism predicts that Member States are mostly interested in the outcome in the specific case because politicians have a short term interest to get re-elected. If it turns out that the interviewees are very much concerned with long term legal developments, this would go against neofunctionalism. Similarly, intergovernmentalism sees the observations as threats of override and noncompliance. This would mean that after the Court rules, the Member States would try to change the underlying EU-legislation or not comply. It is a question how the civil servants in the Member States see this. If they do not consider overriding the Court a possibility that would show that at least the Member States do not think of observations as a first step in a strategy that can include legislative steps. Finally, legalism sees Member States as repeat players who seek long term rule change through action before the Court. This is very much in contradiction to what neofunctionalism says. Moreover, according to legalism the best way to influence the Court is sound legal argumentation. As the interviewees are lawyers, it might be expected that they share this perspective.

3.5. Limitations

An obvious limitation of this study is that it only concerns two Member States out of 28. As a result, it could be that some of the results found in this thesis are not generalizable to the other Member States. However, as stated before, it is not possible in a Master's thesis to perform an in-depth study of all Member States and there is a case to be made that Sweden and the Netherlands are good countries to include. A similar concern might be raised about which ministries are included. However, this concern should be allayed by the fact that the interviewees in both Sweden and the Netherlands indicated that their governments should be seen as unitary actors, and that this is the principle on which their working processes are based. In addition, the civil servants at the Ministries of Foreign Affairs in both countries have an overview of all cases in which their government is involved. Nevertheless, it cannot be excluded that additional relevant aspects might have been discovered had more interviews been conducted.

4. Results

In this chapter the results of this thesis will be presented. One point on terminology is in place here. The term 'department' is sometimes used for different units within ministries and sometimes for ministries themselves. For the purpose of terminological consistency 'department' will be used in this thesis for all different units within the ministries and never for the ministries as a whole.

4.1. Process

Sub-question 1. How is the decision-making about submitting observations to the CJEU organised in Sweden and the Netherlands?

In broad strokes the process through which observations are formulated is the same in Sweden and the Netherlands. First, the legal department of the Foreign Ministry distributes the cases that come in from the CJEU to the other ministries. Those ministries then respond by indicating in which of the following ways they want to be involved in case: i) not involved, ii) following the case, i.e. receiving all the documents and information, but not being active, or iii) submitting an observation. So, in principle it is the ministry responsible for the policy area in question that decides whether or not there will be an observation, not the Foreign Ministry. However, if the Foreign Ministry thinks an issue is very important they can also push for an observation in that case, but this is rather the exception.

Following the decision that submitting an observation is desirable, the Foreign Ministry and the ministry or ministries that want to submit an observation cooperate in writing the legal brief. In this drafting process the Foreign Ministry is primarily responsible for writing the observation, procedural matters, and ensuring that the observation makes European-legal sense. The other ministry or ministries is/are mainly responsible for defining the position that the government should take, and for providing the main line of reasoning, specific arguments, and the practical or policy context of the questions at hand. Some Swedish interviewees summed up this distribution of labour by describing the civil servants at the Foreign Ministry as the 'barristers' for the others.⁶⁶ Finally, the civil servants in the Foreign Ministry submit the observation and represent

⁶⁶ interviewees 2 and 3 Ministry for Foreign Affairs, Sweden; and 5, Sweden

the Member State at the oral hearing. Both Sweden and the Netherlands in principle go to the oral hearing if they have submitted observations.⁶⁷

However, if one takes a more detailed look, there are differences between Sweden and the Netherlands. In the first step, when the Foreign Ministry distributes the cases to the other ministries, the Swedish Foreign Ministry sends the cases only to those ministries whose policy areas might be affected by the case.⁶⁸ In contrast, in the Netherlands, the Foreign Ministry sends every case to every ministry and adds a note that states for which ministries the case is especially relevant.⁶⁹ In other words, the first broad selection of which ministries might possibly be concerned is made by the Ministry for Foreign Affairs in Sweden, while in the Netherlands this is left up to each ministry. However, in both Member States all observations have to be approved by a meeting of representatives of all ministries, so also in Sweden all ministries can have their say.⁷⁰

In addition, in the Netherlands there is a checklist⁷¹ that is used to determine whether making an observation is desirable, while in Sweden this is not the case. As can be seen in Appendix 3, the checklist consists of 14 yes-or-no questions. The questions are mainly about whether the case could affect Dutch policy or legislation. This document is widely used in practice. For instance, in the Dutch Finance Ministry, every department that might be affected by the case (including the tax authority) fills out the entire checklist. Those lists are then collected and the Ministry of Foreign Affairs is informed whether the Ministry of Finance wants to follow the case, be active, or neither. In principle, one 'yes' is enough to trigger the submission of an observation.⁷² Having to actively consider those questions for each and every case in one's policy area might lead to more submissions. This could be part of the explanation why the Netherlands submits more observations than Sweden. However, it is impossible to know, based on the data in this Master's thesis, whether such a checklist has a big effect, if at all.

A further difference is that in Sweden there is always a third entity involved besides the Foreign Ministry and the ministry whose policy area is affected. This entity is called *Statsrådsberedningen* in Swedish. Its official name in English is Prime Minister's

⁶⁷ Information from all interviews and, for the Netherlands: ICER (2011)

⁶⁸ Interviewee 1, Ministry for Foreign Affairs, Sweden

⁶⁹ Interviewee 10, Ministry of Foreign Affairs, the Netherlands

⁷⁰ Interviewee 4, Ministry for Foreign Affairs, Sweden. Interviewee 9, Ministry of Foreign Affairs, the Netherlands

⁷¹ ICER (2002)

⁷² Interviewee 8, Ministry of Finance, the Netherlands

Office, but this is perhaps a misleading term. It should be thought of more as an entire ministry than the office of the Prime Minister. In any case, the responsibility of the Prime Minister's Office is to coordinate government policy across ministries. Accordingly, its main role in the process under study here is to have a political and strategic long term view, and to see what the impact can be of certain positions on policy areas that are not directly at issue in the case.⁷³ As such, the Prime Minister's Office is "the voice of politics"⁷⁴ in the drafting process. As we will see below, political considerations can have an influence on the content of the observation. In Sweden, this political input can come through the hierarchies within ministries, or via the Prime Minister's Office.

There is also a difference between Sweden and the Netherlands in the human resources that are available for this process. While in Sweden there are six agents at the Foreign Ministry,⁷⁵ in the Netherlands there are eight.⁷⁶ Moreover, at both the Finance and Environmental ministries in the Netherlands there are specific civil servants who are responsible for their ministry's involvement in EU judicial proceedings, while in Sweden this is not the case. The specific organisation varies per ministry.

In the Dutch Ministry of Finance, all preliminary references in Dutch taxation cases are handled by a specialised group of lawyers, whose main task is representing the government in tax proceedings before the Dutch Supreme Court. The tax cases from other Member States are dealt with by an EU-law specialist at the department in whose competence the issue falls.⁷⁷ In the Dutch Ministry of Infrastructure and the Environment there are two specialists for the CJEU. They are responsible for all the cases in which the ministry is involved. Naturally, they coordinate closely with civil servants at the departments whose policies are affected by the case.⁷⁸ However, the Finance ministry has more manpower available for preliminary reference cases than the Environment ministry in the Netherlands. This might be an explanation for the fact that the Finance Ministry often sends a more extensive draft to the Foreign Ministry than the Environment Ministry, which focusses more on outlining the main points in brief.⁷⁹

⁷³ Interviewee 1, Ministry for Foreign Affairs, Sweden

⁷⁴ Interviewee 5, Sweden

⁷⁵ Interviewee 3, Ministry for Foreign Affairs, Sweden

⁷⁶ Interviewee 9, Ministry of Foreign Affairs, the Netherlands

⁷⁷ Interviewee 8, Ministry of Finance, the Netherlands

⁷⁸ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

⁷⁹ Interviewee 8, Ministry of Finance, the Netherlands; Interviewee 9, Ministry of Foreign Affairs, the Netherlands; Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

In the Swedish ministries studied in this thesis there are no specific specialists for CJEU-cases. In the Ministry of Finance, taxation cases are the responsibility of the legal department, within which the individual cases are assigned to civil servants in part based on experience with the matter at hand, and in part based on who has time. Moreover, the tax authority can play a role in the process.⁸⁰ In the legal department of the Ministry of the Environment and Energy in Sweden, the cases are distributed to the civil servants who are responsible for the specific policy area that is at stake in the case.⁸¹ In sum, it should be clear that the Dutch ministries have more human resources available for the preliminary reference procedure than their Swedish counterparts.

Interviewee 7 at the Swedish Ministry of Finance is aware of this, and attributes the fact that the Netherlands is more active in preliminary reference procedures in the area of taxation than Sweden to this difference in resources: “Holland and Germany are very active, and they have persons [who] only work with [CJEU cases], so they’re very active. We don’t have that kind of resources.”⁸² This would correspond with the pattern that we saw in the methodology chapter, that larger Member States, which are presumed to have more resources, submit more observations. Nevertheless, the Netherlands is not that much larger than Sweden, so it might also be a difference in prioritisation, or a combination of the two.

4.1.1. Preliminary references and the legislative process

The question how the observations of Member States in preliminary reference cases relate to EU-legislative processes is especially relevant for intergovernmentalism. Intergovernmentalists conceptualise the observations as threats of legislative override. In the theory chapter this thesis argued that it is therefore relevant to know to what extent civil servants in Sweden and the Netherlands see their observations as part of a broader strategy that can include legislative steps. Moreover, it is relevant to know to what extent there is coordination between the civil servants dealing with the observations and those responsible for EU legislation.

As said before, preliminary references often deal directly or indirectly with the compatibility of national legislation with EU-law. For that reason, the civil servants who

⁸⁰ Interviewee 7, Ministry of Finance, Sweden

⁸¹ Interviewee 6, Ministry of the Environment and Energy, Sweden

⁸² Interviewee 7, Ministry of Finance, Sweden

negotiated the directive in question, and the civil servants who are responsible for implementing current EU-law might have very relevant insights. Therefore, in both Sweden and the Netherlands, those civil servants are involved in the process. This includes both civil servants with legal expertise in specific policy areas, and civil servants with technical expertise or practical experience. However, the specific people who negotiated the directive might not be available.⁸³ Nevertheless, the intent is for the government to take the same position in the Court cases as it did in the negotiations. Thus there is close coordination between those dealing with the Court and those involved with EU-legislation. This coordination occurs mainly within the ministries that are responsible for the policy area at hand.

When it comes to the question of a possible attempt to override the Court's ruling, a first thing to note is that different ministries play different roles after the CJEU has delivered its judgement. The civil servants in the Foreign Ministries who deal with the Court are not involved in EU-legislative processes. However, they can help with interpreting the ruling of the Court if that is requested.⁸⁴ In contrast, the legal departments of the other ministries, and in Sweden the Prime Minister's Office, will be deeply involved in any changes to national or EU legislation.

However, it should be noted that the first instinct of all interviewees is that if the Court's ruling makes national rules incompatible with EU-law, the national rules have to be adjusted, rather than the EU-rules. This is very understandable when it concerns Treaty-interpretation because changing the Treaty is exceedingly difficult. However, the same initial response that national law has to be adjusted and not EU-law, came back when it concerned secondary EU-law. Interviewee 11 for instance says: "But in the end, whether we participate or not, there will be a ruling of the Court on the directive; or European law in any case. So, if that is not in line with your regulations then you will have to do something about it."⁸⁵ This idea comes back in all interviews, that if the Court delivers an unfavourable ruling, national laws and regulations will have to be adjusted accordingly. This goes against the idea of the observations as a first step that can be followed by legislative initiatives.

⁸³ Interviewee 2, Ministry for Foreign Affairs, Sweden

⁸⁴ Interviewee 3, Ministry for Foreign Affairs, Sweden

⁸⁵ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands. All Dutch quotes are translated into English. A list of the original phrasing in Dutch can be found in Appendix 4.

Nevertheless, the observations can be part of a legal-political strategy in another way. As EU legislation is the product of many compromises, some provisions can be interpreted in several ways. It is up to the CJEU to define the correct interpretation of such provisions. For that reason, submitting observations is seen by the interviewees as a way to push for the interpretation of the relevant provisions that the Member State advocated for in the negotiating process. Interviewee 6 mentions Article 33 of the REACH regulation⁸⁶ as an example where the Swedish government and other governments have a very strong idea about how that article should be interpreted. When that issue reached the Court, the observations were seen as way to argue for the preferred interpretation.⁸⁷ In this way, the observations are not a first step in a legal-political strategy, but rather the final step in which the precise meaning of earlier compromises is decided.

In conclusion, the evidence on the relationship between the preliminary references and EU-legislative processes is mixed. On the one hand, there is close coordination between the actors who deal with the Court and the actors responsible for EU-legislation. This could enable a larger legal-political strategy in which submitting observations would be a first step that can be followed by legislative action. On the other hand, the first impulse of the interviewees is that a negative ruling by the Court will lead to changes to national rules, rather than an attempt to change European rules.

4.1.2. Coordination between Member States

The question to what extent the Member States coordinate their observations is relevant as intergovernmentalist scholars argue that the threat of override or noncompliance is stronger when more Member States are active in a specific case.

A first note is that coordination only takes place between Member States that agree with each other in the specific case. The main differences on this issue are not between Sweden and the Netherlands, but rather between the different ministries. The Foreign Ministries have “a very well-functioning network among agents in the Member States.”⁸⁸ However, the coordination is not very extensive in most cases. It is mainly limited to things like drawing each other’s attention to important cases⁸⁹ or requesting

⁸⁶ Regulation 1907/2006/EC

⁸⁷ Interviewee 6, Ministry of the Environment and Energy, Sweden

⁸⁸ Interviewee 1, Ministry for Foreign Affairs, Sweden

⁸⁹ Interviewee 9, Ministry of Foreign Affairs, the Netherlands

more information on the specific national regulations in question from the Member State from which the case originates.⁹⁰ As interviewee 10 puts it: “[we do ask] ‘well, what is your position and are we in the same camp?’ so to say, but not ‘well, we have this argument are you also going to use that?’ I do try sometimes (...), [but] everyone has their own deadlines and their own way to go through that procedure nationally (...). So it is often hard [to coordinate] within those deadlines.”⁹¹ This comment and others like it⁹² indicate that the time frame of 8 weeks between the Court informing the Member States and the deadline for submission of written observations limits the level coordination between the Member States in preliminary reference cases.

However, before the oral hearing, when all the written observations are submitted and known to all Member States, there can be more coordination. This is especially the case if there are a lot of Member States involved. At this stage it is also fairly clear what the position of all the Member States will be because of the written observations. A prime incentive for coordination is that speaking time is limited to 15 minutes per Member State. Moreover, if multiple Member States are going to make very similar arguments it can be worth distributing them somewhat to optimise the use of the limited time available.⁹³ Nevertheless, it remains the case that these are separate Member States who decide themselves what they are going to say.⁹⁴

When it comes to the Environment Ministries, the situation is mostly similar to the Foreign Ministries, with Member States mainly drawing each other’s attention to important cases and perhaps coordinating before the oral hearing. However, the interviewees at the Environment Ministries in both countries brought up two additional aspects of the coordination between Member States. Firstly, interviewee 11 mentioned that the Dutch Environment Ministry sometimes helps other Member States by suggesting arguments to support their case.⁹⁵ However, this mainly occurs when the Netherlands does not itself submit an observation, be it because of a lack of resources or because the case is not very important for the Netherlands. In such cases it can still be desirable to help another Member State. However, this occurs rather rarely. In contrast,

⁹⁰ Interviewee 3, Ministry for Foreign Affairs, Sweden

⁹¹ Interviewee 10, Ministry of Foreign Affairs, the Netherlands

⁹² E.g. Interviewee 7, Ministry of Finance, Sweden

⁹³ Interviewee 4, Ministry for Foreign Affairs, Sweden

⁹⁴ Interviewee 10, Ministry of Foreign Affairs, the Netherlands

⁹⁵ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

when the Dutch Environment Ministry submits observations itself, there is no need to advise others, since all arguments can be included in the own observation.

Secondly, interviewee 6⁹⁶ explained that groups of Member States can have ongoing discussions on important legal questions, especially if new legislation is adopted in which crucial provisions can be interpreted in different ways. The example she mentioned was Article 33 of the REACH regulation. When such an issue then reaches the Court, the Member States involved in those discussions have a good view of each other's preferences and priorities and have had plenty of time to hone their arguments.

Similar discussions exist between the Finance Ministries of a group of Member States. The specific issue at hand was the compatibility of exit taxation with the free movement clauses of the EU Treaties, about which there were several cases over the last few years, but this cooperation also extends to other issues in the field of taxation.⁹⁷ This cooperation can be quite extensive. Firstly, interviewee 8 at the Dutch Ministry of Finance meets about twice a year with the Benelux countries, France, Germany and the UK to discuss ongoing cases.⁹⁸ In addition, when an important case comes up, a meeting of a group of around ten Member States is organised. These meetings can take place either before observations are submitted or before the oral hearing. In addition, to help the other Member States, interviewee 8 sometimes distributes an English translation of the request for a preliminary ruling from the Dutch court in the case and other relevant documents. This can be useful because the CJEU only sends a summary of the reference to the Member States, which can be insufficient to fully understand the issues at hand. Moreover, sometimes even drafts of the observations are circulated, but because every Member State uses their own language, there is a language barrier here.⁹⁹

These examples of Member State coordination correspond with the repeat player model, as the Member States are interested in the legal development over time, rather than just specific cases. They also have strategies ready when such issues reach the Court or even coordinate across cases in order to get the desired long-term outcome.

In sum, the coordination between the Member States is fairly limited in most cases. However, in very important cases in which large interests are at stake the

⁹⁶ Interviewee 6, Ministry of the Environment and Energy, Sweden

⁹⁷ Interviewee 7, Ministry of Finance, Sweden

⁹⁸ Interviewee 8, Ministry of Finance, the Netherlands

⁹⁹ Ibid

cooperation can be extensive. Nevertheless, the instances of extensive coordination described above are the exception rather than the rule. In addition, differences exist between the ministries, with the Finance Ministries being the most active in coordinating.

4.2. Why submit observations?

As the reader may recall, Granger found three categories of reasons why Member States submit observations: “the defence of domestic or national interests, the promotion of national visions of Europe and the furthering of EU interests.”¹⁰⁰ This result corresponds with the findings in this thesis. However, the question is what counts as a national or EU interest worth defending through the submission of observations, in the eyes of the officials making these decisions. This is the question that is at issue in this section.

4.2.1. Considerations

Sub-question 2. What factors are considered by the Dutch and Swedish civil servants when they have to decide about submitting observations to the CJEU?

One clear difference between the answers from the Dutch interviewees and the Swedish interviewees is that all the Dutch interviewees refer to the guidelines and the checklist when asked why the Netherlands submits observations and what is taken into consideration. In addition, one should note that the decisions studied here are made on a case-by-case basis and no argument for or against submitting an observation is automatically decisive.

However, some answers were given by all interviewees and are included in the checklist from the Dutch government. Firstly, if national legislation or policy is directly at stake because the reference comes from a court in the own Member State, Sweden and the Netherlands will in principle submit an observation. Secondly, an observation is usually submitted if the case comes from another Member State and concerns legislation that is similar to Dutch/Swedish legislation. This can include forthcoming national legislation. These two considerations are neatly summed up by interviewee 11: “the question then actually is: ‘could a ruling have consequences for the interests, the practice, the legislation, the enforcement, the supervision of your ministry?’”¹⁰¹ The

¹⁰⁰ Granger (2004), 10

¹⁰¹ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

reason behind these two considerations is that the national legislation would have to be changed if the Court rules that it, or similar legislation, is not compatible with EU law. This changing of legislation takes up resources. Moreover, there might be undesirable policy effects or financial consequences from making national law compliant with the ruling. This is why interviewee 1 describes the nature of the observations as “quite reactive really, you try to defend already taken positions.”¹⁰²

There are also some answers that were not given by all interviewees, but at least by several, across different ministries in both Sweden and the Netherlands. Some of these are also listed on the interdepartmental checklist in the Dutch government. One such a reason for submitting an observation is the degree of discretion that is left to the Member States.¹⁰³ If a case comes up in which one of the potential ways the Court could rule would limit the discretion of the Member States, that can be a reason to submit an observation. Even if there is no specific national rule that would have to be changed, there is the possibility that the Member State would want to change the rules at some point in the future. Therefore, the Member States have an interest in keeping a degree of discretion. Interviewee 1 formulates this as follows: “one interest would also be (...) to know where the limits are (...). How far is the room for manoeuvre at the national level in relation to Union law? So, even though one is (...) not so sure that we want to keep this legislation, it would be interesting to know where the exact limits are.”¹⁰⁴ She goes on to mention cases concerning monopolies as an example of this. In these cases, Sweden has an interest to know where the limits are for its alcohol and gambling monopolies.

A further consideration is how important the issue is politically.¹⁰⁵ This can influence whether or not it is opportune to submit an observation. For instance, if the policy area or the specific issue in the case is the subject of a strong domestic political debate, that can lead to pressure from the political level to submit an observation. In addition, the political perspective can influence the content of the observation, as a certain argument or a certain phrasing might be politically undesirable. In the theory

¹⁰² Interviewee 1, Ministry for Foreign Affairs, Sweden

¹⁰³ ICER (2002) and interviewees, 1, Ministry for Foreign Affairs, Sweden; 7 Ministry of Finance, Sweden; 8, Ministry of Finance, the Netherlands; and 11, Ministry of Infrastructure and the Environment, the Netherlands

¹⁰⁴ Interviewee 1, Ministry for Foreign Affairs, Sweden

¹⁰⁵ ICER (2002) and interviewees 2, 3, and 4, Ministry for Foreign Affairs, Sweden; 5, Sweden; 6, Ministry of the Environment and Energy, Sweden; 9 and 10, Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands;

chapter of this thesis it was explained that Adam et al. posit that political considerations can be decisive for Member States in bringing an annulment action. The interviewees in this thesis indicate that if there would be a strong political desire to submit an observation in a preliminary reference case, even though it would be unnecessary from a strictly legal perspective, an observation would follow. However, they have not experienced such a scenario.

Another consideration that relates to what is in the observation, rather than the decision whether or not to submit, is that an effort is made to ensure that the Member State takes the same position across different EU institutions. In other words, the Member State should try to take the same position in the Court case as it did during the negotiations about the directive or regulation in question and in other Court cases. For instance, if the Member State argued for or agreed to the inclusion of a certain provision, it might have done so based on an assumption about the policy implications of that provision. Moreover, the Member State might already have adjusted its national law based on that assumption. When that provision then reaches the Court, the Member State will try to argue for the position on which it based its agreement with the inclusion of the provision in the directive.

This is related to a further reason for submitting an observation, and that is the broader legal development in a certain policy area.¹⁰⁶ This means Member States have an interest in how certain legal questions develop over time. One example of this is the strong Swedish interest in the principle of transparency. This issue is perhaps more prevalent in direct actions than in preliminary references. Nevertheless, several Swedish interviewees mentioned the furthering of transparency within the EU as a reason to submit observations.¹⁰⁷ This commitment to transparency can in and of itself motivate a Swedish submission: “transparency, that’s very important so if any case concerns this principle of transparency, we enter and defend it.”¹⁰⁸ A relevant question when a Member State wants to submit an observation to influence broader legal developments is whether the case at hand is suitable to make the point it wants to make. This is a

¹⁰⁶ Interviewees 1, and 3, Ministry for Foreign Affairs; 10, Ministry of Foreign Affairs, the Netherlands; 11 Ministry of Infrastructure and the Environment, the Netherlands

¹⁰⁷ Interviewees, 1 and 2, Ministry for Foreign Affairs, Sweden; and 6, Ministry of the Environment and Energy, Sweden

¹⁰⁸ Interviewee 6, Ministry of the Environment and Energy, Sweden

question where the Foreign Affairs Ministry plays a role.¹⁰⁹ As was said earlier, this neatly fits the repeat player model.

A related, but broader, consideration is the question whether an important principle of EU-law or an important institutional question is at stake.¹¹⁰ This can apply to very broad EU-legal principles, but also to principles that are more specific to a certain policy area. If such a principled question reaches the Court, that can be a reason to submit an observation.

The fact that the interviewees indicated that larger legal developments and principled questions are taken into consideration seems to contradict the neofunctionalist argument that Member States care most about the result in the individual case, while the Court focusses on long-term developments. Nevertheless, it is the case that the first thing most interviewees mention is the effect on national legislation and policy that already is in place. Moreover, this concern about national legislation seems to motivate most observations and seems to be the main concern of the interviewees. We will return to this issue in the section about the objectives of the civil servants below.

When it comes to reasons to *not* submit, the main one brought up by the interviewees was the availability of resources.¹¹¹ As interviewee 6 puts it: “It’s also a question of resources because it takes a lot of time. So you can’t go in in every case, you have to pick the most important ones.”¹¹² Naturally, this mainly plays a role in cases that are of lesser importance. Related to this is another factor, namely the confidence in the ability of the Member States that are going to submit. Interviewee 8 indicates that she sometimes worries that the Member State from which the case originates might present a weak case in court. This can be a reason to submit a supporting observation, or to coordinate and help the other Member State improve its arguments.¹¹³ Conversely, if the case is not very important to the Member State and many likeminded countries are sure to submit observations, maybe it is not so important anymore to submit something.

¹⁰⁹ Interviewee 9, Ministry of Foreign Affairs, the Netherlands

¹¹⁰ ICER (2002) and interviewees, 1, Ministry for Foreign Affairs, Sweden; 7 Ministry of Finance, Sweden; 8, Ministry of Finance, the Netherlands; 9, Ministry of Foreign Affairs, the Netherlands; and 11, Ministry of Infrastructure and the Environment, the Netherlands

¹¹¹ Ibid; 7 Ministry of Finance, Sweden; and 11, Ministry of Infrastructure and the Environment, the Netherlands

¹¹² Interviewee 6, Ministry of the Environment and Energy, Sweden

¹¹³ Interviewee 8, Ministry of Finance, the Netherlands

However, the dynamic might also be the opposite, as interviewee 7 says: “I think it’s important that, even though perhaps Germany and Holland and the UK are there, saying things in the Court, very much the same things that we are going to say, it’s a good point for the Court to see that there are many countries that will be affected, even though we are saying about the same thing. So it’s a way to show that this is not a small matter.”¹¹⁴ This latest point corresponds closely with what an intergovernmentalist scholar would say. Namely, that the more Member States show up on one side of the argument, the more likely the Court is to agree with them.

A final consideration that might shape the outlook of the observation is that several interviewees stated that it is ‘not done’ to write in an observation that another Member State’s legislation violates EU-law.¹¹⁵ One reason for this is that it is pretentious to believe one knows exactly how the legislation of another Member State works.¹¹⁶ More importantly, the Member States will need each other again in other arenas in the EU and it is not good for the diplomatic relationship to lecture the other Member State on its own legislation. For instance, interviewee 8 says: “In principle we do not intervene against the fiscal legislation of other countries. Then we say: ‘the European Commission [can] fix that,’ because, my director general just sits around the table every month, or twice a month, with the directors general of the tax agencies of other countries. So you really do not like to get into an argument with your British colleague, if you need him for another political deal in Europe. So then you think: ‘well, you have that big Dutch company that is litigating, they have a whole army of lawyers, you have the European Commission who will say that this company is right.’ Those judges will also say this company is right without us directly picking a fight with our English colleagues.” Interviewee 8 goes on to say that if the Netherlands does not show up to support another Member State in tax cases, it is effectively a signal that the Netherlands thinks that Member State’s legislation is wrong.

If this policy of not submitting observations against the legislation of other Member States is followed by all Member States, that could significantly affect the datasets used in statistical studies. It would skew the distribution of the Member States’

¹¹⁴ Interviewee 7 Ministry of Finance, Sweden

¹¹⁵ Interviewees 6, Ministry of the Environment and Energy, Sweden; 7 Ministry of Finance, Sweden; 8, Ministry of Finance, the Netherlands; and 11, Ministry of Infrastructure and the Environment, the Netherlands

¹¹⁶ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

positions in favour of the position of the Member State from which the case comes. Therefore, it would be harder for the Court to estimate the strength of the threats of override and noncompliance. However, Member States can, and sometimes do, not comment on the national legislation at stake and only on the interpretation of the EU rule.¹¹⁷ Another way around this concern is to comment on only some of the questions referred by the national court.¹¹⁸ However, this remains a diplomatically delicate course, as it might be clear what the consequences of the proposed interpretation would be. In sum, the data in this thesis is not enough to draw definitive conclusions on whether this factor significantly affects the results from statistical analysis.

In conclusion, the main factor that is considered by Dutch and Swedish civil servants when they have to decide about submitting observations to the CJEU is the effect the case will have on national policy, regulations, legislation, and discretion. A lesser role is played by political concerns, broader legal developments and principles, resource availability, and the role that other Member States will play in the proceedings. With regards to the content of the observations, two additional factors are sometimes considered. The first is consistency of the position across EU institutions. The second is that Member States do not submit observations that explicitly state that another Member State is violating EU law. Concerning these considerations, there are no clear differences between Sweden and the Netherlands or the various ministries. The only exception is that the fact that a lack of resources might hinder the submission of an observation was not mentioned by interviewees at the Foreign Ministries. This can be explained by the fact that the other ministries make the decision whether or not an observation will be made in cases in their policy area. The Foreign Ministries are not concerned with why the others choose not to submit an observation.

4.2.2. Objectives

Sub-question 3. What are the objectives that Swedish and Dutch civil servants seek to achieve with their observations and what do they believe their effect is on the rulings of the Court?

All interviewees mentioned something along these lines as one objective: “it’s all about trying to influence the Court, the outcome of the case. In the end we want the Court to

¹¹⁷ Interviewee 6, Ministry of the Environment and Energy, Sweden

¹¹⁸ Interviewee 7 Ministry of Finance, Sweden

give a certain answer to the questions posed by the national court.”¹¹⁹ For most interviewees, this is by far the most important and in some cases even the only objective. For these interviewees, success is when the Court agrees with their arguments. The reason the outcome of the case is most important is that it determines whether or not national legislation has to be changed. This is also why interviewee 1 identifies an outcome where the Court does not fully agree with the Swedish standpoint, but Swedish legislation does not have to be amended as a lesser form of success.¹²⁰

This answer points to an important caveat, namely that there are cases in which the reasoning of the CJEU is more important than the outcome in the specific case.¹²¹ ‘Outcome’ here means the final conclusion, e.g. ‘legislation A in Member State X violates Article P of the TFEU.’ The reasoning is the part of the ruling where the Court explains why this is the case. Interviewee 8 gave an example of why the reasoning matters. She referred to a Belgian case¹²² in which the question was whether the EU Treaties oblige Member States to prevent double taxation. Many Member States really disliked the Belgian legislation at hand and for that reason did not submit observations. In contrast, the Netherlands and some other Member States thought that it would be a bad outcome if the Court struck down the Belgian legislation at hand with the reasoning that the EU Treaties oblige Member States to prevent double taxation.¹²³ Nevertheless, the reasoning of the Member States that did not submit an observation because they disliked the Belgian legislation corresponds with what neofunctionalism would predict: Member States care about the issue at hand, the Court about long term developments. However, as we saw earlier, and also in this case, concerns about legal principles and developments can be an important consideration for the Member States.

This can also be seen in a further objective, which was mentioned by five interviewees: the objective for the Member State to be a part of the general development of EU law.¹²⁴ Since the Court’s jurisprudence develops over time and can have significant implications, it is important for Member States to use the opportunity they have to attempt to influence it. Furthermore, Member States can have an interest in the

¹¹⁹ Interviewee 4, Ministry for Foreign Affairs, Sweden

¹²⁰ Interviewee 1, Ministry for Foreign Affairs, Sweden

¹²¹ Interviewees 3 and 4 Ministry for Foreign Affairs, Sweden; and 8 Ministry of Finance, the Netherlands

¹²² Case C-513/04

¹²³ Interviewee 8, Ministry of Finance, the Netherlands

¹²⁴ Interviewees 3, Ministry for Foreign Affairs, Sweden; 7, Ministry of Finance, Sweden; 9 and 10 Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands

development of specific legal questions. An example of a policy-specific objective is that Sweden seeks to make EU law more environmentally friendly.¹²⁵ In the Netherlands an example that was mentioned is the objective to preserve broad national discretion in questions concerning direct taxation.¹²⁶ These objectives fit the assumptions of the repeat player model from legal scholarship, as the Member States seek to achieve long-term goals through their activity before the Court. However, as we saw earlier, the effect of the ruling on national legislation is the main concern. The broader policy objectives can be seen as secondary to that main concern. In addition, they can influence the content of the observation.

The objectives mentioned so far are centred on the Member States' self-interest. In contrast, two Swedish interviewees¹²⁷ referred to an objective that is not related to the interests of the Member State. This is the objective "to help the court, be a friend of the court and to say: 'hey, you have this question, we have something interesting to say that you could, or could not, have as the basis for your judgement.'"¹²⁸ This can even extend to cases from the own Member State: "it could also be that the question concerns Swedish legislation and then we see it as our duty to help the court get as clear a picture as possible, even if we don't have any particular interest in the outcome or it's not politically interesting."¹²⁹ This aspect of informing the Court was also brought up in other interviews. However, in those interviews it was with the reasoning that the information might influence the Court to decide favourably. In the event the Court would decide unfavourably, at least some solace might be found in the fact that Court decided based on the right information. In contrast, the idea of informing the Court as a self-standing objective was mentioned by only two interviewees.

When it comes to the question what constitutes success in the eyes of the civil servants, the most common response is something along these lines: "Well, of course, it's the outcome. (...) If the Court has especially listened to us, then that is fun to have, to be able to make our voice heard [in that way], but the outcome is more important."¹³⁰ This is by far the most important form of success, for all but one interviewee: to have the

¹²⁵ Interviewee 6, Ministry of the Environment and Energy, Sweden

¹²⁶ Interviewee 8, Ministry of Finance, the Netherlands

¹²⁷ Interviewees 2, Ministry for Foreign Affairs, Sweden; and 5

¹²⁸ Interviewees 2, Ministry for Foreign Affairs, Sweden

¹²⁹ Ibid

¹³⁰ Interviewee 7 Ministry of Finance, Sweden

Court rule your way, with a positive reference to your arguments as a pleasant “bonus point.”¹³¹ Again the caveat applies that the reasoning of the Court can be more important than the ruling in the concrete case. Interviewee 8 differed in her response. She expressed the opinion that success is “when the ruling of the Court is so (...) that it [gives] a workable solution. For instance [in the case] National Grid,¹³² the Court did not find in our favour, but it is a [ruling] with which we can work just fine, and it is also executable for the Tax and Customs Administration.”¹³³ Interviewee 8 went on to state that it is not a problem to change Dutch legislation, as long as there is still room for a reasonable solution. However, this outcome might be seen by others as agreeable rather than a success, interviewee 11 confirms as much.¹³⁴

The finding that success is mostly defined as the Court handing down a ruling that corresponds with what the Member State advocated for is perhaps unsurprising. It seems basic common sense that actors before a court are satisfied when the Court decides in their favour. Moreover, all three theoretical perspectives described in this thesis could predict this outcome, or at least the outcome is not incompatible with them.

Now we turn to the second part of sub-question 3, namely what Dutch and Swedish civil servants believe the effect of their observations is on the rulings of the Court. The first question is whether the observations affect the rulings of the Court at all. On this question the majority of the interviewees answered in the affirmative,¹³⁵ while three of them either expressed scepticism or argued that it is very hard to tell.¹³⁶ An interesting perspective on the influence of Member State observations on the Court can be found in this quote from interviewee 1: “that is really difficult to say, but without having the belief that they have an impact, well, there wouldn’t be any [observations].”¹³⁷ This idea was also expressed by two other interviewees.¹³⁸ This is

¹³¹ Quote from Interviewee 10 Ministry of Foreign Affairs, the Netherlands, other interviewees expressing the same idea: Interviewees 7 Ministry of Finance, Sweden; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹³² Case C-371/10

¹³³ Interviewee 8, Ministry of Finance, the Netherlands

¹³⁴ Interviewee 11, Ministry of Infrastructure and the Environment, the Netherlands

¹³⁵ Interviewees 3 and 4, Ministry for Foreign Affairs, Sweden; 6, Ministry of the Environment and Energy, Sweden; 7, Ministry of Finance, Sweden; 8, Ministry of Finance, the Netherlands; 9 and 10, Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹³⁶ Interviewees 1 and 2, Ministry for Foreign Affairs, Sweden; and 5, Sweden

¹³⁷ Interviewee 1, Ministry for Foreign Affairs, Sweden

¹³⁸ Interviewees 9 and 10, Ministry of Foreign Affairs, the Netherlands

exactly what neofunctionalism fails to explain: why would Member States bother to spend time and energy writing observations if they do not have influence?

However, most interviewees are uncertain how great the effect of their observations is, stating that it depends on the specific case how much influence one can have. Interviewee 7 for instance expressed the opinion that in cases in which it is legally very clear what the ruling should be, it does not make a difference if ten Member States are emphatically opposed to that ruling.¹³⁹ Another question is how the interviewees know that their observations have an impact. The most cited way in which the interviewees see their influence is when the Court refers to the arguments they made in its reasoning, or incorporates a line of argument wholesale.¹⁴⁰

The final question to be discussed in this chapter is how and why the observations affect the Court's decisions, according to the interviewees. The most mentioned way through which the Court is influenced by Member State observations is that the Member States give the Court information about the context of the regulations or facts at hand and outline the effects certain rulings would have.¹⁴¹ In addition, the strength of the legal arguments that Member States use can also make a difference.¹⁴² These answers strongly correspond with the perspective of legalism, as was expected. The idea that legal arguments and legally relevant information are the main channels through which the Court is influenced is very much the core argument of legalism. This perspective comes back clearly in some of the answers:

FvS: "And does that work? Does the court listen to the observations so to say?"

Interviewee 6: "Well, (...) [it] depends on the legal argument if we will win or not."¹⁴³

However, these answers are in a way 'normatively correct.' Within legal scholarship and practice there is a strong norm that courts should be apolitical arbiters, who weigh the

¹³⁹ Interviewee 7, Ministry of Finance, Sweden

¹⁴⁰ Interviewees 3 and 4, Ministry for Foreign Affairs, Sweden; and 8, Ministry of Finance, the Netherlands

¹⁴¹ Interviewees 1 and 3, Ministry for Foreign Affairs, Sweden; 5, Sweden; 7, Ministry of Finance, Sweden; 8, Ministry of Finance, the Netherlands; 9 and 10, Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹⁴² Interviewees 1, Ministry for Foreign Affairs, Sweden; 5, Sweden; 6, Ministry of the Environment and Energy, Sweden; and 8, Ministry of Finance, the Netherlands

¹⁴³ Interviewee 6, Ministry of the Environment and Energy

arguments impartially. This could influence the results. However, as some of the answers presented below show, the interviewees are aware that reality is more complex. Despite that awareness, most of them still believe good argumentation that persuades the judges is the best way to influence the Court. Moreover, this sort of language of ‘winning the case’ and ‘defending national legislation’ comes back repeatedly throughout the interviews. It shows that the interviewees, especially at the Foreign Ministries, see their role as that of barristers. Some interviewees at the Swedish Foreign Ministry describe themselves explicitly as such.¹⁴⁴ Moreover, the language of defending and winning cases shows a very lawyerly view of the process.

In addition, several interviewees¹⁴⁵ referred to the opinion of the Court on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁴⁶ In this case, the Court ruled that the accession treaty by which the EU would join the ECHR violated EU law. With that decision the Court went against the opinion of the Advocate-General, the Commission, the European Parliament, the Council, and a whopping 24 Member States. This is not a preliminary reference, but several interviewees pointed to that case as proof that the Court is very independent and not afraid to go against the wishes of the Member States. However, this is only one case, so one cannot draw general conclusions from it. Nevertheless, it is relevant that the interviewees see the Court as very much willing to go its own way. This view of the Court might also explain the belief that arguments and information are the best way to persuade the Court, rather than any extra-legal political machinations. This is very close to the perspective of legalism.

However, one aspect in the answers that more closely corresponds with intergovernmentalism is the idea that outlining the consequences of a possible ruling has an impact on the Court. In intergovernmentalist thinking, the idea would be that the Court would fear an override by the Member States if a sufficient amount of them would be opposed to a certain ruling. Therefore, the Court would avoid making that ruling. Another example that two interviewees brought up further strengthens the intergovernmentalist case. Interviewees 7 and 8 explain that in their view the Court has

¹⁴⁴ E.g. interviewee 2 Ministry for Foreign Affairs, Sweden

¹⁴⁵ Interviewees 1, Ministry for Foreign Affairs, Sweden; 9, Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹⁴⁶ Opinion 2/13

changed its tune over the last ten years on the compatibility of direct taxation measures with the free movement clauses in the Treaties. In their view, the Court used to be strongly oriented towards the internal market. More recently however, the Court has become more lenient with Member States, since more Member States became active in these cases.¹⁴⁷ This entails that the number of Member States that support the same interpretation or the same point of view could influence the Court.¹⁴⁸ Nevertheless, as cited earlier, interviewee 7 stated that it does not matter how many Member States show up if the case is legally very clear.

Moreover, an additional perspective that corresponds with intergovernmentalism is presented by interviewees 1 and 8. They argue that the Court is sensitive to politics. Especially interviewee 1's point corresponds closely with intergovernmentalism. She argues that the political sensitivity of an issue, *as expressed in the observations*, influences the Court. However, she also states that knowledge of the political sensitivity does not mean that the Court follows it.¹⁴⁹ The argument of interviewee 8 is that the Court responds to the general political atmosphere in Europe rather than to the political sensitivity of specific cases.¹⁵⁰ Both these perspectives acknowledge that the Court is sensitive to politics and also makes legal-political choices, at least to some degree. This view corresponds with intergovernmentalism and goes against what legalists would say. However, there were only two interviewees that expressed this view.

A final point about how the observations influence the Court is that five interviewees¹⁵¹ state that at the very least the Court has to consider the information and arguments they present in their observations and provide a reasoning if they disagree. This is why two interviewees¹⁵² expressed the idea that, as interviewee 11 put it: "so that is why you look: what goes wrong if we do not participate [in the case]?"¹⁵³ This is not really an argument for why observations influence the Court, but rather an

¹⁴⁷ Interviewees 7, Ministry of Finance, Sweden; and 8, Ministry of Finance, the Netherlands

¹⁴⁸ Interviewees 4, Ministry for Foreign Affairs, Sweden; and 7, Ministry of Finance, Sweden

¹⁴⁹ Interviewee 1, Ministry for Foreign Affairs, Sweden

¹⁵⁰ Interviewee 8, Ministry of Finance, the Netherlands

¹⁵¹ Interviewees 1 and 3, Ministry for Foreign Affairs, Sweden; 6, Ministry of the Environment and Energy, Sweden; 10, Ministry of Foreign Affairs, the Netherlands; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹⁵² Interviewees 3, Ministry for Foreign Affairs, Sweden; and 11 Ministry of Infrastructure and the Environment, the Netherlands

¹⁵³ Interviewee 11 Ministry of Infrastructure and the Environment, the Netherlands

expression of the fact that the Court has to, at the very least, consider all the opinions presented to it.

In sum, when it comes to objectives of the civil servants, what constitutes success for them, and their perspective on the influence of their observations on the Court, the answers were generally very similar across the different ministries in Sweden and the Netherlands. However, some answers were given by only a few interviewees. Nevertheless, there were generally no clear dividing lines between Sweden and the Netherlands or the different ministries. The only exception is that the interviewees in the Finance Ministries in both countries believe that the amount of Member States that submit observations has an influence on the Court.

5. Conclusion

This thesis has looked at why civil servants in the Member States decide to submit observations to the CJEU. The main method was interviews with Dutch and Swedish civil servants. The research question, 'Why do civil servants in Sweden and the Netherlands decide to submit observations to the CJEU?', was divided into three sub-questions. The conclusions on those sub-questions will be considered in turn, after which an answer to the main research question will be formulated and suggestions for further research presented.

In short, the processes by which decisions about the observations are made are very similar in the Netherlands and Sweden. The Foreign Ministry distributes the cases to the other ministries. Those ministries decide whether they want to become active in a case and cooperate with the Foreign Ministry in drafting the observation. However, some differences between Sweden and the Netherlands were found that might explain why the Netherlands submits more observations than Sweden. The main candidate is the difference in manpower. The Netherlands has more manpower available for submitting observations in preliminary rulings, which could lead to more observations being submitted. This would correspond with the finding from earlier research that larger Member States, which are presumed to have more resources, submit more observations. However, the reason why the Netherlands has more resources is not fully clear, as the Netherlands is not very much larger than Sweden. It might therefore also be a difference in prioritisation, in addition to the difference in size of the countries. Secondly, the existence in the Netherlands of a checklist that is used to judge whether making an observation is desirable might play a role. Having to explicitly consider those questions for each case might lead to more observations being submitted.

The question to what extent the civil servants responsible for EU legislation are involved in the drafting of the observations is relevant for intergovernmentalism, this thesis argues. If such coordination exists it makes the idea of the observations being followed by an attempt to override the Court more plausible. It was found in this thesis that there is close coordination with the actors in the government who are responsible for implementing existing EU-legislation and negotiating new legislation. However, the interviewees saw the adjustment of national law as the logical consequence of an

unfavourable ruling by the Court, not an attempt to change EU law. This was true for both Treaty interpretation and interpretation of secondary legislation. Rather than being the first step of a legal-political strategy, the observations are seen, in some cases, as the last step, a final chance to argue for the favoured interpretation of a legislative compromise. This latter scenario fits the repeat player model from legal scholarship, as Member States seek rule change through litigation before the Court rather than through political manoeuvres against the Court.

That same repeat player model fits well with some of the answers from the interviewees on the cooperation between the Member States. With regard to important legal questions, civil servants have ongoing discussions across Member States. This can include close coordination spanning multiple cases on the same topic. This shows an interest in long-term legal developments, which fits the repeat player model and is rather incompatible with some tenets of neofunctionalism, namely that Member States mainly care about the case at hand. However, it should be noted that these instances of intense coordination are the exception rather than the rule. In general, coordination is mainly limited to drawing other Member States' attention to important cases, exchanging information, and broadly sharing which Member States are on what side of the argument. On the issues of the coordination with other Member States and the actors responsible for EU legislation there are no clear differences between Sweden and the Netherlands. However, the Finance Ministries seem most active in coordinating with their counterparts in other Member States.

Now we turn to the conclusions on the second and third sub-questions in this thesis that deal with the considerations and objectives of civil servants with regard to submitting observations. In both cases, the overriding concern of the civil servants is to protect existing or forthcoming national legislation, regulations, policy, and practice. This is the main thing they consider when deciding whether to submit observations: what effects could a certain ruling in this case have on national legislation or policy? It is also the main objective they seek to achieve: influence the Court's ruling in order to protect national legislation and policy. The Member States do not want to change their legislation or policy because this takes time and effort and because it might have undesirable policy and financial consequences. For this reason, when national legislation is directly at stake because a court in the own Member State sends a request for a

preliminary ruling to the CJEU, Sweden and the Netherlands in principle will submit observations. Similarly, if a case from another Member State concerns legislation that is very similar to the own legislation or a ruling in the case might limit national discretion, that is a reason to submit observations.

Considerations of secondary importance are political considerations, broader legal developments and principles, whether resources are available, and the role that other Member States will play in the proceedings. With regard to the content of the observation, as opposed to whether or not to submit one, two additional factors play a role. Firstly, Member States try to take the same position across different EU-fora. Secondly, Member States do not explicitly write in their observations that another Member State has violated EU-law. This latest factor might present a problem for statistical research, as it would complicate the Court's assessment of the strength of the threats of override and noncompliance.

When it comes to the factors taken into consideration when deciding whether or not to submit an observation there are no clear differences between the Netherlands and Sweden, or between the ministries. The only exception is that the availability of resources mainly plays a role at ministries other than the Foreign Ministry.

As mentioned above, the most important objective of the civil servants is to get the Court to rule their way. That is why it should not come as a surprise that nearly all interviewees define success as the instance when the Court follows the argumentation and conclusion that they have proposed. However, an important caveat is that the reasoning of the CJEU is sometimes more important than the ruling in the individual case. A secondary objective is for the Member State to be part of the general development of EU law, or of the legal development in a specific policy area. Finally, two interviewees saw it as an objective to be a friend of the Court and help the Court by providing useful information. However, this is decidedly a minority position.

The dominance of national interests in the consideration about whether or not to submit observations can be said to be compatible with all three of the theories discussed in this thesis. However, the attention the civil servants pay to larger legal developments does not fit comfortably with neofunctionalism. That does not mean that this thesis claims to disprove this theory. Rather, it shows that Member State behaviour is more complex than some of the assumptions of neofunctionalism would have it.

Moreover, Stone Sweet and Brunell argue that the observations of the Member States do not constrain or influence the Court. This leaves unanswered why the Member States would submit observations at all. It is exactly this sentiment that several interviewees express: without the belief that they have some effect, there would be no observations. Therefore, it is unsurprising that the majority of interviewees believe their observations influence the Court. However, most interviewees are uncertain how much of an influence their observations have. When it comes to why the observations influence the Court the most common answer that the interviewees gave was that the observations can provide the Court with information on the national context, both legal and otherwise. In addition, the quality of the legal arguments that the Member States put forth also has an impact. This is a perspective that fits most with legalism, as its core argument is that legal arguments and legally relevant information are influential in Court proceedings and not political strength or preferences.

However, some of the answers of the interviewees fit better with intergovernmentalism. The idea that sketching the consequences of a potential ruling influences the Court fits very well with intergovernmentalist thinking. In this view, the Court would see how many Member States do not want a certain ruling and how strongly they oppose its consequences. Based on that assessment the Court could estimate the severity of the threats of override and noncompliance. Another factor influencing the Court that corresponds with intergovernmentalism is the idea that the Court is attuned to politics. Similarly, two interviewees suggest that the amount of Member States submitting observations has some relevance, as it shows the Court that the issue at hand is important. Nevertheless, these last two points were minority views as both of them were expressed by only two interviewees. In contrast, with regard to the point about the number of Member States, several interviewees pointed to the example of the ECHR-accession case as evidence that the Court is very much independent and can go its own way no matter how many Member States show up.

With regard to the objectives the civil servants seek to achieve, how they define success, and why the observations influence the Court, there are no clear differences between the Member States or the ministries included in this thesis. The only exception is that only the interviewees at the Finance Ministries indicated that the number of Member States submitting observations might have an impact.

The research question of this thesis was: why do civil servants in Sweden and the Netherlands decide to submit observations to the CJEU? In short the answer is: to defend national interests, legislation, and policies. Naturally, the answer is more complex than that, but unfortunately one sentence cannot capture the full complexity of the answers this Master's thesis has found.

In conclusion, the civil servants responsible for their Member State's observations to the Court of Justice are very much lawyers, with a lawyerly worldview. They talk about 'winning' cases, some describe themselves as barristers, they believe legal argumentation and legally relevant information are the main things that influence the Court. This is why the perspective of legalism so often fits their answers. However, some of the interviewees also expressed views that more closely align with intergovernmentalist thinking. Nevertheless, these were minority views in every instance. A final judgement on the validity of the theories cannot be given based on the data in this thesis. However, neofunctionalism came out as the weakest of the three. This is perhaps unsurprising as this theory predicts that the work these interviewees do has no or very little impact. That is naturally an unattractive perspective and it is understandable that the interviewees do not share this view.

5.1. Avenues for further research

This thesis has only focussed on two Member States. This is naturally a limitation and further research could expand on this by looking at other Member States. Such research could look into whether the process is different in other Member States and whether the views of the Swedish and Dutch civil servants differ from those of civil servants in other countries. Similarly, for this thesis civil servants at only three ministries were interviewed. Further research could expand on this and include other ministries in the same or other Member States. For example, one could look at all ministries in a certain Member State or at one specific ministry across different countries.

Another way to look at the relationship of the Member States with the Court is to look at other procedures than the preliminary reference procedure. This could include Member State interventions in cases between the Commission and a Member State or between the EU institutions. In addition, one could also look at instances where Member States actively decide to bring an action against an EU institution.

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Appendix 1. Interview guide

Possible follow-up questions are in brackets. The Dutch version can be found below.

Process

1. How is the decision-making about observations organised in the Dutch/Swedish government? (Where do you pick up on cases: when notified by the Court or earlier?)
 - What role does your department play in this decision-making process?
 - How many people deal with the observations to the CJEU in your department?
2. Are there sometimes disagreements about sending an observation or the content of the brief between your department and the other departments involved?
 - If yes, what are these conflicts most often about? What are the dividing lines?
3. To what extent is there coordination about submitting observations between those dealing with the Court and those dealing with new EU legislation or compliance with EU law? (What does this coordination look like? Who does it? When does it take place? How important is their input?)
4. To what extent is there coordination with other Member States about submitting observations in specific cases?
 - What does this coordination look like? (Who does it? When does it take place? How important is the input?)
 - Are there Member States with whom there is more often coordination than with others? (Why these?)
 - What are the issues (e.g. policy areas, legal principles, legal arguments, technical issues) you most often coordinate? (Why these?)

Specific cases¹⁵⁴

5. Could you give me an example of an important case that is now going on that your department is considering sending an observation in?
 - Why is this case important?
 - What are the considerations for sending or not sending an observation in this case?
 - Is there discussion on the content of the brief?
 - Who play a role? Who is important?

Considerations

6. In your view, why does Sweden/the Netherlands submit observations to the Court?
7. From your experience, what are the factors that are taken into consideration when a decision is made whether or not to send an observation to the Court?

¹⁵⁴ This part was only included in the first few interviews. As the interviewees were not willing to answer the question, the subject was left out in subsequent interviews.

- A consideration might be a fear to alert the Commission to a compliance issue in your Member State. So, Member States would not send an observation in order to let sleeping dogs lie. Do you recognise that from your experience?
8. What are the goals that Sweden/the Netherlands most often seeks to achieve with submitting an observation?
 - What counts as success?
 9. To what extent do you believe Member State observations have an influence on the decisions of the Court? (Why and how do they have influence?)

Concluding question

10. Those were all my questions, is there anything you would like to add on the subjects we discussed?

The Dutch language interview guide:

Proces

1. Hoe is de besluitvorming rond schriftelijke opmerkingen georganiseerd in de Nederlandse overheid? (waar horen jullie van zaken, wanneer de notificatie komt, of ook eerder?)
 - Welke rol speelt uw departement in dit besluitvormingsproces?
 - Hoeveel mensen zijn er betrokken bij de schriftelijke opmerkingen aan het Hof in uw departement?
2. Zijn er soms onenigheden tussen uw departement en andere betrokken departementen over het indienen en/of de inhoud van de schriftelijke opmerkingen?
 - Zo ja, waar gaan deze conflicten over? Wat zijn de scheidslijnen?
3. In hoeverre is er coördinatie over het indienen van schriftelijke opmerkingen tussen degenen die betrokken zijn bij Hofzaken en degenen die betrokken zijn bij nieuwe EU-wetgeving of uitvoering van EU-wetgeving? (hoe ziet die coördinatie er uit? Wie doet het, wanneer, hoe belangrijk is de input?)
4. In hoeverre is er coördinatie met andere lidstaten over het indienen van schriftelijke opmerkingen in specifieke zaken?
 - Hoe ziet die coördinatie er uit? (wie doet het, wanneer, hoe belangrijk is de input?)
 - Zijn er lidstaten met wie er vaker wordt gecoördineerd dan met anderen? (waarom deze?)
 - Wat zijn de kwesties (beleidsgebieden, rechtsprincipes, juridische argumenten, technische kwesties) die het meest gecoördineerd worden? (waarom deze?)

Specifieke gevallen

5. Kunt u een voorbeeld geven van een belangrijke zaak die nu gaande is en waarin uw departement overweegt schriftelijke opmerkingen in te dienen?
 - Waarom is deze zaak belangrijk?

- Wat zijn de overwegingen om al dan niet schriftelijke opmerkingen in te dienen?
- Is er discussie over de inhoud?
- Wie spelen er een rol? Wie zijn belangrijk?

Overwegingen

6. Waarom dient Nederland naar uw mening schriftelijke opmerkingen in bij het Hof?
7. Naar uw ervaring, wat zijn de factoren die in overweging worden genomen wanneer er een beslissing wordt genomen om al dan niet schriftelijke opmerkingen in te dienen bij het Hof?
 - Een overweging zou kunnen zijn dat men de Commissie er niet attent op wil maken dat er een probleem in Nederland is met de implementatie van EU recht. Dus Nederland zou geen schriftelijke opmerkingen indienen om geen slapende honden wakker te maken. Herkent u dit uit uw ervaring?
8. Wat zijn de doelen die Nederland het vaakst probeert te bereiken met het indienen van een schriftelijke opmerking?
 - Wat telt als een succes?
9. In hoeverre gelooft u dat de schriftelijke opmerkingen van de lidstaten invloed hebben op de beslissingen van het Hof? (waarom en hoe hebben ze invloed?)

Afsluiting

10. Dat waren mijn vragen, is er nog iets dat u zou willen toevoegen?

Appendix 2. List of interviewees

This is a list of the interviewees referred to in the thesis, the ministry at which they work. The English version of the names of the ministries is taken from their respective websites.

- Interviewee 1, Ministry for Foreign Affairs (*Utrikesdepartementet*), Sweden
- Interviewee 2, Ministry for Foreign Affairs (*Utrikesdepartementet*), Sweden
- Interviewee 3, Ministry for Foreign Affairs (*Utrikesdepartementet*), Sweden
- Interviewee 4, Ministry for Foreign Affairs (*Utrikesdepartementet*), Sweden
- Interviewee 5, Sweden, asked that her workplace not be listed to further ensure anonymity
- Interviewee 6, Ministry of the Environment and Energy (*Miljö- och energidepartementet*), Sweden
- Interviewee 7, Ministry of Finance (*Finansdepartementet*), Sweden
- Interviewee 8, Ministry of Finance (*Ministerie van Financiën*), the Netherlands
- Interviewee 9, Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*), the Netherlands
- Interviewee 10, Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*), the Netherlands
- Interviewee 11, Ministry of Infrastructure and the Environment (*Ministerie van Infrastructuur en Milieu*), the Netherlands

Appendix 3. Interdepartmental checklist

Below is a checklist used in the Dutch government to determine whether making an observation is desirable.

Source: Interdepartementale Commissie Europees Recht (ICER), juli 2002, *Criteria voor het maken van opmerkingen in procedures bij het Hof van Justitie van de Europese Gemeenschappen*, ICER 2002/56, 11

The English translation is in italics.

Nr. No.	Vraag Question	Ja Yes	Nee No
1	Betreft het een prejudiciële verwijzing van een Nederlandse rechter? <i>Is it a preliminary reference from a Dutch judge?</i>		
2	Is de Nederlandse overheid procespartij in het geding voor de verwijzende rechter? <i>Is the Dutch government a litigant in the case before referring judge?</i>		
3	Leidt de zaak mogelijk tot aanpassing van de regelgeving van (departement)? <i>Does the case potentially lead to modification of the regulations of (department)?</i>		
4	Leidt de zaak mogelijk tot aanpassing van het beleid of de uitvoeringspraktijk van (departement)? <i>Does the case potentially lead to modification of the policy or implementation practices of (department)?</i>		
5	Leidt de zaak mogelijk tot aanpassing van concreet in voorbereiding zijnde regelgeving of voorgenomen beleid van (departement)? <i>Does the case potentially lead to modification of forthcoming regulations or proposed policy of (department)?</i>		
6	Kan de zaak leiden tot een inperking van de beleidsvrijheid op een kerntaak van (departement)? <i>Could the case lead to a limitation of the discretion with regard to a core responsibility of (department)?</i>		
7	Kan deze zaak in Nederland levende onduidelijkheden wegnemen over de juiste toepassing van de regeling? <i>Could this case take away uncertainties in the Netherlands about the correct application of the regulation?</i>		
8	Het betrokken beleidsterrein kan politiek gevoelig zijn. Daar kunnen twee verschillende vragen uit voortvloeien: <i>The policy area in question could be politically sensitive. This may give rise to two different questions:</i>		
8A	Geeft beantwoording van de vragen van de checklist <i>wel</i> aanleiding voor het maken van schriftelijke opmerkingen, terwijl dat politiek <i>niet</i> wenselijk is? <i>Does answering the questions of the checklist give cause for making</i>		

	<i>written observations, while that is politically not desirable?</i>		
8B	Geeft beantwoording van de vragen van de checklist <i>geen</i> aanleiding voor het maken van schriftelijke opmerkingen, terwijl dat politiek <i>wel</i> wenselijk is? <i>Does answering the questions of the checklist not give cause for making written observations, while that is politically desirable?</i>		
9	Zijn er mogelijk financiële gevolgen voor (departement) naar aanleiding van deze zaak, ook in de vorm van schadeclaims? <i>Are there possible financial consequences for (department) as a result of this case, also in the form of damages?</i>		
10	Kan de uitspraak in deze zaak, vanwege de in het geding zijnde regeling of vanwege de horizontale aspecten ervan, ook gevolgen hebben voor andere departementen dan alleen (departement)? <i>Could the ruling in this case, because of the regulation at issue or because of its horizontal aspects, also have consequences for other departments than just (department)?</i>		
11	Is er (zicht op) overeenstemming met andere departementen? <i>Is there agreement with other departments (in sight)?</i>		
12	Kan deze zaak gevolgen hebben voor het Europese beleid van Nederland? <i>Could the case have consequences for the European policy of the Netherlands?</i>		
13	Kan deze zaak leiden tot een belangrijke ontwikkeling in de Europese rechtsorde? <i>Could this case lead to an important development in the European legal order?</i>		
	Stelt u interventie voor? <i>Do you propose intervention?</i>		

Appendix 4. Quotes in Dutch

This is a list of the quotes in Dutch used in this thesis, listed in order of appearance.

Page 31.

English translation: “But in the end, whether we participate or not, there will be a ruling of the Court on the directive; or European law in any case. So, if that is not in line with your regulations then you will have to do something about it.”

Dutch: “Maar uiteindelijk komt er, of we nou meedoen of niet, een uitspraak van het Hof over de richtlijn; of het Europees recht in ieder geval. Dus als dat niet in overeenstemming is met jouw regelgeving dan zal je daar toch wat aan moeten doen.”

Page 33.

English translation: “[we do ask] ‘well, what is your position and are we in the same camp?’ so to say, but not ‘well, we have this argument are you also going to use that?’ I do try sometimes (...), [but] everyone has their own deadlines and their own way to go through that procedure nationally (...). So it is often hard [to coordinate] within those deadlines.”¹⁵⁵

Dutch: “[we vragen wel] van ‘goh, wat is jullie standpunt en zitten we in hetzelfde kamp?’ zeg maar, maar niet van ‘goh, wij hebben dit argument, gaan jullie dat ook gebruiken?’ Ik probeer het af en toe wel (...) [maar] iedereen heeft ook weer zijn eigen termijnen en zijn eigen manier om die procedure nationaal te doorlopen (...). Dus vaak is het dan ook lastig om binnen die termijnen [te coördineren].”

Page 35.

English translation: “the question then actually is: ‘could a ruling have consequences for the interests, the practice, the legislation, the enforcement, the supervision of your ministry?’”

Dutch: “het gaat er dan eigenlijk om: ‘kan een uitspraak gevolgen hebben voor de belangen, de praktijk, de wetgeving, de handhaving, het toezicht van jouw ministerie?’”

¹⁵⁵ Interviewee 10, Ministry of Foreign Affairs, the Netherlands

Page 39.

English translation: “In principle we do not intervene against the fiscal legislation of other countries. Then we say: ‘the European Commission [can] fix that,’ because, my director general just sits around the table every month, or twice a month, with the directors general of the tax agencies of other countries. So you really do not like to get into an argument with your British colleague, if you need him for another political deal in Europe. So then you think: ‘well, you have that big Dutch company that is litigating, they have a whole army of lawyers, you have the European Commission who will say that this company is right.’ Those judges will also say this company is right without us directly picking a fight with our English colleagues.”

Dutch: “In principe interveniëren wij niet tegen de fiscale wetgeving van andere landen. Dan zeggen wij van: “(...) de Europese Commissie [mag] dat opknappen,” want mijn directeur generaal zit gewoon iedere maand, of twee keer per maand, om de tafel met directeuren generaal van belastingdiensten van andere landen, dus je hebt helemaal geen zin om ruzie te krijgen met je Britse collega als je hem voor een andere politieke deal in Europa nodig hebt. Dus dan denk je van, nou ja je hebt nou dat grote Nederlandse bedrijf die is zelf aan het procederen, die hebben een heel legertje juristen, je hebt de Europese Commissie die gaat roepen dat dit bedrijf gelijk heeft. Die rechters die geven dit bedrijf ook wel gelijk zonder dat wij direct ruzie zoeken met onze Engelse collega’s.

Page 43.

English translation: “bonus point.”

Dutch: “bonus punt.”

Page 43.

English translation: “when the ruling of the Court is so (...) that it [gives] a workable solution. For instance [in the case] National Grid, the Court did not find in our favour, but it is a [ruling] with which we can work just fine, and it is also executable for the Tax and Customs Administration.”

Dutch: “als de uitspraak van het Hof zo is (...) dat het een werkbare oplossing [geeft]. Bijvoorbeeld [in de zaak] National Grid, we werden niet in het gelijk gesteld door

het Hof, maar dat is een [vonnis] waar wij prima mee kunnen werken, en het is ook uitvoerbaar voor de Belastingdienst.”

Page 46.

English translation: “so that is why you look: what goes wrong if we do not participate [in the case]?”

Dutch: “dus daarom kijk je van: wat gaat er mis als we niet meedoen [aan de zaak]?”