Summary

Discussions regarding the acceleration of administrative decision-making and legal protection are not only taking place in the Netherlands, but also in neighbouring countries. Before implementing any substantial changes in the rules of administrative decision-making and judicial review in the Netherlands, an investigation has been carried out in order to ascertain whether any lessons may be drawn from the ideas that have been developed in these areas in other Member States of the EU and, most of all, from the practical experiences that have been gained along the way. Part of this study involved an exploration of the way(s) in which issues relating to complex decision-making procedures in the realm of administrative law are handled in Germany, the United Kingdom and France and the experiences gained after certain acceleration measures have been implemented in those countries.

In Germany, discussions regarding the acceleration of decision-making have already been underway for some 20 years, especially in relation to infrastructural projects arising from the reunification of Germany and the substantial investments that such projects entail. An entire series of statutory measures have been taken as a result of those discussions. A great deal of experience has been gained that can be used to provide inspiration, both in relation to the administrative decision-making process, as well as in relation to legal protection. Almost all German interlocutors pointed out the fact that political discussions unjustifiably focused upon the possible streamlining of statutory procedures, whilst there are a great many non-legal factors that are of at least equal importance when it comes to determining the amount of time taken up by decision-making procedures.

In the United Kingdom, discussions are primarily centred upon administrative decision-making procedures, especially early, preparatory proceedings that take the form of a “public enquiry”, an instrument which is widely used in the case of complex projects and which is elaborated upon in legislation. In France, there is little discussion with regard to the necessity of accelerating the decision-making process and, in contrast, the past few years have seen the inclusion in the decision-making procedure of elements, the primary purpose of which is democratic participation and which actually cause the procedure to last even longer. In France too, the public enquiry (enquête publique), a statutory and extensive early preparatory procedure, plays a major role. In German law as well, and especially in custom and practice in Germany, we find measures designed to enable administrative decision-making procedures to be conducted in an effective, careful and efficient manner, especially in complex cases (with e.g. procedural advisers [Verfahrensberater], the application meeting [Antragskonferenz], the parallel approval procedure [Sternverfahren] etc.).

With regard to the importance that the (Dutch) “Elverding Committee” attaches to a thorough preparatory stage that incorporates broad participation at an early stage, more detailed research into the experience gained under the arrangements in place in the United Kingdom, France and Germany is something that could be considered.

The study discusses certain key features of the administrative law on decision-making and judicial protection in one or more of the relevant countries, which, if introduced in the Netherlands, could enable decision-making procedures to be conducted more rapidly, but which for a variety of reasons are not automatically suitable for introduction in the Netherlands. One such item would take the form of a substantial increase in court registry fees or the financial procedural risk. With regard to this point, it must be pointed out that it is uncertain whether this would expedite the process and it would be necessary to discuss any limitations that apply by virtue of the Aarhus Convention. Another example would be limiting the right of recourse available to environmental organisations by allowing them to invoke only norms intended to protect the interests of private individuals. Also in this respect, doubts can be raised as to whether such a provision might be in contravention with
the Aarhus Convention. A few of the other features of the laws of one or more countries examined during the course of the study have already been incorporated as a means of acceleration procedures in the draft Emergency and Recovery Act (Crisis- en herstelwet) and in the plans for draft legislation to amend the law on administrative judicial review. These features include items such as the limitation of the right of recourse of other government bodies and the widening of the possibilities for incorrect decisions to be rectified by a court of law. An additional and profitable option would be to carry out a study into the use of such possibilities of rectification by the courts in other countries. In Germany, the practical application of the relativity principle (Schutznormlehre), which also forms part of the draft Emergency and Recovery Act (Chw), is not without its problems, especially from the point of view of EU law. As far as their relationship to EU law is concerned, the regulations being proposed in the Netherlands appear to be more open-ended in nature. It remains important, however, for the limitations imposed by international law (in particular, the right to property, provided by the first protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, or ECHR) and European law, that the practical application of the proposed regulations be closely monitored. As far as other aspects are concerned, the regulations proposed in the Netherlands actually go further than is the case under German law. In contrast to the situation in Germany, no exemption is provided in the event that the property of an individual is affected.

The integrated nature of the joint public planning approval procedure (Planfeststellungsverfahren) and the judgment passed at the conclusion of such proceedings form a highly important feature of German law. As part of the joint public planning approval procedure (Planfeststellungsverfahren), the applicable statutory requirements in relation to consent under the relevant sector-specific legislation continue to apply. The power to issue a decision is, however, assigned to a single government body known as the joint public planning approval authority (Planfeststellungsbehörde). This authority consults all interested parties, including any bodies under public law, which, by virtue of sector-specific legislation, originally had the power to issue a decision with regard to a specific requirement in relation to consent. This consultation usually takes place within three months in the form of a parallel approval procedure (Sternverfahren). It is important to take heed of the comments that are submitted. In some cases, it is also necessary to obtain the agreement of a different administrative authority. The joint public planning approval authority then takes a single decision, against which legal protection proceedings may be initiated in a single procedure of judicial review. Once this has been done, all of the requirements under public law that relate to the carrying out of the project have been completed. The procedure contained within the draft Emergency and Recovery Act that applies in the case of medium-sized residential construction projects represents a limited step in this direction, but is not as far-reaching in its application. The more extensive application of the proposed Dutch procedure in the case of complex projects is prevented due to limitations that apply under European law. As far as the arrangements in place in Germany are concerned, this is not the case, as all of the statutory requirements with regard to consent remain intact. One of the significant recommendations put forward by the study is therefore to strongly consider the incorporation of a similar scheme within the General Administrative Law Act (Awb), accompanied by special procedural safeguards.

Both in France and in Germany, legal protection for major complex (infrastructural) projects is limited to a single instance. In Germany, this was regarded as one of the most important measures that could be taken in order to accelerate the decision-making process. In the Netherlands, however, developments are heading in the opposite direction. In the case of specific projects, the recommendation is therefore to consider making legal protection in relation to all of the necessary permissions available from the Council of State, as the sole competent authority. If joint public planning approval (see above) were to be introduced, legal protection by recourse to the Council of State would then need to be available. What is more, it would be possible to consider the
possibilities of introducing general limitations with regard to higher appeals. One way to achieve this would be by introducing a system of leave. This would, however, require the purpose fulfilled by higher appeal to be re-examined.

The administrative courts in Germany have more wide-ranging powers to bring disputes to a final resolution. An important factor in this regard is the ability of appellants to request the court to instruct an administrative body to amend a decision in a certain way, as an alternative to or alongside the annulment of the decision. If the administrative body agrees to this, the appeal can be declared unfounded in the principal action, whilst the interests of the appellants are simultaneously met by granting the subsidiary demand for an amendment to the decision. In handing down a ruling in relation to the case, such an arrangement frequently enables the judge to amend the decision him-/herself or to oblige the government to amend the decision or to take a supplementary decision. Solutions of this type are of benefit to all parties involved in the case. As part of the study, ideas are developed with regard to how tailor-made solutions of this type that enable the final resolution of disputes could also be introduced in the Netherlands, possibly in conjunction with proposed amendments to Article 8:72 paragraph 1 and paragraph 4 of the General Administrative Law Act (Awb).