

PLANNING LAW FOR NATIONAL TRANSPORT INFRASTRUCTURE: BALANCING BETWEEN PUBLIC SUPPORT AND SPEEDY DECISION-MAKING

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Abstract

Transport infrastructure decisions are often contested. To channel infrastructure decision-making, legal procedures have important functions. Legal procedures should (1) lead to a decision within a reasonable time frame, (2) while all relevant interests must have been identified and weighted and (3) affected parties must have had input in the process.

Although these might seem obvious characteristics, many countries in Europe struggle with their legal framework for national transport infrastructure decision-making.

This paper shows how several European countries – all subject to the same European directives – struggle with finding a balance between public support and speedy decision-making.

Special attention will be given to the Netherlands. Three issues are discussed in depth: (1) the involvement of the public in the preparation of a track decision, that is, the decision to appoint a specific route for new infrastructure, (2) the way a specific route is chosen from a set of alternative routes and (3) the moment on which legal protection by the courts is offered against government's decision to appoint a specific route. A number of flaws in current procedures are identified. It is advised that new legislation in the framework of the coming Environmental Planning Act addresses these deficiencies.

1. Introduction

National transport infrastructure (national motorways, national railways and national waterways) is of great economic relevance. However, it also has important spatial and environmental effects. Think of noise nuisance, air pollution and damage to nature. The positive economic effects of infrastructure usually are spread around a region. The negative spatial and environmental effects, however, usually are local. This unequal spatial distribution of benefits and damage is one reason why infrastructure decision-making often is contested. Proponents and opponents confront each other in (political) debates. Also, both parties try to influence public opinion in support of their view. Finally, they, more often than not, meet each other in court.

To channel infrastructure decision-making, legal procedures have an important function. To mention a few functions of legal procedures for infrastructure decision-making: (1) the procedures should lead to a decision within a reasonable time frame, (2) while all relevant interests must have been identified and weighted and (3) affected parties must have had input in the process.

Although these might seem obvious functions of the procedure for decision-making, in practice many countries in Europe struggle with their legal framework for national transport infrastructure decision-making. In particular, several European countries – all subject to the same European directives – struggle with finding a balance between raising public support and speedy decision-making.

To explore this balance, this paper will discuss three issues in particular: (a) the involvement of the public in the preparation of a track decision, that is, the decision to appoint a specific route for new infrastructure, (b) the way a specific route is chosen from a set of alternative routes and (c) the moment on which legal protection by the courts is offered against government's decision to appoint a certain specific route. These seem to be the most persistent problems in planning law procedures for national transport infrastructure.

As will be explained in sections below, in the Netherlands, the legal procedure for national infrastructure decision-making is out of balance. Speed of decision-making outweighs the search for public support. The research question that leads this paper is:

How can a better balance be found between public support and speedy decision-making in legal procedures for national transport infrastructure?

To answer this question, the following topics are addressed: European law influences on national infrastructure planning procedures (section 2); the move toward speeding-up procedures in several European countries (section 3); the legal procedures for new infrastructure in the Netherlands (section 4); an analysis of three elements of the decision-making procedures (section 5); conclusions (section 6).

2. European law influences on national infrastructure planning procedures

Currently no European Directive on the topic of infrastructure planning procedures exists. Although there are no *specific* directives for the planning procedures of new infrastructure – and thus we can see considerable differences between member states as for infrastructure planning procedures – all national procedures *are* quite heavily influenced by the EU environmental directives. Most relevant directives are:

- The Environmental Impact Assessment Directive: for project assessment; (Directive 1985/337/EEC)
- The Strategic Environmental Assessment Directive: for plan and program assessment; (Directive 2001/42/EC)
- The Birds Directive; (Directive 2009/147/EC)
- The Habitats Directive; (Directive 92/43/EEC)
- The Water Framework Directive: for infrastructures with potential risks of water; (Directive 2000/60/EC).

Every member state has to comply with these directives. In the Netherlands the Environmental Impact Assessment directives are fully integrated in the statutory procedure for infrastructure planning, the Infrastructure Planning Act (Dutch: Tracéwet).

The environmental directives have procedural and possibly substantive influences on infrastructure decision-making. First, as said before, the national infrastructure planning *procedures* have to comply with the directives. Second, it is possible that application of the environmental directives will have *substantive* consequences for the project. For instance: (a) compulsory environmental assessments that cover alternatives and (b) consultations with the population concerned by the project, may influence the choice of route of an intended project.

Despite harmonising effects of some of the European Directives, much freedom remains for EU member states to organise their infrastructure decision-making procedures. Striking, however, is that many member states have been and are looking for ways to speed-up their decision-making procedures.

3. The move toward speeding-up procedures in several European countries

It is interesting to note that in the past years the governments of many European countries have felt the need to speed up the decision-making procedures for infrastructure. Many governments are of the opinion that infrastructure decision-making takes too much time and that new legislation is helpful in solving that problem.

In Germany new legislation to speed up the decision-making process was introduced after the reunification of West and East Germany (1990). Swift construction of new infrastructure in the former DDR was needed. Therefore new legislation was introduced, but only applicable in the new eastern 'Länder'. Later, new laws declared to apply many accelerating measures to the whole territory of the Federal Republic (Backes *et al*, 2010, p. 48).

In the UK, the Eddington Transport Study pointed out that the planning system for major transport systems 'has evolved over several decades to the point at which it can impose unacceptable cost, uncertainty and delay on all participants' (Eddington, 2006, p. 56). The report gave impetus to new statutory provisions for improvement of infrastructure planning in the UK: the Planning Act 2008.

In Belgium, the commission-Berx was asked by the Flemish government to make proposals to break the slowness in decision-making on large infrastructural projects. In its report, the commission recommended many changes to the legal system (Berx, 2010).

In the Netherlands, for decades there is an almost continuous debate regarding speeding-up the decision-making process for national infrastructure projects (Hobma, 2000, p. 17 et seq.). In 1994 this debate led to a whole new act regarding infrastructure decision-making: The Infrastructure Planning Act 1994 (*Tracéwet*). However, even after implementation of this new act, in practice the need for a better and faster decision-making process remained. Government appointed the commission-Elverding (2008) and asked for advice. The commission concluded in its report that the existing decision-making process, which finds its legal basis in the Infrastructure Planning Act 1994, holds many inefficiencies (Elverding, 2008). It is acknowledged by the commission-Elverding that some of the causes of the lengthy decision-making process, have a non-legal nature. This applies, for instance, to flaws in project management. Those causes cannot be addressed with legal measures. Other causes, however, can indeed be addressed with legal measures. This applies, for instance, to statutory limitation of the parties that have a right to oppose against infrastructure decisions before court (i.e. narrowing down parties that have a right to legal standing). The commission recommended important legislative changes which were adopted by government. This led in January 2012 to new rules for infrastructure projects, when the revised Infrastructure Planning Act came into effect. The essential elements of the revised act are elaborated in the next section.

4. Legal procedures for new infrastructure in the Netherlands

4.1 The Infrastructure Planning Act

The most important Dutch act in the field of the planning of new infrastructure is the Infrastructure Planning Act (*Tracéwet*). The sphere of effect of the act is restricted to *national* infrastructure. That is: the planning of new national motorways, national railways and national waterways. The Infrastructure Planning Act (IPA) does not only relate to plans for *new* national infrastructure, but also to plans for the *modification* of existing national infrastructure. With this act the Minister of Infrastructure and the Environment directs the planning of national infrastructure. However, as we will see, lower bodies of government (especially municipalities) and interested parties (civilians, environmental interest groups) have legally ensured possibilities to influence the decision making.

4.2 Overview of procedural steps

The Infrastructure Planning Act (IPA) holds two procedures that must be discerned: the full procedure and the shortened procedure for planning of national infrastructure. The full procedure applies to new infrastructure. The shortened procedure applies to the modification of existing infrastructure. This paper is restricted to new infrastructure. For a summary of the procedural steps that apply see Table 1.

Nr.	Procedural step
1.	Decision to start
2.	Exploratory phase
3.	Draft structure vision
4.	Views regarding draft structure vision
5.	Structure vision
6.	Preferred decision
7.	Draft track decision
8.	Views regarding draft track decision
9.	Track decision
10.	Appeal with the Council of State
11.	Coordinated permit procedure
12.	Appeal with Council of State
13.	Construction and operation
14.	Evaluation test

Table 1 Procedural steps

The contents of each step is described below.

1. Decision to start

This is the decision of the Minister of Infrastructure and the Environment, to start to explore an infrastructural problem. The exploration may relate to an existing infrastructural problem, or a problem that may be expected in the future (art. 2 IPA).

Every decision to start contains:

- (a) a description of the area of the exploration;
- (b) a description of the nature of the problem that is to be explored and a description of the relevant spatial developments in the area;
- (c) the way in which civilians, societal organisations, the bodies of government concerned and, if appropriate, the manager of the national railways, will be involved in the exploration.

The ‘decision to start’ is a political and administrative decision which one cannot oppose against; there is no appeal possible against a decision to start.

2. Exploratory phase

The Infrastructure Planning Act stipulates that in the exploratory phase, the minister will collect ‘the necessary knowledge and insights regarding the nature of the problem’ (art. 3 IPA).

In the exploratory phase, logically, the problem is explored. This is done through research and through input by participants from different parts of society. For this cause, one of the instruments that is used

is policy analysis; in particular a societal cost-benefit analysis. Possible solutions are tested on their effects on accessibility, safety, quality of environment etcetera. In this way likely solutions and unlikely solutions become clear. In short, in the exploratory phase benefits and necessity of the solution(s) to an infrastructure problem are being studied (Boardman *et al.*, 2010).

3. Draft structure vision

In some instances, the ‘decision to start’ will include the preparation of a ‘structure vision’. This is required when the minister takes into consideration to solve the infrastructural problem by constructing a new national motorway, national railway or national waterway. It is also required if the minister takes into consideration to add more than two lanes to an existing national motorway, or more than two tracks to an existing national railway (art. 2, para. 4, IPA). The moment on which it is decided that a structure vision must be prepared, it is not *certain* that new infrastructure will be built, or major additions to existing infrastructure will be built. It is just that the minister takes it into consideration. When the structure vision is finished, the minister will be clearer; he will express his ‘preferred decision’ (see below).

From the above it follows, that not always a structure vision needs to be prepared. A structure vision is mandatory in case of major interventions: new national infrastructure or major alterations of existing national infrastructure (two extra lanes or railway tracks). In case of smaller interventions, for instance replacing crossing roads by a fly-over, a structure vision is not mandatory. So, the full procedure has to be followed if infrastructural measures with major spatial implications are taken into consideration. In case of few spatial effects, the shortened procedure will be followed. Equally, if there is no freedom of spatial choice, the shortened procedure will be followed. An example of ‘no freedom of spatial choice’ exists in case of adding one lane to an existing motorway. The location of an extra lane will be determined by the presence and location of the existing lanes. Under this type of circumstances, a comprehensive research into alternatives (which is done in the full procedure) can be left behind.

If no structure vision is needed, the so called ‘shortened procedure’ will apply. This procedure holds fewer steps compared to the situation in which a structure vision must be drawn up. In fact, if the shortened procedure applies, the results of the exploratory phase (step 2) will be directly processed in a draft track decision.

Article 4 Infrastructure Planning Act explains the contents of a structure vision that is prepared in the framework of national infrastructure. The structure vision holds:

- (a) the results of the exploration that has been carried out;
- (b) an account of the way in which civilians, societal organisations, the bodies of government concerned and, if appropriate, the manager of the national railroads, have been involved in the exploration and the results of that;
- (c) the solution the minister prefers to solve the problem, including his motivation for this preference.

4. Views regarding Draft structure vision

If the draft of the structure vision is ready, everybody has the opportunity to bring forward his views: (*zienswijzen*) (art. 6 IPA). This allows for comments on the draft and gives the minister the opportunity to process the views in the final version of the structure vision.

5. Structure vision

If the final version of the structure vision is ready, it will be send to the Second Chamber of Parliament, the bodies of government involved (province, municipalities) and, if appropriate, the manager of the national railways (art. 7 IPA). As a follow up, it is possible that the structure vision is discussed in parliament. It most likely will be discussed in the municipal and provincial councils

concerned as well. That draws the structure vision into the domain of politics. The ‘preferred decision’ of the minister (see below) is part of the structure vision. In particular this decision may raise discussions. It is up to the members of the Second Chamber of Parliament to decide whether this issue is discussed with the minister or not. Often in society there will be supporters and (strong) opponents of, for instance, the construction of a new motorway. Frequently civilians or special interest groups like environmentalists propose alternatives to solve the infrastructural problem, which are in conflict with the minister’s preferred decision. Almost certainly, these parties will try to put pressure on politicians in Second Chamber or municipal councils, so that the majority of chosen representatives will favour the alternative solution, or reject the minister’s preferred decision. Or at least that critical questions are asked by the members of parliament to the minister, leading to further research that might bring the alternative solution in a more favourable position, or weaken the preferred decision.

6. Preferred decision

A structure vision does not end in a neutral way; it will express the minister’s preferred decision. That is, the solution the minister prefers to solve the problem. The minister will motivate his preference for this particular decision. The preferred decision is not necessarily the decision that will be realised, since the procedure for new infrastructure holds more steps to come.

The preference may be (art. 5, para.1, IPA):

- (a) the construction or modification of a national motorway, railway or waterway;
- (b) a solution without the construction or modification of a national motorway, railway or waterway. Such a solution may be traffic management;
- (c) a combination of (a) and (b) including the realisation of other construction projects;
- (d) that no solution will be elaborated. This means that the minister is of the opinion that, actually, there is no problem that needs a solution.

If the preferred decision of the minister is to construct new infrastructure or a major extension of existing infrastructure, the structure vision must contain additional details, such as (art. 5, para. 2, IPA):

- compensation for damage to nature;
- detailed maps;
- the number of lanes or number of tracks to be constructed;
- the noise production ceilings that must be respected;
- an estimation of costs and a substantiation of financial feasibility.

7. Draft track decision

At a certain point in time it is clear which solution to solve the infrastructural problem will be realised. It is the preferred decision of the minister, or it is a solution that results from discussion with notably Second Chamber of Parliament. The chosen solution will be worked out in a draft track decision (*ontwerp-tracébesluit*). Province, municipalities and water boards will be involved in the preparation (art. 11, para. 2, IPA).

Usually a draft track decision will also include drawing up an Environmental Impact Statement. This means that the environmental effects of the proposed infrastructural intervention are known in advance and in great detail.

The draft track decision holds many specifications, such as:

- infrastructural measures that have to be taken;
- measures to compensate for damage to nature, like an ecological passage for small animals;

- safety measures for the motorway, railway or waterway;
- detailed maps (at least 1: 2500);
- the number of lanes (in case of a motorway) or number of railway tracks;
- the noise production ceilings that have to be taken into account.

8. Views regarding Draft track decision

Since it is a draft, affected municipalities, but also private persons, organisations and special interest groups can put forward their views on the draft track decision. The views will be addressed to the minister. The IPA specifies that views can be put forward by ‘everyone’ (art. 11, para.1).

9. Track decision

After having assessed the views, the minister finally decides on the details of the infrastructural solution that is to be constructed. This is the track decision. It holds the specifications similar to the draft track decision.

The track decision has a special planning status. In fact, the track decision overrules the local land-use plan. This is of importance in situations in which the municipality disagrees with the chosen solution for the infrastructural problem, and has not (yet) revised its land-use plan to facilitate the construction activities. In principle, as long as the land-use plan is not revised, construction activities for, by example, the construction of a new motorway are not possible. Indeed, these activities will be in conflict with the land-use plan and thus do not qualify for an environmental permit to build. To prevent such situations, the track decision directly intervenes in the local land-use plan. If the track decision and the local land-use plan do not agree, the track decision counts as a decision to deviate from a land-use plan (art. 13, para. 4, IPA). Hence, the municipality cannot block the construction of infrastructure with their land-use plan.

10. Appeal with the Council of State

Interested parties (for instance environmental interest groups), or interested civilians, who had reacted in the previous stages, can lodge appeal against the track decision with the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*). The Council of State has the authority to nullify the minister’s decision to take the track decision. The council will nullify if the minister’s decision is in conflict with the law. That is, if the decision is in conflict with acts, Orders in Council, European law and international treaties. Another ground for nullification is that the decision is in conflict with an unwritten ‘general principle of proper administration’, like the ‘principle of equal treatment’. From these grounds it follows that the track decision is reviewed on its *legal* merits. The Council of State will not decide whether the track decision reflects the right *policy*. However, the minister’s decision must stand the test of a ‘proper weigh of interests’. Relevant interests cannot simply be neglected.

The possible grounds for nullification that are summed up in the previous paragraph, leave a broad margin of appreciation for the administration (in casu, the Minister of Infrastructure and the Environment). That is, there is a considerable space to manoeuvre for the minister, because the court will not judge whether the track decision reflects the right *policy*. Court rulings reflect this broad margin of appreciation, as can be shown by the following example.

‘To invalidate the lawfulness of the track decision of the minister, it is not sufficient to point out that there are other acceptable solutions, but the appellant must argue convincingly that the choice of the minister lacks reasonable grounds.’ⁱ

As explained, special interest groups and civilians have the right to lodge appeal – at least, if they can be considered to be ‘interested party’. Municipalities, however, do not have legal standing in case of national infrastructure decisions under the Infrastructure Planning Act. This is laid down in the Crisis

and Recovery Act (art. 1.4) (*Crisis- en herstelwet*). The purpose of this provision is to make for swift decision-making. In the past, before the Crisis and Recovery Act came into effect, it was not unusual for local government to lodge appeal with the Council of State against track decisions. The legislators, however, were of the opinion that branches of government (in casu minister and municipality) should not fight each other in court, but should settle their disagreement through consultations.

11. Coordinated permit procedure

In case no appeal is lodged against the ministers' decision, or in case an appeal is dismissed, the decision is final. This means that the track decision is irrevocable. However, the track decision 'only' relates to the spatial planning aspects of the infrastructure, such as: exact location, connection to other roads, landscaping, dimensions and height. Apart from the track decision, permits are needed for all kinds of activities. Take the example of building a bridge over a new motorway. Rijkswaterstaat will need an 'environmental permits to build' from the municipality in order to build the bridge.ⁱⁱ The municipality will test the design of the bridge against the usual grounds. These grounds include the Building Decree holding numerous technical requirements. Since usually many permits are needed, the required permits then go through a coordinated procedure (art. 20 IPA). In essence this means that the permits are bundled. Different permits will follow an identical preparatory procedure. This will speed up the procedures for permit granting.

12. Appeal with the Council of State

The decision to grant permit(s) for the construction of new infrastructure, is subject to appeal. Interested parties have the power to lodge appeal with the Council of State. However, they are limited in their grounds for appeal. Article 20, paragraph 11 Infrastructure Planning Act makes clear that if the topic of the permit finds its basis in the track decision, the appeal cannot refer to that topic. So, appeal against the permit cannot be used to re-discuss spatial planning issues; these have been dealt with in the (appeal against) the track decision. However, for instance the issue of external appearance of a new bridge over the new motorway is an issue that has not been discussed in the framework of the track decision.

13. Construction and operation

After permits are granted, construction activities can begin. After that, the new infrastructure comes into operation. Of course, prior to construction activities, the necessary land must have been acquired by government.

14. Evaluation test

Every track decision holds a 'term within which the minister shall evaluate the effects of the new or modified road, railroad or waterway that comes into use' (art. 10, para. 1, sub f IPA). Apart from the term, the track decision will also describe which environmental aspects will be evaluated. Most likely 'air quality' and 'noise nuisance' will be mentioned in the track decision as environmental aspects that have to be evaluated. Thus, some time after the new infrastructure is in use, an evaluation takes place. This is called the 'evaluation test' (*opleveringstoets*). It has an express legal basis in article 23 Infrastructure Planning Act. Pursuant to article 23 it has to be evaluated if the predicted effects conform to practice. It is possible that the evaluation reveals that the effects (on the environment) are more severe than predicted. Should that be the case, the minister will provide a description of (complementary) measures that are necessary to still meet the environmental requirements. Moreover, he will specify the term within which these measures will be realised. So, the goal of the evaluation test is to ensure that also after the completion measures will be taken if it occurs that not all the environmental requirements are met.

Regarding the evaluation test, citizens and environmental special interest groups are in a relatively passive (or even: weak) position. It is not possible to lodge an appeal against the outcome of a

completion test before an administrative court. So, it is not possible to let a judge assess the quality of the complementary measures. Also it is not possible to let a judge assess the timeframe for the complementary measures.

5. Analysis of three elements of the decision-making procedure

This section discusses three issues in depth: (1) the involvement of the public in the preparation of a track decision, that is, the decision to appoint a specific route for new infrastructure, (2) the way a specific route is chosen from a set of alternative routes and (3) the moment on which legal protection by the courts is offered against government's decision to appoint a certain specific route. The analysis will show shortcomings in the current procedures.

5.1 Involvement of the public

On several moments the public is involved in the preparation of a track decision:

- As described in step 1 (see section 4.2 above) the *decision to start* describes the way in which civilians, societal organisations, the bodies of government concerned and, if appropriate, the manager of the national railways, will be involved in the exploration.
- As described in step 2 the *exploratory phase* uses input by participants from different parts of society.
- As described in step 3 the *draft structure vision* gives an account of the way in which civilians and societal organisations have been involved in the exploration and the results of that.
- As described in step 4 everybody has the opportunity to bring forward his *views against the draft of the structure vision*.
- As described in step 8 affected private persons, organisations and special interest groups can put forward their *views on the draft track decision*.
- Finally, as described in step 10, interested parties (for instance environmental interest groups), or interested civilians, who had reacted in the previous stages, can *lodge appeal* against the track decision with the Administrative Jurisdiction Division of the Council of State.

For the minister, one of the implicit reasons to involve the public at different stages of the decision-making process, is to prevent later appeals with the administrative judge. The assumption is that early involvement averts later appeal (Warbroek, 2009). We can make two comments on this.

First comment is that recent research (Winnubst, 2011) shows that this assumption only stands up if government and citizens already have built up a positive attitude towards each other, which is reflected in the form of their relationship: an alliance or coalition. 'This means that when the relationship is in a conflictive mode it is hard to find a way out and when it is in a collaborative mode this situation will continue' (Winnubst, 2011, p. 370). In other words, when parties do not trust each other and do not have a positive attitude towards each other, a conflict is virtually unsolvable. Therefore, giving the public chances to get involved in decision-making regarding new infrastructure in itself will not prevent them from going to court. The quality of their relation – 'collaborative mode' or 'conflictive mode' in Winnubst's terms – will be decisive.

Second comment is that early involvement of citizens cannot dissolve conflicts of interest between citizens and government. Koning and Vroonhof argue: if administrators think that early citizen participation will prevent differences, they will be disappointed (Koning and Vroonhof, 2010). Their experience (as elderman and as planner) learned them that involvement of the public will not take away the ever present conflicts of interest. It will not stop citizens from defending those interests in court.

5.2 Choice of a route from a set of alternative routes

The overview of procedural steps in section 4.2 shows how the choice of one particular route from a set of alternative routes is made: the structure vision holds the minister's 'preferred decision'. The preferred decision, actually, is the minister's choice of route. The preferred decision is not per se the decision that ultimately will be realised, since the procedure allows for the minister to change his decision – voluntarily or forced by parliament. But in essence the preferred decision holds the minister choice. This means that quite early in the decision-making process, the route is decided from the alternative routes. To put it simply, the minister collects views and insights from interested governments (notably municipalities) and the public and then decides a route. The implicit reasoning is that from that moment (the preferred decision) on, the minister should stand firm and not give in to societal claims for alternative routes. The assumption is that this attitude would serve speedy decision-making.

As said, the preferred decision is taken quite early in the process; the rest of the procedure is basically seen as 'detailing' the preferred decision. The implicit reasoning is that during the rest of the procedure, the minister should hold on to the preferred decision to avoid any delays. This leads to the following comment.

The quick choice for one route from a set of alternative routes, may seem to serve speed of decision-making. Only one route is elaborated once the preferred decision is taken. However, by doing so, the 'project' cannot adequately react to changing circumstances, new information of new technological innovations. After all, the choice of route is frozen. Practically it is not possible to choose another route, or to drastically adapt the chosen route. In reality, however, almost always in the phase of elaboration of a specific route, circumstances will change. After all, these are lengthy projects. For instance, security may become much more important than first envisioned. Furthermore, new information may become available, for instance disturbing vibration because of the preferred road track on nearby high precision manufacturers. Moreover, technological innovations may be revealed, which for instance makes it much more inexpensive to tunnel a river. Therefore, as Priemus (2012) argues, it is more realistic and sensible to elaborate more than one alternative, until the moment the realisation decision (the track decision nr. 9 in section 4.2) can be taken.

5.3 The moment of legal protection by the court

As shown in section 4.2, there are many moments of involvement by the public during the procedure for new infrastructure. However, there are (just) two moments the independent court can be approached. The first moment is step 10 of section 4.2: appeal with the council of state. This means that the possibility to address the independent court is at the end of the procedure. The court can only be addressed if all details of the new road, railway or waterway are designed and worked out. This may seem to be fine; the judge will rule based once all concrete details are available. However, there is downside to this late judicial intervention.

Since the administrative court can only be addressed late in the procedure, a lot of uncertainty remains until then. Only when the judge has ruled, it is certain whether the chosen track can endure all legal tests. Until then, uncertainty hangs over the market. In practice, for instance, the ecological damage to protected habitats of a new route – protected under EU legislation – is much debated between environmentalists and government. Should the court rule that a new route indeed is in conflict with European environmental legislation, there is a serious problem for the minister. Had the minister known this earlier, he – for instance – timely could have chosen for a different track. The current procedure for new infrastructure, however, gives at a very late point in time certainty regarding this type of question, because the decisive legal procedure before court is placed at the back of the decision-making process.

It is more efficient if the court could give certainty on certain issues – like the test on environmental legislation – much earlier in the process. Koeman (2013) calls the issues for which it would be good if there is certainty earlier in the process: 'strategic questions'. After the court's ruling and if the minister's decision stands this test, procedures can continue. This extra moment of legal protection

would have to supplement the possibility to address the judge at the end of the procedure, when all details are known.

6. Conclusions

In a democratic society, procedures for new national infrastructure need to find a balance between public support and speedy decision-making. Both aspects are necessary. Organising public support will take time. Furthermore, organising public support may force the minister to debate and defend his preferences and decisions with opponents. However, without public support, the decision to build new infrastructure will lack legitimisation. Legitimation is important given the often negative spatial and environmental effects of new infrastructure on local communities. On the other side, without speedy decision-making, a region or entire nation may too long be confronted with recurrent traffic jams, economic damage or dangerous traffic conditions.

Several countries in north-western Europe struggle with their decision-making procedures for new infrastructure. The main objective in these countries is to speed up procedures. The general feeling amongst their governments is that the decision-making takes too long.

In the Netherlands, an almost continuous debate is going on regarding speeding up the decision-making process. Analysing current statutory procedures for new infrastructure, we must conclude that the Netherlands have not yet found a balance between finding public support and speedy decision-making. In current procedures, speed outweighs finding public support.

This paper identified three shortcomings in the statutory procedure as laid down in the Infrastructure Planning Act.

- (1) Although the procedure holds many moments for *participation of the public*, this in itself will not prevent later appeals to the court. To prevent court appeals, the quality of the relation between public and government is more important than the opportunities to be involved in the preparation of a track decision. If the relationship is ‘conflictive’ instead of ‘collaborative’, appeals are most likely. Therefore, investing in the relationship is of utmost importance. Anyway, the idea that early public involvement will take away conflicts of interest, must be put into perspective. By example, a convinced environmentalist will, even after participation in the decision-making process, most likely remain opposed against the construction of a new motorway.
- (2) *The choice of route from a set of alternatives* – the track decision – actually is made very early in the decision-making process. The rest of the procedure in fact consists of detailing the decision. The early choice ‘freezes’ the process. It is virtually impossible to adapt to changing circumstances, new information of technological innovations. Now that the lead time of national infrastructure projects is many years, is it almost certain that circumstances will change, essential new information appears and technological innovations are revealed. Therefore, it is advisable to elaborate more than one alternative. This allows for flexibility.
- (3) *The moment of legal protection by the court* is put late in the decision-making process. Approaching the administrative court is only possible once the track decision is fully detailed. The disadvantage of this is that uncertainty remains on many topics until the court rules. Strategic decisions that are made are not ‘safe’ decisions until the court has ruled. It is better if certainty regarding strategic decisions is obtained earlier on in the process. Therefore it is recommendable to introduce an extra moment to address the court earlier on in the process.

In the Netherlands, the draft of the new Environmental Planning Act (*Omgevingswet*) will be sent to Parliament in summer or autumn 2014. The procedures regarding national infrastructure planning will form part of this act. This is a chance to improve the procedure. We must await to what extent the draft of the new act – which is confidential at the moment of writing this paper – takes away the

aforementioned deficiencies. Taking the shortcomings away would lead to a better balance between public support and speedy decision-making. If the draft does not take the flaws away, these issues should be raised during parliamentary discussion of the draft.

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ⁱ Afdeling bestuursrechtspraak Raad van State (*Department of Administrative Justice of the Council of State*), 6 juli 2011, 201009980/1/M2, ECLI:NL:RVS:2011:BR0472.

ⁱⁱ 'Rijkswaterstaat' is part of the Dutch Ministry of Infrastructure and the Environment and responsible for the design, construction, management and maintenance of the main infrastructure facilities in the Netherlands.