ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION

Colloquium 2006: The Case of the Motorway

Netherlands Report
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This report follows the questionnaire

1) Administrative consent procedure

It is hard to give a short outline of the administrative consent procedure applying to project planning in the Netherlands, because of the fact that these procedures vary from project to project. The Netherlands *Trace-Act* contains a procedure for the planning of motorways, railways and canals. Different procedures are applicable on the establishment of airports, industrial and harbour-estates and waterworks others than canals. In the following I shall concentrate on the procedures of the *Trace-Act*.

Project planning for motorways in Netherlands is based on long term planning relating to traffic and transport. The applicable long term plan is the National Traffic- and Transportplan 2001-2020. This plan deals with the long term developments of traffic and transport. But it has also a status in the field of physical planning. According to *art. 2 of the Act on Physical Planning* the Netherlands Government draws up plans for several elements of the national physical planning. These plans are called Physical Planning Key Decisions. The National Traffic- and Transportplan 2001-2020 is such a Key Decision. Physical Planning Key Decisions can contain binding elements for regional and local physical planning. The *Act on Physical Planning* prescribes a procedure for the establishment of Physical Planning Key Decisions, resulting in approval by both chambers of Parliament. Appeal on the Department of Jurisdiction of the Council of State is open against the binding elements of a Physical Planning Key Decision.

The *Trace-Act* is applicable on the planning of national motorways mentioned in the National Traffic- and Transportplan. The act offers two procedures, an extended one and a normal one. The minister of Transport and Waterworks decides whether the extended procedure will be followed or not. The extended procedure starts with the draft of a *trace-note.* The *trace-note* will be drafted in relation to the *Environmental Impact Report* for the planned motorway. Part of the drafting process is consultation of the local and regional administrative bodies involved. The *trace-note* will be published and according to the rules of the *General Act on administrative law* those who are interested do have the opportunity for a period of six weeks to react. Local and regional administrative bodies involved do have the opportunity for a period of four months to advise on the note and to declare which of the alternatives they prefer and against which they object.

On the basis of the note, the reactions and the advises the ministers of Transport and Waterworks together with the minister of Physical Planning and Environmental Policy takes a stand about the planned motorway. This may mean that the idea of the motorway will be cancelled, but in general it means that a *trace-decision* will be prepared. In this last case the minister publishes a draft *trace-decision* at least six months after a positive stand. This draft decision contains the results of an acoustic research. Those who are interested may react within a period of six weeks. The draft will be send to

the local and regional administrative bodies. They should react within twelve weeks. Taking into account the reactions of the interested citizens and the administrative bodies involved the minister takes a *trace-decision.*
The *trace-decision* will be published. Appeal against the decision for those who react in a previous stage is open on the Department of Jurisdiction of the Council of State.
According to the general Netherlands legal system of physical planning a motorway should be planned in a local destination plan before the way actually may be layed out. The *Trace Act* however regulates that a *trace-decision* contains an exemption of existing destination plans.
From history a couple of interesting examples in the Netherlands are known in which local authorities tried to obstruct the construction of national motorways for environmental reasons. During that time they could easily use their competences in the field of physical planning, especially the competence to establish destination plans. The most important aim of the *Trace Act* is on the one hand to give local and regional authorities ample opportunities to react on draft plans, but on the other hand to guarantee that decisions on motorways, once token, are being executed.

2) Public involvement

As explained under 1) there is ample opportunity for individually affected parties during this process to be heard and to react.
During the extended procedure, which starts with the drafting of a *trace note,* there are two opportunities, one in the process of the draft note and the other in that of the draft decision. During the normal procedure there is only one opportunity.
Reactions may be given in oral and in written form. Normally a couple of hearings are organized on which further information is given, the interested people may raise question and bring forward their objections. Both for the written and oral reactions there is a term of six weeks after the publication of the draft.
Normally, the right of appeal against the decision is regulated in a way that only those who react or raised objections in an earlier stage are entitled to appeal. In the case of the *Trace Act* this restriction of the right to appeal has not been made.

3) Judicial process

As explained under 1) appeal against a *trace-decision* is open on the Department of Jurisdiction of the Council of State. The Department of Jurisdiction is one of the three administrative high courts in the Netherlands. Normally the Department of Jurisdiction decides as a court of appeal on appeals against decisions of courts in first instance. In the case of the *Trace*

Act the Department of Jurisdiction decides as a court of first and one instance.
The term for appeal is six weeks. Appeal is open for those who are involved in the *trace-decision.* The ordinary scheme of the General Act on Administrative law holds that before appeal on a administrative court, an objection procedure should be followed before the administrative body that took the decision. In the case of the *Trace Act* objections could be raised against the draft *trace-decision.* In those cases it does not make sense to have a second objection procedure against the decision itself.
Appeal can only be raised in written form. After the written part of the process the Department of Jurisdiction holds a hearing. The *Trace Act* prescribes that the Department of Jurisdiction has to decide within twelve months.
Appeal does not suspend the appealed decision. Suspension may be asked for in a separate procedure before the chairman of the Department of Jurisdiction. Only those who raised appeal are entitled to ask for suspension. A decision on suspension is given within two or three weeks.

4) Standing

The parties mentioned in the questionnaire are:

- an inhabitant of the residential area,
- one of the municipalities,
- the national environmental agency,
- a farmer,
- a national association for the protection of the environment, and
- an association for the protection of the environment in a neighbour state.

Only those who are directly interested in the *trace-decision* do have a right of standing. In the past appeal in environmental and physical planning cases was open for anyone, according to the idea of the *actio popularis.* By a recent amendment of the involved legislation the right of standing is restricted to those who do have a direct interest in the decision. Standing in environmental en physical planning cases does now no longer differ from the general principle of standing according to the *General Act on Administrative Law.*
All the parties mentioned do have the right of standing except perhaps the environmental protection association of the neighbour state. If this association can argue that interests in the neighbour state which it tries to protect, will be really influenced by the *tracé-decision* it will have standing in an appeal before a Netherlands administrative court.
Both the inhabitant and the farmer will be directly influenced by the decision. The fact that the farmer will have protection under the Expropriation Act against the loss of a part of his land does not matter.

Interests entrusted to public bodies are according to the *General Act on Administrative Law* considered to be their own interest. According to public legislation important competences in the field of environmental protection and physical planning are entrusted to municipality-boards and –councils. In general these boards and councils can argue that these interests will be harmed by the *tracé-decision.* This will do to give these boards and councils a right of standing. The same m.m. for a national environmental agency, although a national environmental agency as such is unknown in the Netherlands What we do know is a national environmental inspection; this organisation is not an agency in the sense that it issues bye-laws or takes administrative decisions, but it has important competences for enforcement. The regulation for associations is comparable. General and collective interests, which they according to their aims and their factual activities look after, are considered to be their interests.

5) Scope of claims

In an appeal procedure there is no restriction as far as the scope of claims concerns. Claims may concern infringement of individual rights, general public interests and both the material and procedural lawfulness of the decision.

6) Scope of judicial review

The scope of the review is in the first place determined by the applicable legislation. A decision may not be reviewed because of an infringement of an interest which is not protected by the applicable legislation. But the scope of this applicable legislation can vary from broad to narrow. The *Trace-Act* is a merely procedural act. It is hard to determine which interest the act aims to protect and which not. This means that the applicable *Trace-Act* does not restrict the scope of review in appeal.

So the review may concern procedural and material lawfulness, which includes both domestic and community law. Material lawfulness is not restricted to formal legislation; it may also concern bye-laws, policy rules and general principles of due administration. Not al these principles are codified in formal legislation. This means that the review is not restricted to written law but may also concern unwritten law.

Of course the review is restricted to lawfulness; it may not concern policy-elements. Although in practice it may be hard to discern the borderline. One of the general accepted principles of due administration is that a decision may not be arbitrary. A decision is supposed to be arbitrary when no reasonable administrative body could have taken such a decision. This test on arbitraryness offers a certain possibility to review policy elements of a decision.

7) EU environmental law.

a) The competent court, in this case the *Department of Jurisdiction of the Council of State* will nullify a decision when the EU requirements on environmental impact assessment are not met. However this case will not happen in daily practice as long as these requirements are transformed in domestic legislation. A direct applicable provision of a EU directive may be invoked in domestic appeal procedures when the applicable directive is not timely or completed transformed into national law. As soon the directive is completely transformed the court has to deal with domestic legislation. A decision related to an activity for which environmental impact assessment is prescribed, while the environmental impact assessment has not been carried out duly, will be nullified.

b) Not until recently art. 6 of the *Habitat-directive* was not transformed into Netherlands law. The Department of Jurisdiction of the Council of State however explicitly accepted the direct effect of art. 6, second section of the *Habitat-directive*. Perhaps not quite understandable it did not explicitly for the sections three and four. In case C-127/2 *National association for the protection of the Waddensea/Netherlands secretary of state for Agriculture, Nature-protection andFishery* the European Court of Justice decided that art. 6, section three does have direct effect.
When the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the Habitat-directive we have to distinguish between *conservation areas/Birds-directive areas* and *conservation areas/non Birds-directive areas* . The *conservation areas/Birds-directive areas* are mentioned in the "Inventory of Important Bird Areas in the European Community" of 1989 (IBA 1989). The 1989 report has been renewed in 1994 (IBA 1994). Final designation as a *conservation area/Birds-directive area* has taken place in the Netherlands following a national report on "Important bird areas in the Netherlands 1993-1997" of 2000. Areas which are mentioned in the IBA-reports of 1989 and 1994 and not yet have been transmitted to the Commission do get the same protection according to case law of the Department of Jurisdiction of the Council of State as area which are transmitted. Although after a designation of areas in 2000 we don't have areas in the Netherlands which are mentioned in the IBA reports and not yet transmitted to the Commission.
Both *Birds-directive areas* and *non Birds-directive areas* which are designated as protected nature areas according the national *Act on nature protection* are protected according national law.
Conservation areas/non Birds-directive areas are mentioned on three national lists of 1996, 1998 and 2003. The Commission has accepted these lists in 2003. Areas that are on the list do get the same protection as areas which are transmitted to and accepted by the commission, but not

have been designated by national authorities. After accepting the three lists we expect no more *non Birds-directive areas* in the Netherlands to be transmitted to the Commission.
According to European Court of Justice December 7th, 2000 (C-374/98) projects that effect a *Birds-directive area*- which is not in time protected according to national law should meet the strict test of article 4 of the *Birds-directive*. I am not sure whether this Court-verdict is strictly followed in my country. As far as I can see in all cases these projects meet the test of article 6 *Habitat-directive*.
When the project adversely affects a natural habitat which is eligible for designation but has not been transmitted to the Commission and one plaintiff in appeal would ask for a direct application of art. 6, section three, the competent court will apply the scheme of art. 6, section three. This means that the court first inquires whether the project in itself or in combination with other projects can have significant consequences for the natural habitat. If this is the case the court checks whether a due consideration of the consequences for the habitat has been made taking into account the maintenance-purposes of the habitat. The project may only be approved by the competent authorities when is assured that the natural characteristics of the habitat will not be affected. In a number of cases until now a due consideration has not been made, or when it has been made a no-effect on natural characteristics can not be assured. Under such circumstances relevant decisions about the project will be nullified. So the mere fact that the habitat has not yet been transmitted to the Commission is not relevant as long as the habitat qualifies for transmitting to and accepting by the Commission.

c). From the foregoing follows that it makes no difference whether the project has been transmitted to the Commission and placed on the list or only transmitted. As soon as the area qualifies for protection it gets protection according to national case law.

d). As I mentioned before a project that affects a birds sanctuary in the sense of the *EU-Birds-directive*, that is not timely protected according to national law, should meet the test of article 4 *Birds-directive*. Although until now no cases are available in which this test has been applied.

e). The EU "*Ambient Air Directive*" has been transmitted into national law in the Netherlands in a very strict way. Governmental Decrees of 2001 and 2005 prescribe that by using any public competence that can affect air quality, the quality standards of the directive should have been met. This applies both to environmental competences and physical planning competences of both the national and the decentralized governmental bodies. Until now a number of decisions on projects that may exceed the limit values have been nullified. Among these are decisions about the extension of motorways, about destination plans for housing and offices

building, about the enlargement of a railway and busstation, but also about an environmental license for a cheese and wooden shoes farm that attracts a number of visitors. In all these cases no investigation at all to the effects on air quality standards of the projects has been made. That offered ample reason to nullify the decisions because of improper preparation. In recent cases in which such investigation has been made and the effects were minimal, decisions are accepted by the Department of Jurisdiction. Especially the standard for the 24 hours equivalent of PM10 causes a lot of trouble in the Netherlands. In the major part of the country this standard is already exceeded; according to national law this would imply that no decision on any project whatever could legally been taken.

8). Consequences of procedural and substantive deficiencies of the planning decision:

a). According to Netherlands law a nullification of a planning decision by an administrative court because of procedural or substantive deficiencies makes this decision completely void. We don't know any distinction between completely or partially void. From the description above follows that there are a number of substantive or procedural deficiencies that can make a decision completely void. This means that the competent administrative body has to take a new decision, sometimes right from the beginning, f.i. when there is any deficiency in the environmental impact assessment report.
The *General Act on Administrative Law*offers only one possibility to pass small procedural deficiencies. When it turns out that nobody is harmed in its interests a court may pass a small procedural deficiency. In Netherlands case law one can find regularly applications of this possibility.

b). I do not understand the meaning of this question. Cassation in administrative matters is unknown in the Netherlands. Nullifying a decision by an administrative court makes the decision void. In most administrative cases we know appeal in two instances, but in an number of cases in the field of environmental and physical planning law there is appeal in only one instance, directly to the Department of Jurisdiction of the Council of State.

c). As I mentioned under a) we know in the Netherlands only a possibility to pass small procedural deficiencies.

d). Suppose the appeals of the plaintiffs were well founded, the decision would be nullified and the competent administrative body had to start again.

9) Remedy of deficiencies

Administrative courts do review decisions *ex tunc*. This means that there are no possibilities to remedy deficiencies during the judicial process. In all cases courts are asking the competent body for a reaction on the grounds of appeal. In these reactions often better grounds or motives and additional information for the decision is given. Although courts are reviewing *ex tunc* this information is taking into consideration by the courts.

But a completely new argumentation or new reports to remedy substantial or procedural deficiencies will not be accepted by Netherlands administrative courts.