Conclusions

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CONCLUSIONS

1. Quality and Speed of Decision-Making – Some Introductory Remarks

For many EU and non-EU countries, speeding up administrative decision-making has been a prominent topic over the last decade. In Germany, mainly due to the needs of the reunification, this was already topical at the beginning of the 1990s. This book takes a closer look into the developments in some selected EU countries (Germany, France, UK, Sweden, Italy, and the Netherlands). It is striking that we could not identify a more fundamental discussion about the relationship between speeding up decision-making and the quality of decision-making in any of these countries. Or, otherwise put, the proposals (from politicians and governments) for speeding up decision-making do not really reflect the general discussions about quality of decision-making (in administrative science). As a result, it seems desirable to provide a few general remarks on what is needed for quality decision-making and on how quality and speed relate to each other before comparing any developments in these countries.

1.1. A Definition of Quality?

There is no common ground identifying a set of criteria for the quality of administrative decision-making. Whilst many scholars focus quality on the 'right' or legally correct outcome of decisions,[1] others concentrate on the shift from a governmental authority to an efficient service unit, comparable to a commercial private enterprise.[2] Focussing on the latter, quality management systems like ISO 9000 provide lists of criteria. However, these perceptions mainly concern the effective execution of decisions already taken and not the decision-making process itself. In other words, it concerns the operationalization of what was decided and not the way of determining what the administrative authorities should do. Besides legally correct decisions and efficient services, the democratic legitimacy of

1 Thomas 2015.
2 Schütz 2002.

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administrative decision-making is a third element of quality of administrative decisions. Accountability, transparency and participation of those affected are the key features to be dealt with concerning this third element.[3]

The question of what constitutes quality of administrative decision-making and how it could be measured is also addressed in some of the contributions. Dubos points out that speed is relatively easy to measure, but that quality is not. Caranta suggests that a main element of quality of decision-making is effectiveness. After a certain policy aim has been identified and priorities between different aims have been made, the quality of decision-making could mainly be measured by determining the efficiency of the policy delivery. Within which time and with which costs have the policy aims been realized? This approach mainly focuses on output legitimacy ('government for the people'). As seen above, this is an important element of quality of decision-making, but not the only one. Even if one focuses mainly or only on effectiveness and output legitimacy, several difficulties have to be addressed. As Caranta points out, sometimes it is not easily measurable whether and to what extent the policy aims have been realized. That may be easy with regard to infrastructural works for example, but is more difficult in other areas. Besides that, Caranta concludes that at least legal science in Italy still mainly concentrates on input legitimacy. If citizens are sufficiently involved in decision-making and policy choices and applicable procedural rules are followed, the outcome is legitimate ('government by the people'). Reforms concerning decision-making processes have not explicitly reflected on these two sides of quality of decision-making.

1.2. Quality and Speed – Friends or Enemies?

As already seen above, the speed of decision-making may be regarded as one of the elements of the quality of decision-making. In some countries, efficient decision-making without unnecessary delay is even (an aspect of) a fundamental right. Article 41 of the Charter of Fundamental Rights of the European Union (CFR) also requires the administration to make decisions in due time. As the German contribution demonstrates, undue delay can cause governmental liability. With regard to court procedures, Article 6 ECHR and Article 47 CFR provide similar rights.

Looking at output legitimacy and efficiency, the time needed to come to a decision which can be brought into practice is an important (and relatively easy to measure) criterion for its quality. This means that speeding up decision-making can enhance the quality of decision-making processes. However, as nearly all the authors point out, there is a second, different side to the same coin. Speeding up decision-making can pressurize input legitimacy. If people do not have enough time to take part in the various stages of decision-making, or if they are not involved at all, input legitimacy is reduced or is no longer sufficiently guaranteed. Furthermore, (too) much pressure on the speed of decision-making may lead to poorly balanced or even unlawful decisions. Especially in complex cases, taking into account all

[3] Walter, Gärditz & Pünder 2013; with regard to American agencies see: Bull 2014, p. 611 *et seq.*

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interests and weighing them properly takes time. On the other hand, as Dubos points out, freedom of access to documents and participative democracy also take time. There can be a strong tension between the need for speed, input legitimacy and the quality of the content of a decision. Quality and speed are thus friends and enemies at the same time, or, as Dubos describes it, there is an ambiguous relationship between the two.

Looking at the developments in the different countries researched, one can identify two interesting phenomena.

First, the discussion in all these countries is mainly focussed on speeding up decision-making. Whether the quality of decision-making could or should be improved or whether quicker decisions would mean better decisions and better decision-making was not paid much attention. In another way it can be said that the incentive to propose measures for quicker decision-making seems to have been mainly an economical one. Decisions should be taken faster because that makes investments easier. This is true, for example, for Germany. However, after about 2011, the direction of the discussion in Germany changed. Due to massive public resistance against a few big infrastructural projects, mainly the so-called 'Stuttgart 21' project, the discussion and reforms aimed at improving the legal instruments that enable participation of citizens and making it more effective and efficient - not to speed up decisions, but to improve the quality of decision-making and of the decisions themselves.

Second, in nearly all of the countries, measures to speed up decision-making processes mainly concentrate on increasing effectiveness by reducing participation rights: output legitimacy is enhanced whilst input legitimacy may be reduced. The Dutch reforms may be taken as an example. Whilst the report of the *Elverding*-Commission had identified a whole range of factors which are responsible for the long lasting processes of decisions on infrastructural works and whilst, within this whole range, public participation and judicial review were only of minor importance, the means to speed up decision-making focussed to the largest extent on exactly these public participation and judicial protection elements. Other factors, like budgetary issues and weak-minded and inconsistent authorities were hardly addressed. Similar trends can be observed in Germany. Empirical findings show that the time needed for public participation is rather limited, especially when compared with the time needed for the participation of other administrative authorities. Nevertheless, as Roller points out, all German initiatives to deregulate and to speed up decision-making were based on the assumption that the long duration of procedures would hinder investment decisions and that cutting out public participation would solve this problem. Empirical evidence does not support such an assumption. Gipperth also points out that factors other than the time needed for decisions by authorities and courts, namely the poor quality of the applications, substantially influence the total length of the permitting process.

In some countries reforms seem not only to have been driven by the wish to really shorten decision-making periods, but to some extent more by the need for the government to demonstrate that it takes some kind of action to speed up decision-making. An example of this kind of symbolic legislation is the Dutch provision (Art. 1.4 Crisis and Recovery Act) which forbids decentralized administrative bodies, like

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municipalities, from instituting proceedings at an administrative court against decisions of higher administrative bodies. When this provision was proposed, legal scholars indicated that it was more likely to prolong procedures than to shorten them. Administrative bodies which cannot start proceedings at the administrative court may do so at the civil court. These procedures probably take longer than a procedure at the administrative court. Similar examples can be found in Germany where §71b *et seq*. of the German Administrative Procedure Act set up several kinds of requirements which for most practitioners and authorities were more or less self-evident, such as to conclude the procedure in an 'appropriate time', to provide advice to the applicant or to send the relevant application documents delivered by the applicant simultaneously to the other administrative bodies involved in the decision. In the meantime, most of these provisions have been repealed.

If the discussion about speed of decision-making had been embedded in a more thorough reflection on (enhancing of) the quality of decision-making, the outcome would probably have been somewhat different and governments would perhaps have prioritized measures which serve both the output and the input legitimacy. Recently, the German discussion about participation rights, mainly triggered by the 'Stuttgart 21' project, have developed in this direction.[4] To a lesser degree, one can also identify some elements of this in the deliberations on the drafts of the Dutch Environmental Act (Omgevingswet). In these discussions, it is not the amount of public participation and input that is discussed, but its effectiveness. Does participation come at the right time within the decision-making process and does it have a positive effect on what follows? The main recipe put forward to enhance the quality (and speed) of decision-making seems to be at a very early stage and broad participation with a reduction of participation rights in the later stages.

Little can be said about the effects of reforms aimed at speeding up decision-making on the quality of the decisions taken. There is no or only very little research on that. Sometimes, as the deregulation of the permit requirements for windmills in Sweden shows, reforms intended to speed up decision-making in fact have the opposite effect and have made procedures last even longer. One reason for the poor information about effectiveness of reforms surely is that the quality, other than the duration of the decision-making process, is difficult to measure. Some scholars, especially in Germany, argue that the cumulative effect of all measures to deregulate and to speed up has had or must have had a negative effect on the quality of the decisions.[5] Speeding up decision-making, especially by cutting down time limits, may not only have an effect on the quality of the decision-making and the decisions concerned, but also on the service of the authority as a whole. Short decision-making terms may require an authority to give priority to decision-making processes whilst other tasks like compliance control may be ranked lower.

4 Schuster 2013, p. 337 *et seq*.; Groß 2011, p. 510 *et seq*.

5 Cf. in this book, the chapter by G. Roller, quoting Erbguth 2009, p. 921 *et seq*.

2. National Acceleration Trends, International Acceleration Pressures and Democratic Limitations

2.1. The Need for Speed: Not a New Issue?

The contributors to this book have answered in various ways the question of whether the need to increase speed, and above all, efficiency, in administrative decision-making is a recent or long-standing issue, or a generally discussed topic or one which is uniquely linked to times of crisis and the need to relaunch economic growth.

Caranta indicates, for example, that a number of very diverse reforms have been undertaken in Italy over the past 25 years to speed up the decision-making process, ranging

> 'from organisational measures – such as single contact points, collegiate decision making processes, and terms for taking decisions, to measures aimed at simplification through provisions variously reducing not just the red tape but the competencies and powers of public authorities, and of lately the use of IT instruments […] and the dissemination of best practices'.

Roller also states that measures have been taken to accelerate decision-making procedures in Germany since the beginning of the 1990s. He identifies the rationale underlying these reforms in the need, on the one hand, to rapidly improve the infrastructure of the new German federal states after reunification, and, on the other hand, to reduce overly bureaucratic procedures, seen as a hurdle to economic growth.

In the Netherlands, the need for speedier decision-making is a more recent concern and it is linked to the economic crisis. A specific Act of Parliament (the Crisis and Recovery Act) was developed with the rationale of speeding up decision-making for certain projects, mainly facilitating developers to commence large infrastructure projects (quicker). Administrative courts also made a U-turn. In just a few years, in case of grounded claims, the courts' attitude changed from delivering judgments mainly stating what the administration did wrong (with renewed administrative decision-making as a result) into an attitude which concentrates on achieving final dispute-settlement by stating what is, or at least how to come to a lawful and proper administrative decision within a restricted time-period. The Swedish contribution also only discusses rather recent developments concerning the need to speed up environmental permitting procedures, indicating that the concern for a speedier decision-making process belongs to the newer reform agenda items.

While in Italy, the Netherlands and Germany speed seems to have been at the top of the reform agenda (although with mixed outcomes), Dubos indicates quite clearly that speed has not traditionally been an aim in itself for the French administration. However, because of the development of the Welfare State, it has become increasingly important for citizens to receive administrative services without any undue delay and this is why Dubos' qualifies speed as a 'latent requirement'.

While therefore the section above concluded that efficiency and quality are difficult concepts to define and to measure, this section goes to show that these definitions and evaluations are made even more complicated by the entrenchment of these concepts in the diverse legal cultures and economic backgrounds of the different legal systems. What might be a great result for increased efficiency for the Italian public administration may already have been in existence in Sweden for decades: as Caranta notes, it was not before 1990 that Italy got to enact a basic principle such as the duty of public bodies to bring administrative procedures to an outcome with an explicit decision. Until that point, Italian administration just tended to drag administrative procedures on until the point where ultimately no decision was taken. Similarly to this, Dubos points out that until the 1970s one could have had the impression that the administration worked in favour of the state or even of itself rather than in favour of the citizens. This has dramatically changed over the last decades. In this sense, even a clear statement such as 'the time limit for bringing a claim were halved', may have very different meanings in the different legal systems in light of the very diverse traditions and starting points.

2.2. *The Role of International and European Law: Importantly Unequal and Unequally Important*

The question of the influence of European and international law on the debate concerning the tensions and the balance between speed and quality has been discussed at different levels of depth and intensity by the contributors to this book.

The Aarhus Convention has played a minimal role in Italy, and, apart from strengthening participatory rights, was not a trigger in the debate on quality and speed in administrative action in France.[6]

Other legal systems report very different experiences. Roller emphatically calls European law (and especially the Aarhus Convention as part of the EU legal system) a 'safety net' for participation and access to court rights in the German legal system. Interestingly, according to Roller and the evidence he provides, increased participation and possibilities for access to court increase the quality of decision-making, as claims launched by NGOs tend to be relatively successful. One could, however, see the other side of the coin in that broader chances for NGOs to access courts may also end up in a slower achievement of legal certainty. In the Netherlands too, the Aarhus Convention seems to function as a 'safety net'. However, unlike Germany, this international treaty did not lead to the consequence that participation and access to courts had to be widened, but worked as a sort of last barrier which must not be passed in the attempts made by the Dutch Crisis and Recovery Act of speeding up decision-making by reducing participatory rights and limiting access to justice. We can therefore see an assimilation of both legal orders due to the influence of the Aarhus Convention.

The Aarhus Convention also plays a prominent role in Jenkins' contribution, without, however, delivering the positive news which the German contribution

[6] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999).

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brings to the fore. In particular, a critical point is identified in the UK system of the pre-application consultation by the developer: this system is used in the case of nationally significant infrastructure and essentially entails that the consultation of relevant (governmental as well as non-governmental) stakeholders is 'front-loaded' to a moment before the environmental statement for the purposes of the EIA Directive[7] is finalized. This system seems to be at odds with the Aarhus Convention's requirement to afford the public concerned an 'early and effective' opportunity to participate in environmental decision-making processes. Of course, 'front-loading' implements early participation. Whether it implements effective participation may be questioned, given that the public receives in this way a narrow category of only limited information on the outline of a project and is perhaps not able to substantially influence the actual decision of the authorities. While 'front-loading' is suitable to ensure an 'early' opportunity to participate in the decision-making process, the UK contribution shows some doubts as to whether the 'effectiveness' requirement is equally met if there are no further participation possibilities apart from the 'front-loaded' one. At the same time, the Aarhus Convention and European law did bring about positive changes in the UK legal systems with regard to the costs of judicial proceedings in environmental matters. This issue, which has been contentious in the UK for a long time, has been tackled by the UK legislator, following explicit condemnations by the Aarhus Compliance Committee and the CJEU.

Interestingly, only two contributions mention the ECHR. The Dutch contribution questions whether the so-called 'administrative loop' complies with the requirements imposed by Article 6 ECHR, while the German contribution points to the fact that Germany has repeatedly been condemned by the ECtHR for excessively lengthy court procedures. This conspicuous absence in the other contributions may be explained by the different importance (including from a cultural point of view) attached to the ECHR in the legal systems covered in this book.

What can be concluded from this section is that the debate and the legal regime on speed and quality in administrative decision-making have been influenced by European and international law at various intensities. As such this is not surprising: where national provisions were already in compliance at the outset with the requirements mandated by the European and domestic level, it is rather self-evident that not much debate has arisen concerning their existence, scope of application and obligations. At the same time it is to be noted that even where instances of non-compliance have been identified, they seem to be related to different issues, and even more importantly, to have led to different outcomes. While in the German legal systems the instances of non-compliance have been brought to the attention of the CJEU and have been subsequently repaired at the national level, in the UK the violation of the Aarhus Convention and European law (in as far as the requirement of 'early and effective participation') still seems to be in place.

7 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

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2.3. *What Does the Demos Have to Do With It?*

In the debate on quality and speed in administrative decision-making, all the legal systems covered in this comparative analysis need to comply not only with international and European requirements, but also with national overarching constitutional requirements such as the respect for democracy and the separation of powers. Indeed, several contributors stress how striking a balance between different conflicting values in this thorny debate entails, at the same time, attempting to strike a balance between different constitutional values.

Dubos, for example, emphasizes that transparency in administrative affairs, a well-known prong of democracy, stands somewhat in contrast with efficiency. Evidently, the more the administration needs to show and justify, the slower it will reach its decisions. The French example of the duty to state reasons for unfavourable individual decisions stands as a good example of this tension. The open question remains as to how much a legal system may or should sacrifice transparency to achieve speedier decisions. Similar considerations resonate with regard to transparency 'twin brother', participation: while European law and the Aarhus Convention have strengthened individuals' participatory positions in France, it cannot be denied that more participation entails a decrease in speed in the decision-making process. Jenkins' contribution highlights an opposite tendency: in the UK the traditional system of the public enquiry, a forum where local interests can be represented and defended in environmental decision-making, has been seen by many governments in a negative light because of the costs and delays involved. The newly introduced system of public examination is subject to several limitations (such as strict time limits and the adoption of an inquisitorial approach) aimed precisely at balancing participation with efficiency.

Efficiency, on the other hand, can also be seen as a constitutional value itself. Roller, for example, notes that under German law, the competent authority is obliged to execute the procedure efficiently. This is firstly because the administration generally has to perform its activities in the most effective way and, secondly, in cases where fundamental rights of citizens are involved, the right to receive a response from the authority in due time is part of these fundamental rights. He further specifies that undue delays in the decision-making process may even entail governmental liability. Also with regard to court procedures, some *Länder* constitutions have explicitly laid down a right to an efficient court procedure. Efficiency, however, needs to be balanced with a thorough and qualitatively satisfactory examination of the factual situation at stake: in the case of complex infrastructures, this is not an easy task. To a certain extent the current Dutch regime resembles the German regime. First, undue delay in the decision-making process can lead to financial consequences for the administration. Second, a quite recently introduced provision 'obliges' administrative courts to try to finalize disputes as soon as possible.

Compliance with the rule of law is another conflicting value when it comes to achieving a higher level of efficiency in administrative decision-making: the Italian example of 'emergency legislation' provides an interesting example of how far a legal system may go in derogating to the ordinary legal regime for speedier

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decision-making. The Italian legal system has faced various types of 'emergency' situations by acting outside the applicable rules, including EU environmental and public procurement requirements. The case study illustrated by Caranta shows that the desire for increased speed can legitimately lead, in emergency situations, to the establishment of special legal regimes, but cannot trump respect for EU law provisions.

Finally, if by *demos* one understands the 'public' and the 'public interest', the concerns expressed in the Dutch contribution cannot be overlooked: curtailing access to court for environmental NGOs entails, in essence, curtailing the protection of the environment, something which belongs to nobody and everybody at the same time.

3. Acceleration Initiatives Concerning the Administrative Decision-Making Process

3.1. Measures Taken to Speed Up Decision-Making

Looking at the different national contributions, often the same kind of measure is taken to speed up decision-making. However, as a result of different historical (political) frameworks of administrative law and practice, a different focus can be identified.

One Stop Shop

There is a group of measures trying to harmonize, coordinate and simplify different decision-making procedures which apply to a certain activity. Whilst in former times applicants had to consult several different authorities, now there often is only a 'one stop shop'. The need and burden to procedurally coordinate different permits or aspects of permission no longer therefore lies on the applicants, but on the government. The application of the 'one stop shop' principle is a widely known development, which is mentioned in the UK, Dutch, German, French and Italian contributions. However, in some countries, like Sweden, this is hardly applied. In Italy it was introduced quite early on. It is said to reduce complexity and increase transparency and accessibility. Moreover, it helps to speed up the decision-making process. As long as it is only a procedural instrument, as is the case in Italy, one may conclude that it serves both speed and quality. A variety is the *conferenze di servizi*, a system which tries to bring together all the authorities involved in a certain decision-making process. The German *Planfeststellungsverfahren* and the licensing procedure under the Federal Emission Control Act use similar means. This ensures, to a certain extent, that different decisions on one activity are not only procedurally harmonized, but also coordinated content-wise. Although applied in Italy very often during the last decades, Caranta reports that this instrument still does not always work smoothly.

Integration of Decision-Making Procedures

A more far-reaching step is to actually integrate different decision-making procedures. That often requires a shift of decision-making power. If the 'one stop shop' is combined with a shift and concentration of powers to one single authority, things may become different. This seems, at least to a certain extent, to be the case in the UK and Germany and is also planned in the Netherlands. This may lead to a certain devaluation of interests and policy fields which originally were administered by a separate, specialized administrative body. If the competence of these specialized bodies to decide is transferred to a single, general administrative body, certain 'weak' aspects like nature conservation or environmental protection, or local interests may be set aside more easily. There are some fears that this may lead to less quality in decision-making in the countries which do not stop at procedural integration, but have shifted competences or are planning to do so. As mentioned in the German, Dutch and UK contributions, decisions which are taken as a result of integrated permitting procedures sometimes have, to a greater or lesser extent, what the Germans call concentration effect (*Konzentrationswirkung*). The applicant can be sure that all public law requirements are met and that no other consent is needed.

A somewhat different approach seems to have been taken in France. Creating separate, specialized agencies, which operate aside from the hierarchically structured ministries, was a mean to increase the quality and speed of decision-making.

Fictive Decisions and Lex Silentio Positivo

Another instrument, used in more than one of the researched countries, is the fictive permission. If the authorities do not take any decision in time and do not react on a request, the so-called *lex silentio positivo* is applied and the request is deemed to be decided positively. To a certain extent, European law urges the Member States to introduce this instrument, mainly in the area covered by the Services Directive.[8] However, some contributions point out that the *lex silentio positivo* is not used when third parties may suffer disadvantages from such a decision. Other countries (Italy, France and the Netherlands) seem to apply the *lex silentio positivo* even if the fictive positive decision can be detrimental for third parties. The concrete provisions and legal arrangements seem to differ. In France, third parties that cannot know that a fictive decision has been taken, are not bound to any time period if they want to object to such a decision. In France and in the Netherlands, the administrative authority loses the competence to decide after a fictive decision has come into force. In Italy, the opposite is the case. In Italy, this instrument seems to be the most important and a very widely applied means to speed up decision-making. Linked to this discussion, it should be noted that periods granted to authorities to take a decision seem to vary widely. In France, until 2000, four months was the most usual time limit. Reducing this limit to two months was perceived to be a means of speeding up decisions. In other countries, shorter periods such as six weeks, are

[8] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

(recently in the UK) common and in even short terms of four or (sometimes in Germany) two (+ four) weeks are known.

Penalty Payments

Some countries, like the Netherlands and France, have introduced penalty payments for administrative authorities which do not meet their deadlines. However, it is not (yet) known whether this instrument has been effective and has reduced undue delays.

Emergency Clauses

A last instrument, which was already discussed in paragraph 2.3, but has also to be mentioned here, concerns the possibility to set aside legal obligations in case of urgency. In France, this instrument is known at least in theory, in Italy it is also applied in practice very regularly. If urgency demands it, certain Italian administrative authorities may deviate from almost all procedural and material rules to manage a 'crisis' or 'state of emergency'. Caranta recognizes that this instrument has a widespread area of application throughout all levels of Italian administrative bodies. Administrative authorities even use these powers to deviate from EU law requirements. This may speed up decision-making. However, it will not often contribute to their quality.

All in all, this overview of measures to speed up administrative decision-making is significant. Some of the very diverse instruments can also improve quality (besides the aspect of speed), like one stop shop-structures, which may improve coordination of different decisions. Others, like penalty payments, are purely meant to speed up decision-making. Their effect on quality is, in most cases, unknown.

3.2. *Shortening Decision-Making Time Limits*

Although, 'the real potential of speeding up administrative decision-making processes lies much more in sound administrative management'[9] (as the German contribution states), legal provisions which provide for strict time limits may to be expected to be one of the most favoured attempts to achieve the goal of quicker administrative decision-making. If the time involved in the decision-making process is felt to be (far) too long, one of the *prima facie* measures to shorten the duration of this decision-making is to reduce the amount of time the administration has to issue an administrative decision.[10] In France for instance, the current regime (which dates from April 2000) has halved the time given to act from four to two months. In this (limited) context, French administrative law made use of the instrument of shorter time-limits to force the administrative authorities to act with the aim of less time consuming administrative decision-making. In the Netherlands, time limits for

9 Cf. in this book, the chapter by G. Roller.

10 This is probably a measure for the legislator to take. Also note that sometimes fixed time-limits are not to be found in legislation as they are prescribed by administrative courts, as for instance in France.

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certain steps in the decision-making process have been reduced for certain kind of projects.

Quite often decision-making requires certain steps or conditions to be complied with before the decision can be issued, for example the competent authority has to ask for advice from an advisory board or another administrative authority. As a species of the genus of fixed time limits to take an administrative decision, time limits therefore exist for the required contributions of other authorities or advisory bodies. Some of the legal systems covered in this comparative analysis have indeed enacted measures aimed at reducing the period allocated to advisory boards (such as Italy and the Netherlands). The shortening of such time limits brings about greater speed (as was the case in Germany and Italy). On the other hand, to impose ambitious time limits seems to illustrate the tension between speed and quality, since a priority shift of the administration to meet short time limits could bring about effects to the detriment of other tasks of the administration - such as surveillance and compliance control. This, for instance, happened in Germany.

In case the legislature sets shortened time limits, this sometimes proved to be of only limited relevance, as is illustrated in French law: in cases where the legislature has set time limits for the government to pass implementing decrees for laws, the Council of State considered such deadlines as guidelines instead of strictly obligatory provisions.

The contributions contained in this edited collection show that sometimes legislative measures taken with regard to time limits often concentrate on the *consequences* of exceeding the prescribed time limits to take decisions rather than on the introduction of legal provisions which prescribed shorter time-limits.

One further means to foster quicker administrative decision-making is the concept of the implicit decision of refusal. Fixed time-limits for the conclusion of the decision-making process can be set as a default period in case another act does not provide for a maximum duration of the administrative proceedings (such as in the Netherlands and Italy). If the administration exceeds the fixed time-limit, this can not only result in an implicit refusal which can be challenged in court or, in the opposite case, in a fictive positive decision (as discussed in para. 3.1), but also in an action for damages (for example in Italy).

3.3. Participation Rights

As already mentioned, several of the countries looked at (Germany, the Netherlands, England) tried to save time in the decision-making process by cutting down participation rights, mainly in the area of environmental and physical planning law. Especially in the Netherlands and Germany, but also in the UK, a whole range of measures have been taken over the years which make it more difficult for neighbours or environmental NGOs to participate in the decision-making process and to object against (draft) decisions on infrastructural and other projects. Whilst most of these measures concern objection and judicial review procedures, which will be discussed below, restrictions have also been applied in the decision-making phase. This development mainly concerns shorter time periods

to take part in the debate before a (draft) decision is taken, often combined with preclusion clauses which hinder claimants from bringing forward grounds in the phase of objection and judicial review which have not been brought forward in the early phase of decision-making. With regard to cases falling within the scope of application of the Aarhus Convention, the CJEU has declared that such preclusion clauses are in violation of EU law.[11] Besides that, some scholars in Germany argue that the combination of these measures in the decision-making and judicial review phases has as a consequence that the requirements of effective judicial protection are no longer met.

However, in the same countries it is discussed whether the 'traditional' way of public participation is an effective one and whether it should, at least in some cases, be replaced by new forms of broad participation at a very early stage. In the UK, this is called 'front-loading'. In Germany and the Netherlands traditionally the public is consulted only on a draft decision of the authorities. Nowadays, or until recently, public consultation took place after the authorities had almost entirely made up their minds. A broad participation at an early phase, when solutions for a certain problem are not yet clear and the authorities are more open-minded, could be more effective and could broaden the democratic legitimacy and so foster the quality of such decisions.[12] The hope is that the extra time needed for such an early phase consultation could (at least) be saved in later phases because those who were sufficiently consulted earlier are less likely to object once decisions are adopted. The new German laws which should foster the enlargement of the grid (*Energiewende*) introduced a very early public participation moment in the general planning of the energy network on the Federal level (*Bundesnetzplan*). The law does not provide for access to court as far as this plan is concerned. Access to court is only granted against the final planning permit, and in this procedure the previous general plan can be examined implicitly by the judge. It is too early to decide what effects this approach has on speed and on quality of decision-making. Also in the UK and the Netherlands, front-loading is combined with restrictions in the phase of judicial review. It seems that the UK is currently the most experienced with this kind of 'front loading' procedure. Jenkins concludes in her contribution that 'front-loading' participation has been significant in increasing efficiency and is 'theoretically' important to create an effective process of participation. However, as already mentioned in paragraph 2.2, the 'quite unsatisfactory' experience when trying to find new locations for nuclear power plants demonstrates some of the difficulties which can be faced when such kind of 'massive' early stage public participation procedures are applied, and which seem to limit the effectiveness of this approach.[13]

3.4. *Deregulation and a Greater Role for Private Parties as a Way to Reduce Administrative Burdens*

Another set of acceleration initiatives is aimed at deregulating administrative decision-making and increasing the role of private parties to unburden the

11 Case C-137/14 *European Commission* v. *Federal Republic of Germany*, EU:C:2015:683.
12 Groβ 2011, p. 510 *et seq*.
13 Cf. in this book, the chapter by V. Jenkins.

administration. The contributions included in this book seem to indicate that many legal systems have opted for this solution. One could legitimately wonder where to strike the balance between deregulation and increasing the role of private parties, and the need to preserve the quality of administrative decisions.

For example Caranta indicates that Italy has long had a system whereby sworn declarations may take the place of certificates as evidence of status and personal conditions (such as place of birth, personal income) in order to alleviate the workload of the administration. Furthermore, specifically in planning matters, the main act in administrative decision-making provides that when an activity is conditioned upon the granting of a licence, authorization, permission, or any other decision by the public administration, the interested party may submit a sworn declaration that he meets all legal requirements for the activity. Different standstill periods were provided in previous versions of the provision, but they were progressively reduced and finally eliminated.

Similarly to the Italian situation, the German legal system has experienced a wave of deregulation initiatives. Roller indicates that in recent years the legislator released industrial plants from the licensing obligation under the applicable legislation in a number of cases. A similar observation is shared by Gipperth with regard to the Swedish situation, where since 2009 many types of installations no longer need a permit or even to send a notification to the local authority.

Another element of deregulation noted by Roller in the German context is the increasing importance of the notification compared to the permit. In cases of simple modification of the installation that does not have a negative impact on the environment, the operator of the plant is not obliged to run through a permitting procedure: he simply has to notify the authority which enables the operator to implement the modification after one month from the notification, even if the authority has not replied.

Deregulation is also an important topic in the Netherlands. In fact, the Dutch contribution calls it a 'constant hype over the last three decades'. As in other legal systems, in many areas of law, substantial requirements have been diminished or abandoned, and private parties and 'the market' have been given more room for manoeuvre. Furthermore, in the area of environmental and planning law, future legislation aims at a further substantial deregulation of procedural and substantial requirements. Amongst others, the requirement to have an environmental permit will become redundant for many thousands of installations.

Also in the UK a greater role for private parties, especially the developer, can be identified in the system of pre-application consultation, whereby it is for the developer (rather the public authorities) to organize the consultation process on a certain project and to incorporate its outcome into the environmental statement to be submitted to the authorities.

3.5. Special Regime of Major Infrastructure: in Search of More Speed

Several of the contributions contained in this book highlight how, for largely similar efficiency reasons, major infrastructures have been made subject to a special regime.

In Italy, the applicable legislation provides a specific procedure for major infrastructures, whose approval is given at the central level by the Council of Ministers and it takes the place of any other decision necessary for environmental protection, urban planning, or expropriation which may be required by the law to start the implementation of the project. Clearly, the rationale here is to do away with the complexity caused by different administrative procedures needing co-ordination at different governmental levels.

Similarly, in the UK, the applicable legislation created a special form of authorization for nationally significant infrastructure projects: the main feature of this system is the greater role assumed by the SS at the central level (as opposed to local authorities in the 'normal' regime) who acts upon the advice of the Major Infrastructure Environment Unit of the Planning Inspectorate. A second feature of the authorization system of major infrastructure projects is the presence of the so-called 'NPPS', which are aimed at setting the framework for future planning initiatives by identifying the amount, size or type of development that is appropriate nationally - and even suitable locations. To ensure they have a democratic mandate the NPPS must be formally passed by Parliament and, despite what the term 'statement' might indicate, the NPPS are, once enacted, binding upon the competent authorities unless it is shown that the adverse impacts of the proposed development on the local community would outweigh its benefits.

The need to speed up the approval of major infrastructure has been at the forefront of the discussion about quicker and better decision-making also in the Netherlands. The 'Crisis and Recovery Act' discussed in the Dutch contribution in fact contained several provisions which deviated from the general system of decision-making and legal protection against administrative decisions which were aimed at achieving faster decision-making procedures for major infrastructure. The means to realize this goal were very diverse: shortening time limits, tightening the EIA procedure, reducing judicial review to only one instance, limiting the grounds of review and many more. Interestingly, to quite an extent, changes which were first and foremost introduced in the law concerning the approval of major infrastructure have later been transferred to the General Administrative Law Act and hence now apply in all areas of administrative law.

4. Legal Protection and Court-Related Measures

Next to changes in the context of the decision-making process and administrative managerial and organizational adaptations, courts and court proceedings are involved in the issue of quality and speed of administrative decision-making. Amongst other things, this is because, if challenged, often only after all court procedures have been exhausted does the administrative decision become final. Courts (and their judgments) can contribute to the quality of the decisions, but they (or rather the availability of legal protection against the administrative action) can delay as well, because legal protection and court procedures usually prolong the period before a decision becomes final. Sometimes, the reorganization of the court system can (be intended to) contribute to shorter proceedings. In this context, the reforms which took place in Sweden can be mentioned. The tension between quality

and speed is not unique for administrative-decision-making process but is felt within judicial court proceedings as well. The application of specific tools of administrative judges can, however, also result in speedier final resolution of the legal dispute at stake.

The most important acceleration measures related to courts and court procedures can be subdivided into three main categories. The first category consists of measures with the intention to shorten the length of court procedures. The second category in this respect is the limitation of the right of access to court. Third, the removal of one or more levels of legal protection can be considered a factor.

4.1. Measures to Speed Up Court Procedures

Additional instruments for courts

In the Netherlands, the legislator provided the administrative courts with additional instruments, in particular new kinds of rulings. Some of these instruments can be regarded as a means to speed up court procedures since they contribute to final dispute settlement and hence final decision-making within a shorter time period, for example by avoiding the continuation or the duration of the court procedures. Dutch courts, for example, currently have an enlarged toolbox at their disposal if compared to about five years ago.

In the last two decades, administrative law has been subject to significant developments likely to influence the speed of administrative judicial procedures in France too, such as the power of the court to issue injunctions to ensure the effectiveness of annulment decisions and the finding that annulments on grounds of ultra vires 'lost ground against full remedy proceedings'.[14]

One of the tools, used in more than one country, that could contribute to stop the continuation of court procedures, is the provision according to which errors of a procedural, but sometimes also of a substantive, nature in the decision-making process no longer necessarily result in the annulment of the decision. For instance, if the decision is correct on the substance, or no other decision could have been taken and the irregularity therefore has no effect on the outcome of the procedure, and interested parties do not suffer any harm, annulment can be omitted (such as in the case of Germany, the Netherlands and Italy).[15] In some systems this instrument is more frequently used in practice (in Germany and the Netherlands) than in others (such as Italy). That is because according to Caranta, in contrast to Germany, Italian courts are reluctant to go into the merits of an administrative decision.

Another instrument for courts is to replace the annulled administrative decision by their own decision. This means that the unlawful decision is annulled, and therefore the administration does not have to issue a renewed decision to replace the annulled one, as the court will take a decision on the matter. By avoiding

14 Cf. in this book, the chapter by O. Dubos.

15 Concerning the Netherlands, such an instrument was introduced in 1994 but the scope was widened in 2013 by setting aside the limitation of applicability only in case of *procedural* irregularities. In Germany, such an instrument, which can also be found in the legislation on general administrative law decision-making and court procedure, is not part of a novel approach and a new toolbox.

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the mechanism of renewed decision-making, this 'replacing power' can be considered a sort of measure to speed up court procedures (in total) as well. In the countries where courts have such a power at their disposal, the prerequisites differ. A clear example of this far-reaching court power can be found in the Netherlands. In Germany, a court instrument similar to this one is that in infrastructure planning procedures where the plan is not in compliance with substantive law, instead of annulling the plan, the administrative court determines a supplementary measure to repair the plan. In France, it seems as if the power of administrative courts to award an injunction in case of non-discretionary powers of the administration resembles the power to replace the decision by the court's own decision (French administrative courts can adopt an enforcement measure and order this measure).

Of a different nature and in the field of stating reasons is the power given to the administrative courts to hand down a judgment with very brief reasoning (as is the case for Italy).

Time limits for court procedures

Sometimes the legislator prescribes fixed time limits for administrative courts to hand down a ruling (for example, in the Netherlands). This Dutch obligation to deliver judgment within a certain time (such as within 6 months) only applies to specific disputes, covered by a few specific Codes (such as the Crisis and Recovery Act and some planning law litigation).

In the same context, the strict possibility to challenge a planning decision by way of judicial review within six weeks in the UK and the introduction of a time limit for some actions against regulatory acts in France must be mentioned.

Also in the area of planning law and other infrastructure projects, Caranta reports that the Italian legislator created a fast track procedure by halving most of the deadlines for judicial review.

In complex infrastructure and planning law cases these short time limits can be considered problematic, which makes the tension between speed and (means to guarantee) quality manifest.

4.2. Access to Court

Since the use of court proceedings by natural and legal persons (including NGOs and interested third parties) can delay decision-making, one potential measure to speed up decision-making is to restrict their right of access to court.

Firstly, standing can be lost if a participation or objection right was not exercised. The German *materielle Präklusion* comes down to such a restriction of access to court. This limitation applied to all infrastructure planning procedures. Due to the *Commission* v. *Germany* case,[16] however, this *materielle Präklusion* will no longer be applied in any environmental law case. This development also illustrates the tension between 'efficiency' of proceedings and access to court and it emphasizes the significance of European and international law.

[16] Case C-137/14, *European Commission* v. *Federal Republic of Germany*, EU:C:2015:683.

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To a certain extent the German *materielle Präklusion* resembles the general approach in the Dutch GALA (Art. 6:13 GALA): an objection or appeal is inadmissible if the interested party did not participate or challenge the act in earlier administrative or court stages, without good reason. In light of the *Commission* v. *Germany* case,[17] it is questionable whether Article 6:13 GALA may be applied in environmental cases in the future, at least with regard to cases falling within the scope of Article 9(2) Aarhus Convention.[18]

Another option to limit access to court is the so-called 'connectivity principle' (*Schutznorm*). In both Germany and (recently) the Netherlands the connectivity principle restricts legal protection as it requires that the infringed rule aims at the protection of the interest of the person who relies on it. Whereas in the Netherlands this requirement does not bar the admissibility (but the possibility to get the decision annulled), in Germany it is a hurdle to access to court. In environmental matters EU law and the Aarhus Convention, however, forced Germany not to unduly restrict avenues to legal protection for associations. Hence, in Germany the *Schutznorm* requirement for NGOs has been abolished in cases in which Article 9(2) of the Aarhus Convention is applicable. As already mentioned in paragraph 2.2, there are indications that the latter development affects the quality of the decisions in a positive way. Moreover, the German situation illustrates the tension and possible conflicts between restriction of access to court and procedural safeguards and the boundaries of access-related restrictions set in EU law and international law.

A bar for third parties to challenge the administrative action is also possible by alternative means to a *Schutznorm* mechanism, for instance in a specific area of law. In the UK planning system, for example, sometimes, there is no right of access to court for third parties affected by a decision.

Access to court can also be restricted due to the (risk of) high *costs* of bringing an action. In the UK this is or at least was quite a barrier, and was considered unlawful by the Aarhus Committee.[19] The CJEU similarly (as regards Art. 10a of EIA Directive)[20] found that the use of so-called protective cost orders failed to meet the requirements of the Directive, as Jenkins points out.[21] Such European judgements can – and did in the UK - result in legislative action and led to measures restricting claimants' liability to pay the defendants' costs.[22]

17 *Ibid*.

18 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999).

19 'Aarhus Convention Implementation Report', DEFRA, 2008.

20 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

21 Case C-427/07, *Commission of the European Communities* v. *Ireland*, EU:C:2009:457; Case C-530/11, *European Commission* v. *United Kingdom of Great Britain and Northern Ireland*, EU:C:2014:67.

22 (Overly) high costs for procedures and hence for getting legal court protection are not unique to the UK. In Italy the costs for commencing judicial review proceedings have risen considerably, according to Caranta, p. 42.

Finally, with regard to restriction of access to court, it must be mentioned that in France, particularly in the sphere of urban planning law, access to court has been seriously restricted, especially since 2013, to bar frivolous litigation that slows down decision-making processes. This has happened firstly by means of a more restrictive approach towards *locus standi* and secondly by letting applicants bear the risk of paying damages for the undertaker.

4.3. Elimination of the Compulsory Objection Procedure or of a Court Instance

The accumulation of available court instances (two or three) as well as preliminary objection proceedings is sometimes a delaying factor. Therefore, some legislators decided to eliminate one or even two courts levels, or the objection procedure.

It is not really a novel development in French administrative law, but in France the legal protection for major infrastructural projects is limited to a single instance (the Council of State). This restriction has been introduced in Germany too, as well as abandonment of the objection proceedings in some cases. In Germany, limiting judicial protection to only one instance was even regarded as one of the most important measures to accelerate the decision-making process. For certain infrastructure and large industrial plant projects, in 1985 the German legislator eliminated the administrative court of first instance. The (overly) long court proceedings hindered planning security and came in conflict with the large investments involved, according to the legislator. Not only the court of first instance but even the administrative court of appeal was removed in the law on the acceleration of traffic infrastructure. Nowadays, the *Bundesverwaltungsgericht* is the one and only court competent in a large number of railway, road and waterway cases, which are explicitly listed in the relevant laws.

On the one hand, the availability of only one court contributes to a shorter duration of court procedures; on the other hand the subsequent question arises whether it may disturb the balance between quality, including judicial safeguards, and speed.

5. Administrative Decision-Making and Court Procedure: Substantially Quicker, but Qualitatively Better?

Speeding up decision-making processes is an issue in all of the countries covered in this book. Although speed and quality of decision-making may be regarded as two sides of the same coin and hence cannot be considered separately, this is exactly what happened in many examples discussed in the contributions to this book. *Accelerating* decision-making and review by courts often was approached as a single issue as part of the fight against the economic crisis. Although, as especially the development in Swedish environmental law shows, not all reforms have led to the expected gains in tempo, and some of the measures taken emerged to be window dressing rather than having substantial effects, it is also true that in all the countries examined the speeding up of decision-making was at least partly successful.

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We can be less sure whether the *quality* of decision-making was raised or, on the contrary, even declined. It is much more difficult to measure the quality of decision-making than its duration. Even a good and comprehensive definition of quality of decision-making is missing. A more comprehensive conceptualization of quality of decision-making seems, therefore, to be needed. For a long time, the quality of decision-making has not been the focus of administrative law reforms. In some countries touched upon this is still true today. Attempts to assess or estimate effects of reforms on quality usually are missing. There is a lot to gain in this respect, within the national context and of course also in a comparative context. However, times may have changed. In some countries like the UK, the Netherlands and Germany, the quality of administrative decision-making has become an important issue. Interestingly, in all three countries, this led to try-outs with concepts of very early and broad public participation ('front-loading'). Although the first results of the use of this concept in the UK seem not to have been very promising, a thorough evaluation of the application in the UK and other countries is needed. The results should be compared and discussed not only within a national, but also in a comparative context.

Although measures to speed up decision-making cannot be understood well without their different national legal context and history and the very different economical context and administrative cultures, the overview in this book may provide food for thought for those seeking inspiration for measures aimed to speed up decision-making. Some instruments and concepts applied in one or more countries may inspire discussions in other countries. We hope all the more so that this book will contribute to a discussion about the need to further enhance and better assess the quality of decision-making. Speeding up decision-making has received a lot of attention in the past decades and should not be forgotten in the future, but, we submit, the focus of the discussion should move somewhat forward. Speed should become one element of a more general discussion about enhancing the quality of decision-making. The recent discussions in Germany and the UK raise our hope that quality is moved into the spotlight of the discussion in the future after decades of speed driven reforms. The comparative exchange of ideas makes a lot of sense in that respect.

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