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CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on Transport - Intermodal Questions and Networks
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on streamlining measures for advancing the realisation of the trans-European transport network - Comments by the Netherlands

Delegations will find attached written comments by the Netherlands on the above-mentioned proposal.

DRAFT OF A DIRECTIVE
ON THE BASIS OF THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND
THE COUNCIL

**ON STREAMLINING MEASURES FOR ADVANCING THE REALISATION OF THE TRANS-
EUROPEAN TRANSPORT NETWORK**

(8) MARCH 2019

Contribution of the Netherlands: *Our legal department has put its initial thoughts on paper about the form a directive might take. This may help us to bring our ideas about the choice between a regulation and a directive into sharper focus. It should be noted that our legal department's findings may prove useful even if it is ultimately decided to proceed with a regulation. The Netherlands is still studying the effect of this draft and reserves the right to alter its position.*

Explanatory notes

1. Regulation (EU) No 1315/2013 is referred to below as 2013R.
2. The Proposal for a Regulation No 2018/0318 is referred to below as 2018pR.
3. The comments in italics are the views of the Netherlands as a Member State (below: Member State NL).

Article 1 (subject matter and scope)

This Directive shall apply to the preparation and implementation of projects of common interest on the core network of the trans-European transport network.

NL comments:

- *It is important for the Member States to have a clear idea of the projects to which the 2018pR applies.*
- *Clearly, however, the 2018pR does not apply to the comprehensive network.*
- *Whether there are any projects on the core network other than projects of common interest is unclear.*
- *Article 3 of the 2013R defines a project of common interest as 'any project carried out pursuant to the requirements and in compliance with the provisions of this Regulation'.*
- *Article 1, paragraph 2 states that the Regulation identifies projects of common interest. Article 7 specifies some characteristics of these projects. No projects are listed or identified.*
- *For the sake of clarity, the list of definitions has been supplemented and elaborated in Article 2.*

Article 2 (definitions)

1. For the purposes of this Directive, the following definitions shall apply:

- (a) 'core network' means the network shown on the maps contained in Annex 1;

- (b) 'projects of common interest' means the projects specified in Annex 2;
- (c) 'cross-border projects' means the projects specified in Annex 2;
- (d) 'development consent' means the decision of the competent authority or authorities of a Member State, not including courts or tribunals, which entitles the developer to proceed with the project;
- (e) 'development consent procedure' means the procedure that has to be followed to obtain consent;
- (f) 'coordination procedure' means the procedure under the direction of the competent authority that has to be followed to obtain the other decisions necessary for the implementation of a project of common interest;
- (g) 'competent authority' means the authority which adopts the decision to grant consent and under whose direction the other decisions necessary for the implementation of a project of common interest are coordinated;
- (h) 'project' means the construction or alteration of a project;
- (i) 'alteration of a project' means an alteration to an existing project with a view to improving the trans-European transport network;
- (j) 'European Coordinator' means the coordinator referred to in Article 45 of Regulation (EU) No 1315/2013.

2. In so far as terms have not been defined in paragraph 1, Article 2 of Regulation (EU) No 1315/2013 shall apply.

NL comments:

- *It is important for the Member States to have a clear idea of the projects to which the 2018pR applies. This is why the main terms, such as those used in Article 1, have been defined in Article 2.*
- *The 2018pR uses the term 'comprehensive decision'. As an environmental impact assessment must be drawn up for all projects, it is proposed to use the term used in Directive 2011/92/EU, namely 'development consent', rather than 'comprehensive decision'.*
- *The definition of 'comprehensive decision' is not entirely clear. Is the comprehensive decision comparable to development consent or does it go further and include all other decisions needed to complete the requisite infrastructure?*
- *Integration of the development consent procedure presupposes the existence of two or more competent authorities. In such a case, integration is logical. However, various Member States have already passed legislation conferring the power to decide on projects of common interest on a particular authority, often a minister. These laws provide that there is a single competent authority which grants development consent. In such cases, the obligation to integrate administrative procedures is not relevant.*
- *Many of the projects of common interest have already been completed. But the 2018pR will nonetheless still have to apply to significant alterations to existing infrastructure. It is necessary, however, to ensure that the procedure is not also applied to alterations of only minor importance (such as installation of an electric charging station, enlargement of a car park and construction of a slip road to serve a residential district). Clearly, a project of common interest need not only be the construction of part of the core network. It may also*

involve a major alteration intended to improve the core network (such as motorway widening and rail track doubling).

Article 3 (priority status)

1. The Member States shall adopt the necessary measures to ensure that there is a single competent authority to grant development consent, for example by integrating consent procedures.
2. The Member States shall adopt the necessary measures to ensure that projects of common interest are granted priority status and treated as such.
3. The Member States shall adopt the necessary measures to ensure that the procedures are completed as rapidly as legally possible and that the requisite resources are allocated for this purpose.

NL comments:

- *The 2018pR imposes an obligation to integrate various procedures.*
- *Integration assumes the existence of two or more competent authorities.*
- *The existence of different procedures is a thing of the past in some Member States, where the power to grant consent (or, to use the terminology of the 2018pR, take comprehensive decisions) has been conferred by law in accordance with the Constitution on a single competent authority, usually a minister.*
- *An obligation to integrate procedures is not relevant where this power has been conferred on a single authority.*

Article 4 (integration and coordination)

1. To expedite decision-making, the Member States shall adopt the necessary measures to integrate the development consent procedures for projects of common interest.
2. If two or more competent authorities are involved in granting development consent, the Member States shall adopt the necessary measures to establish a coordination procedure.
3. The coordination procedure shall include a statutory power for the competent authority to substitute for other authorities which are initially authorised to act but prove to be uncooperative or fail to respond in a timely manner.

NL comments:

- *Article 4 of the 2018pR relates to the integration of development consent procedures for reaching a comprehensive decision.*
- *As noted above, it is unclear whether a comprehensive decision relates solely to development consent or to all decisions necessary to implement a project of common interest.*
- *This draft of a directive distinguishes between these two categories and treats the comprehensive decision as consent. The applicable development consent procedure should be integrated, in so far as this has not already occurred.*
- *It is therefore a good idea to arrange as well for a coordination procedure under the direction of the same competent authority so that the other decisions can also be expedited.*
- *Coordination involves the retention of powers, whereas integration involves the transfer of powers.*
- *The transfer of powers can be a sensitive subject among Member States.*

- *Nor is it actually necessary to transfer powers, provided that the sole competent authority is able to manage the procedure and has the power to substitute for other authorities.*
- *This power is seldom used, but its existence serves as a stimulus to subnational authorities to cooperate in the manner requested. A statutory provision of this kind is important to enable the coordination function to be performed.*
- *The reference to the EIA directive is strange, particularly since the SEA directive too is often applicable and the fact that they are applicable is apparent from their own provisions. The reference to Article 2, paragraph 3 is not necessary. This is a reference to too specific a directive to avoid problems of concurrence.*

Article 5 (competent authority)

1. The Member States shall adopt the necessary measures to enable the competent authority to obtain the powers it needs to ensure that projects of common interest can be implemented as rapidly as possible.
2. The Member States shall adopt the necessary measures to ensure that in the case of cross-border projects the cooperation and coordination are arranged as effectively and efficiently as possible.

NL comments:

- *The draft paragraph 1 above covers the substantive provisions of paragraphs 1-3 of the 2018pR. Paragraph 4 of the 2018pR can be omitted as it is self-evident.*
- *The draft paragraph 2 above corresponds with paragraph 5 of the 2018pR.*
- *The measures can also include financial measures, for example the inclusion of funds in a budget.*

Article 6 (development consent procedure)

1. The development consent procedure shall consist of the pre-application phase, the phase of the assessment of the application, the phase of the decision-making by the single competent authority and, in so far as applicable, the phase of the decision-making necessary for implementation of a project of common interest.
2. The pre-application phase shall, in principle, not exceed two years.
3. The competent authority shall arrange for wide notification of the project. The notification shall contain at least a detailed description of the project, the identity of the persons and authorities that will be involved in the preparation of the project, and a detailed schedule of the procedure.

NL comments:

- *In the past 20 years, Member State NL has gained much experience of the setting of statutory time limits for major infrastructure projects.*
- *In practice, time limits are often exceeded for reasons that are in themselves valid and understandable.*
- *Projects are so varied that it is not possible to set time limits for the procedures.*
- *Where time limits are exceeded, this is not automatically treated by the courts as default.*
- *This is why the practice now adopted in the Netherlands is to include a time schedule in the initial decision (part of the pre-application phase), as well as an obligation to report to Parliament every six months about the progress of major infrastructure projects. The report provides accountability and, where necessary, it is accompanied by an amended schedule.*

- *Member State NL is convinced that there is little point in standardising time limits since the projects differ so greatly in terms of their nature and effects and the involvement of the community and other stakeholders.*
- *In the opinion of Member State NL, a progress report to the Commission would be a good way of closely monitoring the progress of the decision-making on projects of common interest.*

Article 7 (cross-border projects)

1. For cross-border projects, the competent authorities shall align their timetables and agree on a joint schedule.
2. The European Coordinator shall be empowered to closely follow the development consent procedure for cross-border projects and to facilitate contacts between the competent authorities concerned.
3. Without prejudice to the obligation to comply with the time limits under this Directive, if the time limit for the adoption of a decision granting consent for cross-border projects is not observed, the competent authority shall immediately inform the European Coordinator concerned about the measures taken or to be taken to conclude the development consent procedure with the least possible delay. The European Coordinator may request the competent authority to regularly report on progress achieved.

No NL comments, taken from the 2018pR.

Article 8 (public procurement)

1. Public procurement in cross-border projects shall be conducted in accordance with the Treaty and Directives 2014/25/EU and/or 2014/24/EU.
2. If the procurement procedures are conducted by a joint entity set up by the participating Member States, that entity shall apply the national provisions of one of those Member States and, by way of derogation from these Directives, those provisions shall be the provisions determined in accordance with point (a) of Article 57(5) of Directive 2014/25/EU of the European Parliament and of the Council or point (a) of Article 39(5) of Directive 2014/24/EU of the European Parliament and of the Council, as applicable, unless an agreement between the participating Member States provides otherwise. Such an agreement shall in any case provide for the application of a single national legislation if the procurement procedures are conducted by a joint entity.

No NL comments, taken from the 2018pR.

Article 9 (technical assistance)

At the request of a project promoter or Member State, in accordance with the relevant Union funding programmes and without prejudice to the Multi-Annual Financial Framework, the Union shall make available technical assistance for the implementation of this Regulation and the facilitation of the implementation of projects of common interest.

No NL comments, taken from the 2018pR.

Article 10 (transitional provisions)

This Directive shall not apply to the decision-making on projects of common interest whose pre-application phase, as referred to in Article 6, started before the date of entry into force of this Directive.

No NL comments, taken from the 2018pR.

Article 11 (provision of information)

1. The Member States shall arrange for the requisite laws, regulations and administrative provisions to enter into force in order to comply with this Directive before ##. They shall notify the Commission of this without delay.
2. The Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.
3. The Member States shall send the Commission every two years a progress report on the projects of common interest.

NL comments:

- *An implementation period of, say, three years could be chosen, or it could be decided to complete the draft paragraph 1.*
- *Paragraph 2 is a fairly standard provision in directives.*
- *Paragraph 3: see comments on Article 6.*

Article 12 (entry into force)

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 13 (addressed to the Member States)

This Directive is addressed to the Member States.