

Osmosis or an impossible match?

A normative perspective on value-exchanges in collaborative public-private enterprises

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1. Introduction

This paper is about public values and the legal possibilities of a *binding determination* of (the scope of) these values in the course of Public Private Partnership (PPP).

We consider this an important issue as, firstly, the standard legal opinion on binding determination of public values is, that this is a matter over which government holds a *legal monopoly*,² and which should be driven by public values only, *legally indifferent* to private interests.³ Secondly, however, we find that especially in 'wicked policy problems', as concerning innovative and sustainable solutions, there is a need for a *broader basis* for rational (knowledge-based) and legitimate (interest-based) decision-making; a broader basis that requires participation by *private* (non-governmental) parties, both from the profit and not-for-profit sectors.

Can and if so, how may these two elements be combined or, on a somewhat pessimistic tone, be reconciled? Can PPP, as a specific type of *network-cooperation*, offer a platform for such a combination? Is this a viable option to the extent that participation is geared towards making externally binding decisions (as legal acts) and that private party's involvement exceeds the mere opportunity of offering advice and opinion – as we take the premise that a 'broader basis' for decision making must involve private party *voice* and (hence) private party *commitment*? In such an ambitious arrangement the public and private values involved and brought together in PPP will meet, but will they merely be confronted with and weighed against each other, or will they intertwine or even merge to an osmosis in which private values and public values reciprocally permeate each other's definition and scope – and what consequences will or should this have for the relevant *institutional settings*?

These settings are the rules relevant to making and performing *public legal acts*; acts that precede the stage of providing a public service or public works, which may, in itself be a matter of implementation by PPP. Most PPP-studies actually focus on the stage of implementing public legal acts and in these cases often PPP amounts to little more than applying the market mechanism (such as through a tender procedure). In this paper the PPP-option is researched in relation to actual decision making, weighing public values in network-cooperation that is underpinned by private interests, and with private parties having a say.

The paper starts by showing relevance of PPP in the face of wicked policy problems, especially with regard to rationality and legitimacy, and continues by setting out how hierarchical government decision-making is to incorporate network-cooperation, firstly in general and, subsequently, in operational terms. These operational terms offer a 'simple

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² following, amongst other basic values, the 'legality principle'.

³ Both negatively, the promotion of private interests may not be the objective of determination (remember the French revolution; comp. the 'Speciality principle'/prohibition of *Détournement de pouvoir*!), nor positively, existing private relations should remain equal, unless this equality should as a matter of public interest be changed (as in changes in taxation or in welfare-support)(comp. the 'principle of *égalité devant les charges publiques*').

model' for PPP and present the main dilemmas concerning the process of public and private value-exchange.

2. Policy problems and criteria for 'good' policy

Changes and developments influence the quality of life and the human environment. Citizens, bureaucrats and governors all assess such situations continually. These situations and changes can be expressed in objective measurable facts. For example, the length of traffic jams during the rush hour in a specific region, perhaps compared with the national average. Situations and changes, however, may also be described in perceptions and appreciations. This can be illustrated by the sense of loneliness felt by older people. Clearly situations and changes can be evaluated as desirable or undesirable. To arrive at such an assessment, a norm, standard or an ideal is needed, against which to measure or indeed to formulate an ambition. Ideals may be derived from opinions on how society should function. The confrontation between an existing undesirable state of social affairs and a notion of how these affairs ought to be or function, creates a social issue or problem (see: Van de Graaf & Hoppe 1996, p. 46). The traffic jams around big cities, the integration of immigrants and the pollution of the environment are examples of social problems. With such issues, it is possible to pressure the government to place them on the policy agenda and act. When an issue reaches the policy agenda, the social problem becomes a policy problem.

Policy problems are unrealised needs, values or opportunities for improvement (Dunn 2008, p. 72). The natures of such problems can differ. Van de Graaf & Hoppe (1996, p. 48) typify a policy problem using a two-axis scheme: (i) societal agreement on problem formulation and (ii) certainty of scientific knowledge. The first reflects the degree to which there is a consensus about the desirable norm or standard by which a situation is assessed. There can be a strong consensus, or very little. The second axis reflects the fact that there may be clear facts or only contested views about a certain situation. This systematic approach leads to four types of policy problems: (i) *technical* problems, (ii) *untamed technical* problems, (iii) *political* problems and (iv) *wicked* problems. Table 1 gives an overview of this classification.

Table 1: Types of policy problems

Societal agreement on problem formulation	Certainty of scientific knowledge	
	Large	Little
	Large	Technical problems
Little	Political problems	Wicked problems

(See: Van de Graaf & Hoppe 1996, p. 48)

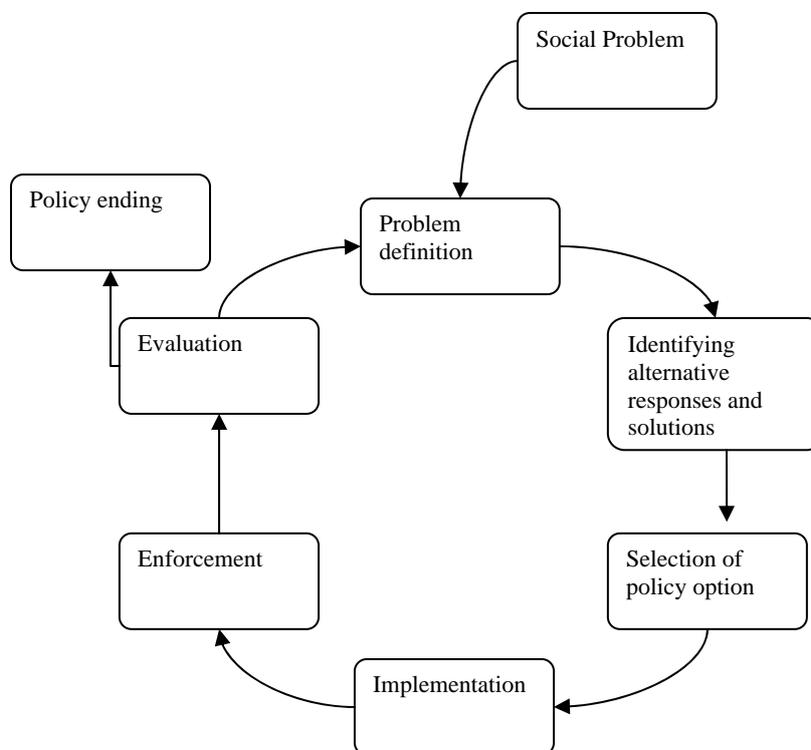
Governmental organisations formulate policy for all such issues. According to Keynes (1971) and also Parsons (1995, p. 170), knowledge and ideas are the main sources of governmental legitimacy. Lindblom (1993) mentions similar starting points, but speaks about these as undependable values. In his view government has to be able to formulate policy that is intelligent and democratic. Similarly, Hoogerwerf & Herweijer (2003), as well as Van de Graaf & Hoppe (1996), point at rationality and legitimacy as two major standards for 'good' policy. Firstly, a policy has to foresee a solution for a societal problem. This means that it has to pass the criteria of rationality. A policy can be seen as more or less rational or reasonable depending on the reason or argumentation on which it was grounded, since this can provide proof against fundamental criticism (Hoogerwerf

& Herweijer 2003, pp. 90-91). Secondly, a policy is a politically sanctioned plan since a policy programme is subject to political scrutiny. If it survives political debate, it fulfils the legitimacy standard (See: Van de Graaf & Hoppe 1996, p. 46). On this basis, the plan acquires legal status, and there is a possibility that the policy programme will be accepted by society.

3. The policy network approach as a solution for rationality and legitimacy issues in policy formulation

Over some time, government was regarded the central actor in dealing with and solving societal problems. It has had the exclusive task of formulating rational and legitimate policy interventions and subsequently implementing them. This concept of monopolist task allocation leads to an image of 'the government' as 'the central steering agency' (Snellen 1987, p. 18) for societal changes and developments. To fulfil this task, government provides instructions to formulate policy programmes in the course of which binding governmental decisions are taken. The bundled activities by which a policy is shaped is generally referred to as the *policy process*. In policy studies, traditionally the policy process is described in different stages, modelled in a reproductive cycle (see Parsons 1995; Hoppe 1996; Hoogerwerf & Herweijer 2003; Van Hoesel et al. 2005). This is illustrated in Figure 1. According to this model, the policy process is a rational political-administrative activity. In the process, interaction takes place through hierarchical relationships, bureaucratic institutional frameworks and defined checks and balances. The government is seen as the actor with a monopoly on defining the policy problem, formulating policy alternatives, selecting a policy option, implementing it and finally evaluating it (see Sabatier 1999; Van Hoesel et al. 2005).

Figure 1: The policy cycle (based on Parsons, 1995 and Hoogerwerf & Herweijer, 2003)



The tradition of viewing a proposed policy as a product that is the outcome of rational decision-making is not without criticism in policy studies. According to Sabatier (2007, p. 7), the policy-stage model fails to allow adequate room to a multi-actor and multi-level

approach in policy formulation. This point may be linked to the growing awareness that there is a lack of steering capacity in the government when it comes to policy-making and implementation (see: Heldeweg 2006; Kickert, Klijn & Koppenjan 1997; Rhodes 1997; Hufen & Ringeling 1990).

As a consequence of its failure to develop sufficient steering capacity, government is no longer able to adequately deal with societal problems in their original institutional context. In implementing public policy, government has, in recent decades, increasingly relied on the input of experience and knowledge from private actors. This has led to a new balance in tasks, responsibilities and authority among public actors, citizens and business enterprises. This repositioning of actors has led to new equilibriums in interdependencies between public and private actors.⁴ This has had a profound influence on the manner in which the government coordinates societal life. Thompson (1991, p. 1) makes a distinction between three coordination mechanisms in societal life: (i) market, (ii) hierarchy and (iii) network. In the policy field, there is a visible shift from the traditional hierarchical approach towards a network approach (see Van Heffen, Kickert & Thomassen, 2000). The policy network features autonomous interdependent actors trying to cope with policy problems through horizontal relationships. Crucial element in these horizontal relationships is actor cooperation on an interactive and reciprocal basis (see Heldeweg 2006, p. 217).

The cooperation between the government and actors from the policy field has the objective of realising a *surplus*; an added value that is not (as easily, if at all) obtainable in traditional coordination between government and the market. For society, this surplus appears as increased rationality and legitimacy of the policy programme. Not all policy problems are in need of such a network approach. The typology of Van de Graaf & Hoppe, however, points at the policy problems which are particularly in need of either increased (certainty on) information and scientific knowledge, or of societal agreement on problem formulation. In the first case, rationality of the policy intervention is increased and, in the second, legitimacy of the policy programme is enhanced. One or the other, or both, is possible for either: (i) untamed technical problems, (ii) political problems and (iii) wicked problems. That is, the character of policy problems can be changed by increasing the rationality and/or legitimacy. This is illustrated in Table 2.

⁴ In policy studies this is called the 'governance' issue. This concept has become increasingly fashionable and covers many trends and developments; thus becoming a 'container concept' (see also, Hajer, Tatenhove & Laurent 2004). Rhodes (1997, p. 47), distinguishes six types of governance including 'corporate governance' and 'good governance'. In the context of this paper, governance is understood as a manner of steering or coordination that contrasts with the traditional hierarchical approach of central governments (Heldeweg 2006, p. 217). This corresponds to Rhodes' conceptualisation, since he relates the concept to *self-organising, inter-organisational networks* (1997, p. 53). Similarly, Van Heffen, Kickert and Thomassen (2000, pp. 3-5) distinguish two types of governance: multilevel governance and multi-actor governance; "*Generally speaking, the ongoing vertical differentiation of public administration systems into supranational, national, regional, local and quasi-autonomous government organisations furthers the interaction of institutions.*" Van Kersbergen (1999, p. 85) states that, "*... the interrelations between the [European] states, the supranational organisation, and the various levels of governance have by now acquired such a scale and have become so complex that a new and unique system of multi-level governance has emerged. (see also Marks, 1997; Thomassen & Schmitt, 1999). Furthermore, public policy has become a matter of cooperation between governmental organisations and societal actors. Hence public management and policy-making are presently best characterised in terms of processes in which a large number of actors are involved, both from the public arena and from civil society (multi-actor governance) (Van Heffen, Kickert & Thomassen 2000, p 3-5).*" This paper is about multi-actor governance.

Table 2: Changing problem types through the network approach (based on the typology of Van de Graaf & Hoppe, 1996)

Societal agreement on problem formulation	Certainty on scientific knowledge	
	much	little
	much	Technical problems 
little	Political problems 	Wicked problems 

4. PPP as an organisational form to resolve societal problems - the big picture

A Public Private Partnership (PPP) is an example of a new organisational form for government to use to deal with societal problems. In this new form, policy formulation and decision-making take place in a multi-actor context. In public policy formulation, over recent years, a whole range of meanings has been labelled 'PPP'. The common denominator of that range is the fact of a public actor cooperating with a private actor to realise a common purpose. At the same time, social science literature also presents a wide diversity in the definitions used to conceptualise PPP-cooperation in literature. In this paper we opt for the definition by Bregman, especially because he proposes a clear distinction between a PPP and more traditional forms of cooperation. The definition used by Bregman (2005, p. 5) is:

A PPP is a legally structured type of cooperation between the government and private actors concerning spatial planning and the exploitation, other than traditional modes of allocating task between government and private actors.

The core of the approach by Bregman is that the forms of cooperation between government and private actors can be divided into two main groups, as two types of cooperation relationships. To understand how a PPP differs from what Bregman calls 'a traditional allocation of tasks', one must look at the important differences across the spectrum of three types of coordination mechanisms: the government hierarchy, the market and the network. In this paper, the position taken is, that a PPP is a form of network steering in which public and private actors jointly take decisions, on the basis of the following characteristics:

- a. there is a constitutive agreement on the input of various types of resources and the risk allocation;
- b. the extent of substantive resource inputs and subsequent benefits have deliberately not been defined;
- c. coordination and decision making take place in a network;
- d. the outcome of the network is legally binding for the involved actors and possibly for third parties.

The characteristics above clearly place a PPP outside the government hierarchy and market steering coordination mechanisms. This is the case because steering is not left to the government alone and similarly not only to the market. It is not about an organisational form that aims to deal with public values through one-sided decision-making, but equally it is also not about a form in which private actors are responsible for dealing with public values in a context of supply and demand. The core of a PPP is that public and private actors cooperate to deal with a public value, and in a way where the

responsibilities and control are not assigned to a single party. The characteristics listed above are explained below in more detail.

Characteristic a – the constitutive agreement

In a PPP there is a constitutive agreement between the parties that cooperate. This contractual arrangement is the basis for the cooperation. The document takes account of the way in which the policy issue is to be implemented. Furthermore, it provides a legal structure for the network-organisation. This means that it binds the parties in the policy network. Each of the contract partners has some of the available resources that are necessary for the realisation of the outcome. A combination of a strategy and resources is essential for an optimal policy outcome. To achieve this, the actors that are involved in the network need to agree on the type of resources that they will contribute.

Klijn & Koppenjan (2004, pp. 144-145) distinguish five types of resources: (i) financial resources, (ii) production resources, (iii) competencies, (iv) knowledge and (v) legitimacy. Beyond (type of) resources each will provide, parties to the network need to also agree on the allocation of risks. There are inevitably risks and uncertainties when parties deal with policy problems. These risks are connected to events and circumstances, and the implications need to be allocated to the sphere of risks one (or more) of the involved parties have to bear (Bregman 2005, p. 174). Before cooperation starts, there must be an inventory of these risks, and there must be agreement on the mechanisms for risk control and their specific allocation. These points should be embedded in the constitutive PPP contract.

Characteristic b – resource inputs

In the formulation and implementation of a policy solution, the resource contributions from the policy network partners are complementary and hence cumulative. Thus the general expectation is that the cooperation will generate a *surplus*. In other words, PPP-cooperation leads to a result that a more traditional role-play between the government and private parties cannot achieve. Given the nature of the policy problem preceding the establishment of a PPP, the societal surplus may be expressed in either an increased rationality or an increased legitimacy of the policy programme.

An (almost) unconditional contribution of resources, by the parties involved, is seen as the best breeding ground for this surplus; better than in the traditional setting where parties carefully calculate their contributions and benefits. Attempts at formulating unconditional contributions and motivation in contractual legal terms, however, stand the chance of (unwillingly but inescapably) leading to 'conditional' barriers. The premise for unconditional participation effort is intrinsic motivation, supported by the view that an increased contribution leads to an enhanced outcome (more positive than in a traditional approach). Hence the intended substantive result of PPP can not be completely or conclusively described *ex ante*. This calls for an incomplete contract, addressing input of main types of resources, a sharing of (surplus) benefits, a general and provisional description of the object of cooperation, and basic 'rules of the game'. Clearly, for this 'formula' to provide success, trust between parties will be the driving force of the cooperation. In essence PPP distinguishes itself from traditional organisational forms, as 'soft law' on substantive issues, as against 'hard (contractual) law' concerning specific contributions and results.

Characteristic c - coordination

The previous analyses shows that there is an interdependent relationship between actors in the realisation of a policy programme through a PPP. Drawing on their own organisational backgrounds, they arrange a contractual relationship. This agreement defines the type of resources that the actors will contribute and the allocation of risks, but it is incomplete in terms of the extent of resource contribution and the substantive specifics of the (end) result. Given the incomplete contract, trust is the fundamental basis and driving force of the cooperation. Since the more traditional coordination mechanisms (of governmental hierarchy and market steering) are based on distrust, there is a need in a PPP to develop a coordination mechanism based on trust. This is the

case in the network approach since policy networks are reasonably stable patterns of social relationships between interdependent actors that take shape around policy problems and/or policy programmes (Kickert, Klijn & Koppenjan, 1997, p. 6). These authors distinguish three important characteristics of networks (ibid., p. 31):

- a. networks exist because of interdependencies between actors;
- b. networks consist of a variety of actors each with their own goals;
- c. networks consist of relationships of a more-or-less lasting nature between actors.

Characteristic d - outcomes

Participation in a policy network is aimed at delivering an optimal policy solution to deal with a societal problem. The parties that cooperate do so for the sake and on behalf of society. It is possible that the policy programme and its outcomes have an effect on the quality of life and the environment of citizens. For this reason, a policy programme has associated legal claims and duties. This is authorised by the fact that on the basis of network cooperation, a governmental authority must take a legally binding policy decision that states these claims and duties.

5. Policy formulation in a PPP: the creation of value hybridity

In dealing with a particular societal problem, the tradition image is that of government initiating policy formulation and eventually taking a legal decision on the outcomes. Policy formulation in a PPP, however, deviates from this hierarchical path. That is because, for the optimum result, government is dependent on the inputs of resources by other parties. The identification of alternative responses/solutions and the selection of options does not take place in a bureaucratic organisation, but in the context of organisations linked in a policy network. This network can be seen as a puzzle. Like all proper puzzles, all the necessary pieces have to be put in their right place before you can see the picture: in a network, complementary resource contributions by parties and a common strategy are necessary for an optimal policy outcome. The organisations together shape a decision arena. In this arena, all parties are equal and together they try to manage a societal problem. In this context, they retain their own identity and each act on the basis of their own organisational objectives. Given the dependency of their relationship, the focus needs to be on the interaction processes between the parties. This interaction results in an agreed combination of goals, resources and time choices, and eventually in a specific policy programme outcome. In the policy network approach, the network process produces the output's content. Then this outcome is fed back into the hierarchical decision-making process. Figure 2 gives an overview of this process.

Figure 2: Policymaking in policy networks by PPP

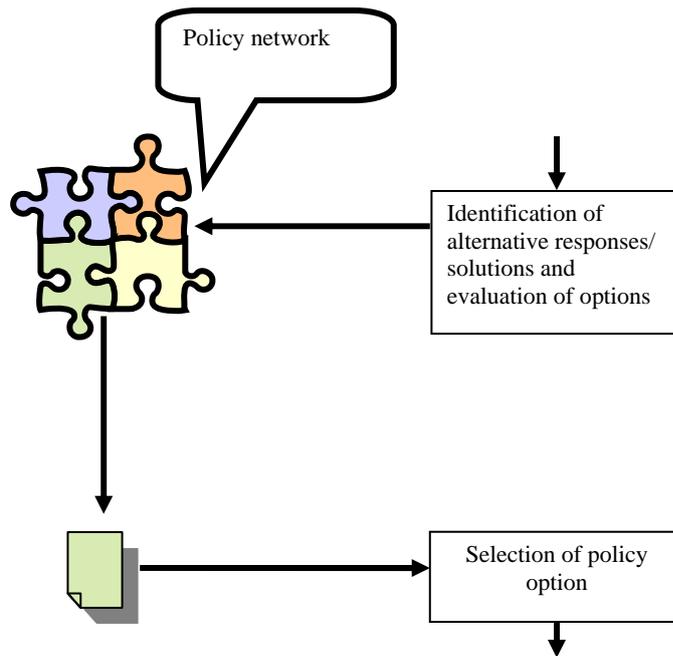


Figure 2 shows that, in the policy process for a PPP, two coordination mechanisms are combined: (i) the governmental hierarchy in which the policy task is formulated and the decision about the policy programme is taken, and (ii) the policy network that delivers the content of the policy programme. A consequence of the converging coordination mechanisms is value hybridity in the policy process. The policy programme becomes the result of interaction between public and private actors. Each of the parties contributes from its own value orientation. The only relevant value for government is the public interest, since this frames their concern with the societal problem at hand. The private actors participate primarily on the basis of their private interests, which gear their input in the PPP-cooperation.

6. The organisation of value hybridity- part 1 (preliminary remarks)

This is all nicely said – at least, we hope so – but can it be done in practise, also in terms of legal acceptance? Is it possible to indeed ‘hybridise values’ in the sense that private and public values, as pursued by either public or private participants, are moulded into a synergetic framework or operative mode, which then serves both?⁵ We will look into this question in the below by outlining a ‘simple option’, in which this synergy is considered in terms of combining valuable resources or *competences*. Secondly, we will reflect on the outcomes of that option in terms of effectiveness and legal acceptability and, if necessary, make suggestions on alternative options.

Before we outline this option, it should be understood that the measure to which both types of values or interests are served synergetically may be conceptualised differently. One way may be to require an ‘equal share’ in the benefits described in the above as the *surplus*. Yet another may be a ‘strong *Pareto-optimal*’ approach, in which none of the values loses out and at least one stands to gain,⁶ or an amendment which entails that both (or all) values should gain from the surplus (as a ‘weak Pareto-optimum’), albeit not necessarily to the same extent. While preferring to proceed on the basis of the latter

⁵ Again, also in ways that are legally acceptable.

⁶ Without pushing this economic metaphor to the level of the Kaldor-Hicks proposition in which a Pareto-optimum may also be reached through compensation of the costs or loses to the one by part of the fruits to the other.

(‘weak’, surplus-for-all) concept, we feel that it is not fruitful here to elaborate on if and how a measure for comparison may be formulated.

It should, however, be clear that the concept of synergy serving both interests, suggests that there is sufficient *constructive-overlap* between the relevant values or a sufficient ability to accommodate such an overlap, both in terms of the values themselves and in terms of the abilities of the participants to a PPP to express these overlapping values and abide by them. As shown by (amongst others) Van der Wal (2008), on an empirical basis professional decision-makers in private and public organisations/arenas show a considerable overlap in their value orientations – suggesting an ability to express and abide by values ‘from both sides of the isle’. As this also suggests a common core of values, such as efficiency, effectiveness and loyalty to the organisational objectives, the prospects at a synergy seem positive. However, without wanting to tantalise, the stance taken in this paper is that the public values paramount, or even exclusive to the initiative taken by the competent public authority, may in the course of the procedures not be *corrupted* by private interests.⁷

As to the outcome of procedures, the decision taken must comply with *public law requirements* concerning unilaterally binding legal acts. This will entail, amongst other requirements, that the outcome *must and may only* serve the general interest, setting aside that private interest may benefit, but no other than as an indifferent result of that decision – that is: indifferent in terms of their weight in the decision-making process. In other words, a synergy in values may underpin commitment and shape the PPP-arena, but both in initiative and outcome values must be considered separately and public values must be the exclusive drivers and determinants.

These remarks follow (also) from the focus on PPP as an arrangement for *decision-making*, that is a decision as a legal act with public authority, and not on implementation of a decision in terms of providing a service⁸ or constructing public works! This is why the aspect of hybridity or synergy is so important, as the PPP directly concerns joint decision making, not ‘*merely*’ implementation. Although in the course of implementation iteration between public and private parties is possible, and the public party may adjust a (provisional) decision that is already taken, in the face of difficulties or opportunities arisen as implementation proceeds, generally this interaction still rests on a traditional role-model.⁹

To clarify our focus we may *compartmentalise*, and must separate different stages of policy-making. This will show that policy-making within a PPP-network is a separated segment of the chain of policy-making which overarching principle is governmental hierarchy (see in the above). For our purposes we distinguish the following segments or steps within the policy chain:

1. Starting point of prioritising and setting the agenda for decision-making (policy priority);
2. Procedural decision by competent authority (to shift decision-making to a PPP-network);
3. PPP-network decision-making;
4. Declaratory decision, by the competent authority legally ascertaining the go-ahead;
5. Implementation of the decision taken under 4, possibly involving PPP;
6. Final results, hopefully solving the policy problem identified under nr. 1.

So, again, this paper focuses on PPP as relevant to segment or step nr. 3. However, the possibility of a second PPP-stage (see nr. 5) may have effects on earlier decisions (see below). Furthermore, it may show that the kind of wicked policy problems as discussed

⁷ In short: this is what the French revolution was all about! Separating ‘*imperium*’ from ‘*dominium*’. See also the prohibition of ‘*Détournement de pouvoir*’ (abuse or, rather, misuse of power, for personal gain or irrelevant public interests).

⁸ Other than to make legal acts (legislative or administrative; either or not as a matter of supervision, enforcement or dispute settlement).

⁹ Only in as much as private parties may explicitly influence adjustment of a given decision, in terms of having a (more than merely advisory) say in that decision, does this resemble the situation on which we focus in the paper.

here require iteration between step 3 and step 5, the essential element being that step 3 involves a weighing of interests, involving general interests or public values, whereas in step 5 issues are of an operational and technical nature. In this latter stage problems are solved by discretely choosing the best operational or technical option, considering available resources. Complications in step 5, the best operational/technical option involving a rearrangement of interests weighed or involved may require a re-evaluation or further precision in those general interest decisions in step 3, as mentioned before.

7. The organisation of value hybridity- part 2 (step by step)

First, we will address the different steps as a linear process, applying the 'simple approach' of merely seeking to combine the necessary resources or competences. We do so, as we think this will clarify the opportunities and threats to value hybridization (which will, in part, be discussed alongside and, in part, in the next paragraph).

7.1. Policy priority: setting the agenda

Our starting point lies with a perceived public challenge or problem in which a public interest crystallizes as a *policy priority*. This is the stage of agenda setting.¹⁰ Sometimes this is a simple matter of a request to take a legally prescribed decision (on the basis of one specific power to perform a single administrative act). On the other hand this priority may follow from public concern, articulated in a general plan, budget or legislative assignment, or, more incidentally, voiced by the press, by private parties in or outside the market, or from a parliamentary or (public) advisory body, or as a clear and present 'danger', as a state of affairs, such as physical disaster or economic decline. Thus this concern manifests itself as an appeal on a government believed to be most competent, to act – in which 'to act' means to take decisions which provide the necessary legal basis (in terms of rights and/or duties) for establishing or legally underpinning existing physical measures. The before body or office will henceforth be called the competent authority (or authorities, as it may turn out that a joint decision or a combination of decisions (one being useless without the other) need to be taken.

7.2. Procedural decision-making

The next step would be the *procedural decision* by the competent authority, specifying which mechanism for decision-making will be applied. This decision may follow from existing legislation but may also be a discretionary choice of the authority in case, and it is to determine (conclusively) in a general or abstract sense which type of decision needs to be taken and, subsequently, which mechanism is prescribed or chosen. Hence, this decision (also) specifies which type of policy-mechanism is applied: hierarchy, network or market – in our case we focus on the network.

The *minimum content* of the procedural decision will involve three elements – sketched in the below (7.2a-c).

7.2a - Procedural decision; first element – general objective

The *general objective* in terms of substantially solving (or addressing) the problem, translated in a substantive description of the desired outcome of the decision-making process. As it is characteristic of a wicked policy problem that this substantive description is incomplete, because rational input and legitimacy are suboptimal, the substantive description will be general, abstract, tentative and/or provisional.

The stance taken in this paper is that the procedural decision may obviate this descriptive fallacy by a procedural description which calls upon a network of (ad hoc) selected decision makers to take arrive at a decision on the basis of a prescribed decision-making process. In other words: *substantive incompleteness is overcome by procedural completeness*. Needless to say, however, that although this procedural approach obviates substantive fallacy, in itself it will remain an imperfect solution as it

¹⁰ PM Abundant literature on public agenda setting...

will not foresee all possible situations and hence leave open procedural indeterminacies and ex post undesirable outcomes. Therefore the competent authority will probably want to retain the competence to refute any outcome of the network that in its view, on the basis of a *marginal test*, can not be understood as resting upon reasonable deliberation (in which case – time permitting – the network would have to reconsider) – see step nr. 4.

7.2b - Procedural decision; second element – selection of participants

The *selection of participants* basically follows the type of decision-making procedure, in our case through PPP-networking. The premise underlying this selection is that the network takes a decision that is in principle externally binding, in the sense that, setting apart the abovementioned ‘marginal test’ to exclude unreasonable outcomes, the competent authority is committed to implementing the outcome, with binding consequences (legal and otherwise) for the ‘outside world’. Hence the selection of participants is important both in terms of who’s included (and why) and who’s excluded (and why) – although procedural arrangements may soften this divide when excluded parties are given the opportunity of presenting their views or launching a complaint. In terms of *inclusion* the main abstract criteria are rationality and legitimacy. Hence selection will have to take place in terms of suitability to remediate the lack of rationality (in terms of input of information, knowledge or expertise), and the lack of legitimacy (in terms of positive input by interested parties).¹¹

Here, in the ‘simple option’, the stance is taken that selection on the basis of these criteria should be regarded in terms of ‘*adding competence to procedure*’. Criteria for selection should rest on the desire to include necessary competences (bridging the fallacy), while at the same time avoiding an adverse or perverse use of competences (for private interests only). This means that the competent authority must:

1. make explicit which **resources or means** for decision-making present the authority with a lack of or, respectively, a need for an input concerning rationality and legitimacy. Note, that these resources or means relate to the envisaged network decision only, not to the stage of implementing this decision (once authorized by the competent authority), as this implementation may also involve PPP. Note also, that prior knowledge of the fact that implementation may also be in need of private party participation, may lead to the abovementioned adverse or perverse use.¹²
2. define the required **input** in abstract indicators for selection and make explicit which type of participant (as a class) may fit the indicator and which mechanism for selection is fitting to reach optimal input with least fear for adverse or perverse effects.

Consider *firstly*, that a **specification** of competence is needed as a basis for selection, such as: which information, knowledge or expertise is deemed necessary, which interests are involved and how should these be given a voice (such as for instance the environmental or nature conservation interest, the interest of public transport, the interest of private transport, of regional business etc.), i.e. who is best to articulate and/or negotiate these interests. Theoretically, it will be especially difficult to separate different types of rationality and legitimacy and also the necessary measure of both needed for proper decision-making in the network: which types of additional information or knowledge are needed (or ‘on what’; is entrepreneurship also a relevant resource)?; which interests are in need of a voice (only the above, or also others)?; where to draw the line in terms of remote interests (even a local ring road may influence the national economy or a transboundary

¹¹ Interest of interested parties in a positive output may also be a measure of legitimacy, but touches on the substantive results of the decision-making process and hence seems more relevant in terms of procedure than adding to selection.

¹² For instance by aiming for a decision which in implementation requires the use of specific assets that places one of the private participants in the decision-making in an advantageous position in a possible future tender.

habitat) or in terms of knowledge needed (dependent on the type of decision that needs to be taken).¹³

Consider *secondly* that for each type of competence it will be necessary to determine the (aggregated) level of representation (individual persons, organizations, networks) that may offer information or voice its knowledge, expertise or interest. Identifying the '**embodiment**' of representation (or personification) is important especially with regard to the actual selection. Ideally, the embodiment presents the perfect *proxy* to the specific competence; primarily to get the competence aboard, but also to keep incongruent interests (interests perverting the competence needed or disturbing the otherwise arranged and balanced selection of interest representation) out. *This means then that the level of representation, i.e. the type of embodiment is chosen as such that it ensures, positively, the best available support needed, and, negatively, minimizes adverse or perverse interests or motives.* Clearly embodiment may also stretch out to which combinations of competences are or aren't acceptable, as a reductionist approach (one competence one personification) need not be the only option; some environmental organisations may offer a desirable combination of interest and knowledge, as others, for instance a university research group, may represent only particular knowledge.

3. Make the **selection**. The afore second consideration (on identifying embodiment and choosing proxy) provides the basis for selection as it identifies the type of person or organization in terms of specific, yet abstract, characteristics. The step may already include identification of persons and organizations which present themselves as possible candidates – either in terms of existing contacts (in the network of the competent authority) or as the outcome of an 'open call' for participants. This step will include the determination of whether a candidates fits the description, but also (certainly as a new element), if more candidates seem eligible to a specific position (representing a certain competence, or set of competences), a mechanism for choosing between candidates will be necessary.

Deciding on who fits the ticket will primarily be a matter of checking the indicators or descriptors, which may already exclude some candidates – as they are presumed unable to deliver the desired competence or only at a 'price' that the competent authority does not want to pay – both in monetary terms and in terms of perverse interests.

To *select* amongst candidates may, firstly, be a matter of *comparing* qualities ('Who has more knowledge on what?' or 'Who represents what best?').¹⁴ Consider, for instance, two Environmental NGO's willing to voice the environmental interest with regard to a project on a new connecting highway between two major cities. They may differ in terms of their organization (e.g. a society versus a trust; terms of funding; openness to outsiders), in terms of their goals (national versus local; environment versus nature; etc.), in terms of activities (e.g. only legal procedures, scientific research, awareness campaigns) and in terms of experience (long standing versus newcomer), to name but some. What offers the best fit?

An important element in selecting is to rule out biases (undesirable/perverting interests) and avoid improper 'favouritism'.¹⁵ This latter point is especially, but not exclusively, important in relation to commercial private parties as candidates to participate (for instance on the basis of their expertise in the particular type of project that need to be decided upon). If such a candidate is a competitor on the market, his involvement in the decision-making network should not disturb market positions, i.e. should be based on the (most) fitting and most cost-effective bid (which in this example boils down to a tender on consultancy expertise). Hence in this simple option

¹³ This is also a matter for 'bounded rationality' that in all projects somewhere a line must be drawn deciding which (scientific) uncertainties we are willing to allow for.

¹⁴ Which may lead to a multi-dimensional comparison.

¹⁵ This section is presented in Italic to underline that it reflects on several underlying difficulties and dilemma's concerning selection (i.e. inclusion and exclusion).

means selecting private commercial parties a market-mechanism (e.g. the tender) may be necessary to finally select the candidate).

In selecting non-commercial participants a 'substantive judgment' is probably the most appropriate mechanism for selection, but possibly a game-theoretical test to find the ideal mix between strongly voicing the interest but at the same time being willing to negotiate seriously, is available.¹⁶ It should be clear that for an NGO to participate this would not be by virtue of the private interests of its staff, members or supporters, but its suitability to present and promote a particular public value/interest. In as far as this interest is best expressed by the consumers of a certain service (such as travellers in public transport), an organization that best represents these consumers may be selected by virtue of its communicative capability to do so.

Clearly, it will be up to the competent authority to set the relevant criteria and make the relevant selection. The choice of criteria may to some extent correlate with the choice of procedural rules (which we will address below) – such as on the issue of negotiating skills of '**representatives**'. In this simple option we will not overcomplicate. Then again, having used the term 'representatives', we are inescapably confronted with the comparison between the parliamentary-model and the network-model of decision-making. There is no definition on intrinsic or substantive criteria for selecting parliamentarians, at least none other than (the extrinsic element of) convincing (a party ballot committee and then) a sufficient number of voters. Furthermore, a parliamentarian will be involved in a broad spectrum of decisions, rather than a single or at least limited number of specific ones. In addition, in most countries a parliamentarian is, once elected, not institutionally bound by his voters or party (i.e. holds the institutional right to a free vote or conscience vote).¹⁷ This is believed to enhance the focus on the general interest which should be at heart of parliamentary decision-making and control, rather than merely bundling and confronting private social interests.

An important choice in PPP will be whether 'representatives', as they are selected on the basis of their **competence** in enhancing rationality or legitimacy, should act on a 'personal' basis, being individually competent and 'free to vote', individually competent and in voting limited thereto, or 'impersonal' as a tied-in representative speaking on behalf of the selected embodiment/proxy (as an organisation), or even interchangeable as the organisation behind the person may choose to change representatives as it sees fit (which leaves hardly any room for a free to vote option). When we look at this spectrum of (only some of the) theoretical possibilities of representation, it needs to be clarified (at least) that even in the simple option or model, the ambition is to reach beyond the scope of mere 'service or competence procurement'. In broadening the knowledge and legitimacy base of decision-making in a PPP-network perspective, government is reaching beyond mere advice by offering a **share** in decision-making power. This share is taken to be necessary as it provides an incentive to the parties concerned to actively (and responsibly) involving themselves in decision making, knowing that involvement may serve their personal, private interests. These private interests may be served in several ways, such as:

- firstly, but least provoking, by a payment for services rendered; taking part in decision-making and providing knowledge, information and communicative aid, takes time and resources and should come with a reward (**payment/compensation**);
- secondly, more provokingly, the possibility of influencing decision making may serve private interests of the parties involved (better than in not participating) as 'none or not for profit organisations' may find that the public interest they represent is voiced more efficiently and effectively than would otherwise be the case, and whereas 'for profit' organisations may find that other parties involved,

¹⁶ A 'willingness to pay' type of test, determining what sacrifices the NGO is willing to make to participate (is the interest involved sufficiently important to the NGO?) may also be a useful tool. PM

¹⁷ Other than an incidental right, on a specific issue. The Dutch phrase for this institutional right reads: 'Zonder last of ruggespraak' (Without instruction and under no obligation to consult).

- amongst which government representatives, get a better understanding of the added value the organisation can bring (**awareness/exposure**),
- *thirdly, the creation of mutual commitment reaching best outcomes networks for involves a sharing of resources, which extends to sharing in the surplus that the cooperation delivers. Parties to the cooperation should have something in the way of a common or shared intellectual property. Cooperation should work as an open source activity, which means that information and knowledge that is put in may be used by all. Certainly specific restrictions may be in place and furthermore, some information and knowledge may become public as the decision taken does require ample and accessible argumentative underpinning (**sharing in the common residual claim**).¹⁸*

*These incentives are important as government will want to ensure willingness to take part and, more specifically, willingness to provide resources (information, knowledge, support), willingness to actively interact and make necessary trade-offs (preparations, negotiations) and **commitment** to revolve the problem by delivering one or more option to a possible decision. The essential element here is that the nature of the problem involved requires an intense interaction between expertise and interests and a motivation of the parties involved to seek innovative solutions and effectively decide upon such solutions. Hence the ambition overrides the procurement image and reaches onto actual delegation of decision-making power.¹⁹ The parties are not merely actors in a play, selected to give their best in performing their part within a given script and at the hand of the director, but they are, within a broad framework, the preselected joint directors/play-writers (and actors come in once we reach the implementation stage). Hence their cooperation as a network is not a mere package of specific services, in terms of information, knowledge, expertise, articulated interest, but a group effort.*

*So, the parties selected are those that may be considered the **best proxy** of their class of existing embodiments of the expertise or legitimate interest involved, taking specific competences as primary indicators, but including willingness and commitment to cooperate (which may also be phrased as a particular competence). Consider, on this point, that legitimacy was described as reaching agreement on political choice, which overarches the mere voicing of a particular interest at stake. Likewise, rationality is not merely input of information and knowledge, but involves debate and internalisation.*

Finally, given the fact that the decision to be taken rest upon a legal power to introduce unilaterally binding acts, the final outcome will have to abide by legal rules & principles (which in part is what the governmental participants in the PPP-network represent). Some of these may already be included in the description of the objective of cooperation, but as the solution to the 'wicked problem' may vary in its scope, dimensions and effects, legal consideration will be relevant throughout the process and certainly the outcome will, if and when authorised by the relevant competent authority, have to meet the legal requirements. To ex ante ensure legally desired commitment and enhance the chances at reaching an ex post legally sound outcome, it will in all likelihood be necessary to:

- *firstly, include only those parties that have committed themselves to a code of **good governance** in terms of their own organisation and activities, and,*
- *secondly, to ensure commitment of these parties to a set of leading principles of **good network governance** whilst in the process of cooperation and thereafter (in as much as relevant).*

It is in this perspective that we may find an important example of how value hybridity may be conceptualised. Consider in this regard the Principles of proper public governance (Beginselen van deugdelijk overheidsbestuur) as proposed by the Dutch minister of the Interior. These include: 1. openness and integrity (offering information

¹⁸ In essence this third element presents a property rights angle to PPP-network cooperation.

¹⁹ Of course less far-reaching option may in practise be on the table, but this paper's quest is to explore the ultimate viable option.

and clarity and acting responsibly); 2. proper provision of services; 3. participation (concerning those within and outside the organisation); 4. purposiveness and effectiveness (setting objectives, acting accordingly); 5. legitimate and lawful; 6. self-cleaning and learning (willingness to improve performance); 7. accountable (regularly, frequently and generous; to outside stakeholders). (BZK 2008) These are mere examples of principles that could be used as a point of departure in shaping the organisational principles that should be drivers in private parties if they are to be eligible to participate and to the proceedings in the PPP-network arena.

Clearly, as to some private parties it will be important to find whether this principles of good public governance coincide with for instance typical corporate governance values such as those set, in the Netherlands, in the code Tabaksblat. (Tabaksblat 2003)

An important issue for debate on the network governance code is whether more private interest influence is allowed than in terms of specifics that are indifferent to the public values that lie at the heart of the decision that is to be taken. Similarly to that it isn't up to government to determine who is to ask for environmental permits (under 'hierarchy') and up to government to decide if a private enterprise presents a bid in a tender over providing public services and whether this enterprise offers certain extra's above the level of the minimum level of public service (as agreed in the tender – so under 'market'), maybe there should be room for particular private interests influencing the outcomes, as long as these are indifferent to selection and to the public interest involved in the decision-making).

In addition in the design of PPP-Network arrangements, it may prove to be necessary to introduce **legislation** that remedies legal loopholes concerning what in essence is a delegation of administrative power; more importantly, administrative power involving discretion in weighing public interests. The underlying question is whether legally it can be made acceptable that unilateral decisions, in which only public values should rule,²⁰ private interests are sufficiently excluded from influencing decision-making. Note that in legal doctrine a delegation of government power is only possible on a legislative basis and often requires a specific legislative act.

In legislation the problem of private interest is obviated as **all** private persons have a say in the formation of parliament, and representatives are, once elected, formally separated from their voters. In administrative acts, public offices are under legal obligation only to decide on grounds of designated public interests while abiding by public values such as legal principles. In network decision-making only few private parties are included in decision-making and even though these parties are selected as they are regarded the most competent, this does not in itself exclude that their private interest can wilfully or unwillingly permeate the weighing of interests.

Of course apart from selection, this matter may be addressed in terms of **controls**, such as in the aforementioned authorisation of the network proposals by the competent authority. Controls, by this authority or by third and independent parties (as in, finally, the administrative courts), should however not be regarded as the remedy to inadequate ex ante provisions. As to the role of the competent authority the danger would be that a refusal to authorise on grounds of private interest bias would be criticised as a refusal of hierarchical public powers to share influence with private parties. Courts may come under the suspicion of over-influencing the weighing of interests and thus not respecting the separation of powers (vis a vis the executive branch of government).²¹ Clearly however, controls may offer compensation to those private parties which are excluded from the network. Hence this aspect is an issue for further investigation, not addressed in this paper. Some of the essential elements will be:

- o how to keep private interests of decision makers at bay? A question that rests on the separation of dominium and imperium; the principle of **non-identification**

²⁰ As drivers, with legal indifference to private interests.

²¹ Compare the criticism on the Council of State decision on the PPP A4 decision. PM

and the equality-principle. The determination of public values (in the particular context) should not be influenced by the private interests of participants, but only by their competence and willingness to cooperate (see 2c);

- *the principle that government decisions should respect **market relations** and not favour one enterprise against another, unless on the basis of market parameter of efficient service (the fair competition principle);*
- *the position of (excluded) **third parties** (with an interest), both citizens and consumers. Legitimacy will surely not be served if inclusion is decided on bias (also because this may shed doubts on the rationality of decision-making). Consumers may fear that the influence of their market transactions on price and quality of goods and services on offer is ill-influenced by government intervention.*

Finally, it must be remembered that to select parties to cooperate presupposes their interest to commit. Clearly this commitment must be clear not only upon unilateral selection (ex ante) by the competent authority, but also once selection is completed and cooperation begins. In terms of legal bindingness of commitment the procedural decision of the competent authority should be based on, include or reflect this reciprocal commitment between parties (for instance on the basis of prior contracts between each or indeed all private parties and the competent authority).

7.2c - Procedural decision; third element – form & procedure

Determining the co-operative form and procedure will in practice coincide (or may even precede the above). The essential choice will be that of what type of cooperation is considered most desirable.

Legally speaking the main choice is that between cooperation in an organized legal entity (a legal person), which then allows for different types and subsequent different patterns of internal decision-making and external representation, or cooperation on the basis of a relational contract between separate parties binding them with regard to their share and commitment to decision-making and the reciprocal share and commitment of others (in terms of rights and duties to effort and results).

The competent authority will have to decide on the basis of criteria for choosing the type of cooperation it aspires. The basis of cooperation as addressed in this paper is expressed in the above:

1. the *constitutive reciprocal willingness* of all participants to commit to cooperation by delivering its competences/resources;
2. the explicit acceptance of the *openness or incompleteness* of the substantive objective as a challenge of cooperation;
3. the acceptance also of rules concerning *coordination and decision-making* within the cooperative setting;
4. acceptance of the *outcomes* of the partnership (following 1-3) as binding for all and possibly for outside third/parties [check wording].

Still this leaves open what the internal rules of the game are to be and whether cooperation will take the shape of a separate entity or of a contractual relationship between separate parties.

Much will depend on the motives for and intent of cooperation. Does the basis lie with mutual dependencies (one party can not act without the other)? It would seem so as the premise behind the wicked policy problem suggests a need, at least on the part of the competent authority, to add 'reason and legitimacy' to the decision-making.

Other parties may, however, have a different stance regarding the process, perhaps more adequately described as an 'opportunity' rather than a 'necessity'. Clearly though, the underpinning notion is that to reach the objective cooperation, in terms of working together by bringing together resources (competences), is a necessary requirement, resting on the intention to reach the result by applying procedural rules for decision-making by which the combination and use of resources is decided upon. Cooperation may differ to the extent in which each participant has an equal say in the matter or even has a right of veto (or merely the certainty that a qualified majority will be necessary).

Furthermore, cooperation will mean that the parties involved will not counteract each other.

As the competent authority decides upon form and procedure and parties selected declare their willingness to abide by these constraints, clearly the common objective is paramount to the proceedings. Nevertheless, the concept of a hybridity of values, as coined in the above, suggests that participants are expected to 'act naturally', delivering their competences and resources on the basis of their private (commercial or not for profit) interest to do so. This suggests a heterogeneous background to the decision-making process rather than a homogeneous concept as suggested when a governmental body (other than a parliament) decides.

Furthermore, on the basis of this heterogeneous concept, participants act together, regardless of their title, that is regardless of whether their basis for participation lies with the aspect of legitimacy or of expertise. This presupposes that for wicked policy problems we depart from a rather primitive '*bucket theory*' of decision making: as long as all competences (as decision-making resources) are in the bucket, somehow the best 'solution' will result (the assignment by the competent authority being the stirring-spoon, burner or prime mover. Of course this is a matter that needs further elaboration, but again it emphasizes the need to regard both rationality and legitimacy as concepts that rise above the input of specific competences, carried by single participants to the process.

7.3. PPP network cooperation

The *third step* in the decision-making process will be the process of actual **PPP network-cooperation**. This is probably initiated by a constitutive agreement and/or constitutive meeting in accordance with the 'rules of the game', as set under 2c, involving participants, as selected under 2b. This is in fact how the 'substances in the bucket will react' and hopefully result in an outcome that entirely or most closely meets with the substantive criteria set under 2a. In all likelihood many PPP-decisions will go through a draft-stage in which the competent authority or a party assigned by the competent authority can give its views on the draft decision (setting apart the possibility of consultations ad interim).

7.4. Bestowing authority

As the procedural decision (2.) rests on the presumed politico-administrative primacy of the government body or office concerned over the decision that must be taken (and subsequently implemented), it follows legally that this competent authority must authorize the outcome of the PPP-network cooperation. Only then can the procedure lead to a decision with legal status.

The crucial element will be that the competent authority must, pursuant to the PPP (first stage) decision:

1. perform a test of formal and/or procedural conformity to the procedural decision as described in Step 2. This should not be a substantial basis. At its most this test would take the shape of the famous marginal reasonability test on arbitrariness as performed by courts in administrative cases. If the outcome of the PPP cooperation is so out of tune with the procedural decision in Step 2, that it cannot, within reason, be regarded as an outcome of that procedure, the competent authority must conclude that the decision presented as such is invalid and must be sent back for re-evaluation. The basis for this test lies with two considerations:
 - o incompleteness even of the procedural 'contract' that forms the basis of PPP;
 - o the fact that the participants to the PPP are mere proxies of the competences that were deemed necessary to a rational and legitimate outcome and as such interests incongruent with the general interest may have perverted the outcome.
2. formalise in terms of implementation provide a legal dictum by which the competent authority expresses its formal acceptance (expressing that the outcome of PPS is authoritative in terms of conformity within reason with the objectives and boundary

7.5. Implementation

Implementation of the decision taken under step nr. 4, possibly involving PPP. As this is not the focus of this paper, this step is not elaborated upon. Two brief notes should suffice:

- a party with an interest in participating in an implementary PPP may 'suffer from' a bias in promoting certain decisions as they pave the way for the selection criteria in this 5th step. Safeguards are required to ensure impartiality;
- in practise implementation and primary decision making may iterate.

7.6. Final results

Hopefully implementation will address, solve or aid in solving the policy problem identified under nr. 1.

8. The organisation of value hybridity- part 3 (concluding remarks)

From the viewpoint of expressing, serving and protecting *public values*, the above simple model of PPP immediately confronts us with some major problems. As was stated in the above, trust should be the major driving force behind PPP. The simple model provides a framework that seeks to balance this aspect against the requirements of a policy programme geared at taking binding decisions concerning specific public values. There needs to be certainty about reaching the objective (the 'solution' to the problem at hand) but also about reaching this result within normative public governance requirement, among which the exclusion of private interests determining outcomes, disturbance of market relations, and respect for (principles of) legal certainty, equality and proper care.

The only way of staying clear from these requirements is to place the decision making process outside the public sector realm and into the realm of private initiative (and market forces). The premise of this paper is that this would call for more trust in the market mechanism (i.e. absence of market failure) than is provided for in the cases of wicked policy problems as targeted here (and the financial crisis of 2008 wakes one wonder if a broader range of problems deserves a more sceptical appraisal on market forces).

Choosing to use the PPP-network approach, considering proposed advantages in terms of rationality and legitimacy, inevitably places coordination in terms of mainly procedural complete conditions (proper mechanisms for selecting competence and adequate safeguards against 'private interest perversion'), against the backdrop of trust-based in sharing in surplus. To accept such an arrangement in terms of public governance law requirements can only be envisaged if the wickedness of the underlying problem is accepted for what it is. Similar to the initial soft law approach to recent technological breakthroughs (such as on nano- or biotechnology), there needs to be an understanding that as our solutions for these type of problems are (as yet) incomplete, our safeguards are incomplete too. The model of placing PPP within the framework of government hierarchical decision making, comprising, amongst others, the 'authorisation' as explained in step nr. 4 (including a marginal test on reasonableness) may on the one hand pave the element of trust within the PPP-network under threat, and it may on the other hand at least ensure the much desired minimum level of legal certainty on acceptable end results.

A major conclusion of this paper as to the public values debate is, that such a debate has marginal relevance if it isn't placed within an institutional and organisational context. In as much as a definition of public values will correlate or contrast with the notion of private values, it stands to reason to especially look at public private interfaces that rest on the aspiration or assumption that a true value exchange or is possible. Our

preliminary analyses points in the direction that an exchange is possible in the sense of 'a possible match', not as a (free style) 'osmosis' but only if and when we ensure that there is clarity on how interests correspond with specific values, so the decision making process isn't corrupted.²² To what extent network governance structures may allow for an impetus by private interests, remains a matter for further research. Much of what has been suggested in terms of threats and opportunities will still have to be specified, tested and compared in terms of legal designs for PPP-arrangements for different types of wicked policy challenges. To the researchers of this paper, that will be the next step.

Enschede, October 2008

²² Clearly this statement should be understood in the context of our premise that by law government may only serve the public interest.

Literature

Bregman, A.G. & R.W.J.J. de Win (2005) *Publiek-private samenwerking bij de ruimtelijke inrichting en haar exploitatie*. Deventer: Kluwer.

BZK/Ministry of the Interior and Kingdom Relations, <http://www.minbzk.nl/115545/nieuw> (28 October 2008 affairs).

Dunn, W.N. (2008) *Public policy analysis: an introduction*. Upper Saddle River: Pearson.

Graaf, H. van de & R. Hoppe (1996) *Beleid en politiek: Een inleiding tot de beleidswetenschap en de beleidskunde*. Bussum: Coutinho.

Hajer, M.A., J.P.M. van Tatenhove & C. Laurent (2004) *Nieuwe vormen van governance: Een essay over nieuwe vormen van bestuur met een empirische uitwerking naar de domeinen van voedselveiligheid en gebiedsgericht beleid*. Amsterdam: RIVM

Hajer, M.A. & H. Wagenaar (ed.) (2003) *Deliberative policy analysis: Understanding governance in the network society*. Cambridge: Cambridge University Press.

Heffen, O. van, W.J.M. Kickert & J.J.A. Thomassen (ed.) (2000) *Governance in modern society: Effects, change and formation of government institutions*. Dordrecht: Kluwer

Heldeweg, M.A. (red.) (2006) *Rechtsvorming en governance*. Alphen aan den Rijn: Kluwer.

Hodge, G. & C. Greve (ed.) (2007) *The challenge of public-private partnerships: Learning from international experience*. Cheltenham: Edward Elgar

Hoesel, P.H.M. van, F.L. Leeuw, J.W.M. Mevissen (2005) *Beleidsonderzoek in Nederland: Kennis voor beleid; ontwikkeling van een professie*. Assen: Koninklijke Van Gorcum.

Hoogerwerf, A. & M. Herweijer (red.) (2003) *Overheidsbeleid: Een inleiding in de beleidswetenschap*. Alphen aan den Rijn: Kluwer.

Hufen, J.A.M. & A.B. Ringeling (1990) *Beleidsnetwerken: overheids- semioverheids- en particuliere organisaties in wisselwerking*. 's-Gravenhage: VUGA.

Kaptein, M. & J. Wempe (2002) *The balanced company: A theory of corporate integrity*. New York: Oxford University Press.

Kersbergen, K. van, R.H. Lieshout & G. Lock (ed.) (1999) *Expansion and fragmentation: Internationalization, political change and the transformation of the nation state*. Amsterdam: Amsterdam University Press.

Keynes, J.M. (1971) *The collected writings of John Maynard Keynes*. London: Macmillan.

Kickert, W.J.M., E.H. Klijn & J.F.M. Koppenjan (ed.) (1999) *Managing complex networks: Strategies for the public sector*. London: Sage Publications.

Lindblom, C.E., E.J. Woodhouse (1993) *The policy-making process*. Upper Saddle River: Prentice Hall.

Marks, G. (1997) A third lense: *Comparing European integration and state building*. In: Klausen J. & L.A. Tilly (ed.) *European integration in social and historical perspective: 1850 to the present*. Lanham: Rowman and Littlefield.

- Osborne, S.P. (ed.) (2000) *Public-private partnerships: Theory and practices in international perspective*. London: Routledge.
- Parsons, W. (1995) *Public policy: An introduction to the theory and practice of public policy*. Cheltenham: Edward Elgar.
- Perez, B.G. (2004) *Achieving public-private partnership in the transport sector*. New York: iUniverse, inc.
- Rhodes, R.A.W. (1997) *Understanding governance*. Buckingham: Open University Press.
- Sabatier, P.A. (2007) *Theories of the policy process*. Boulder: Westview Press.
- Schmitt H. & J. Thomassen (1999) *Political representation and legitimacy in the European Union*. Oxford: Oxford University Press.
- Snellen, I.Th.M. (1987) *Boeiend en geboeid - oratie*, Tilburg: Universiteit van Tilburg.
- Tabaksblad/ Commissie corporate governance, 'De Nederlandse corporate governance code, Beginselen van deugdelijk ondernemingsbestuur en best practice bepalingen', 9 December 2003.
<http://corpgov.nl/page/downloads/CODE%20DEF%20COMPLEET%20II.pdf> (24 October 2008).
- Thompson, G., J. Frances e.a. (ed.) (1991) *Markets, hierarchies & networks: The coordination of social life*. London: Sage Publications.
- Wal, Z. van der, (2008). *Value Solidity. Differences, Similarities and Conflicts Between the Organizational Values of Government and Business*. Dissertation Amsterdam, VU University.