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Attn. Ms. Fiona Marshall
Secretary to the Aarhus Convention
Compliance Committee

Per e-mail: aarhus.compliance@un.org

Amsterdam, 13 September 2019
Our ref. K20110027/BK/bk
REF **Communication
ACCC/C/2014/124**

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Re: Communication ACCC/C/2014/124

Dear Ms Marshall,

Please, find hereunder the reaction on behalf of Stichting Greenpeace Nederland (hereafter: Greenpeace) to the additional communication on behalf of the Netherlands by letter of 2 August 2019.

1. Indeed, as the Netherlands hold, the Dutch Raad van State in its judgement of 20 December 2017 (ECLI:NL:RVS:2017:3497) took a new direction where it concerns its case law regarding the interpretation of 'internal deliberation' as ground for refusal to disclose documents under Article 11(1) of the Dutch Public Transparency Law (Wob). This new interpretation was later confirmed in more recent judgements.
2. Where the Netherlands state that 'In this judgment the Administrative Jurisdiction Division took the line that documents of external parties could be deemed internal consultation only if the external third party had no interest in the matter other than giving the administrative authority its opinion on an administrative matter on the basis of its own experience and expertise' its reporting regarding the judgement of 20 December 2017 is incomplete. The Raad van State ruled as follows:

"With regard to the consultation concerning the adapted decision regarding the zoning plan "Rhijnbeek" and Hornbach's project to request a building permit, Hornbach has an interest of its own. For this matter Hornbach is not an external party giving advise solely in the interest of the administrative body and not serving any other interest than giving its opinion based on its experience and expertise". (Judgment of 20 December 2017, par. 7.4)

3. In short, the judgement means that communications between an administrative body and a permit holder or the requester of a permit with an own interest in communicating with the administrative body could not be kept confidential based on the exception of 'internal deliberations' under Article 11(1) of the Wob.
4. Indeed, would this new line have been applied by the province of Groningen or by the Raad van State in the proceedings regarding Greenpeace's request for access to documents, including documents concerning deliberations with RWE and its experts, the outcome would have been that all the documents concerning deliberations with RWE and NUON should have been disclosed to Greenpeace. But, it is important to note that not all the documents falling within the scope of Greenpeace's request would have to be disclosed based on this new line in the case law, as part of the requested documents concerned correspondence, deliberations and exchange of information between the province of Groningen and other third parties, for example external engineers and ecologists (f.e. Arcadis, ECN, TNO) and public officials of other administrative bodies (f.e. correspondence between the province of Groningen with officials of the Department of State of Economic Affairs and officials of Rijkswaterstaat and other provinces).
5. There is no indication in the case law of the Raad van State that other third parties than permit holders or requesters are considered as 'third parties having an own interest in the outcome of the internal deliberations', as was the case for Hornbach in its exchanges with the administration of the town of Almelo in the judgement of 20 December 2017. So, even if this new line in the case law regarding 'internal deliberations' would be applied to Greenpeace's request for access to documents, the province of Groningen still would not have been under the obligation to disclose all the documents concerning communications of third parties with the province of Groningen on the project to realise two coal plants.
6. Indeed, a large part of the documents requested by Greenpeace concerned exchanges of information or correspondence between the province of Groningen and external experts, hired by RWE or NUON or by the province. As the province still did not release these documents to Greenpeace, the allegation of non-compliance with the Aarhus Convention as communicated by Greenpeace to the ACCC by letter of 22 December 2014 remains standing.
7. Also, where the case law indeed changed, the new interpretation of Article 11(1) of the Wob still did not result in the province of Groningen complying with Article art. 4(3)(c) of the Convention. The province of Groningen still did not disclose the requested documents regarding communications and exchanges of information between RWE and NUON and the province where it concerns the coal plants projects. The Netherlands therefore still are in non-compliance with the Aarhus Convention.
8. Documents regarding communications and exchange of information between public authorities and third parties, such as private companies - hired by the administration or by private parties - or officials of other administrative bodies, will still be considered under the current case law as falling under the ground for refusal of 'internal deliberations', even where it concerns environmental information. The case law cited in the Netherlands' letter of 2 August 2019 therefore does not resolve the invocation of this ground of refusal with regard to documents and information exchanged with external third parties. The Netherlands thus still act remains in non-compliance with the Aarhus Convention.

Yours sincerely,



Bondine Kloostra