Nederlandse Vereniging van

Omwonenden Windturbines

'Netherlands Association of People Living in the Direct Vicinity of Wind farms'

COMMUNICATION TO THE COMPLIANCE COMMITTEE

OF THE

AARHUS CONVENTION

Geneva

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Table of content

Reference is to paragraph numbers

I. PRELIMINARY OBSERVATIONS

1. In short

1. This communication concerns access to information on and participation in decision-making regarding wind power en wind farms, as well as access to justice against administrative decisions approving the construction of wind farms in the Netherlands.[1] The NLVOW considers that in all three areas the Netherlands acted and acts in violation of the rights of the public safeguarded by the 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', concluded at Aarhus on 25 June 1998 (hereinafter: Aarhus Convention or Convention). The Netherlands ratified the Convention on 29 December 2004.

2. The communicant submitting the communication

2. This communication is submitted by the 'Nederlandse Vereniging Omwonenden Windturbines' [*Netherlands Association of People Living in the Direct Vicinity of Wind Turbines*] (NLVOW), an association with over 1,000 members. The association has been incorporated by a notarial deed and has legal personality under Netherlands law. The NLVOW's objectives are: (1) safeguarding the interests and rights of individuals and communities living in the direct vicinity of wind farm projects, if necessary by initiating procedures before a court of law; (2) participating in, and contributing to, the public debate on government plans and programmes in relation to wind power and wind farms.

3. Party addressed by the communication

3. The Kingdom of the Netherlands.

4. Applicability of the Convention

4. It is well-established in scientific literature that wind farms may have negative consequences for the environment, especially in their immediate vicinity. For the people living near a wind farm these negative consequences relate in particular to noise and shadow flicker. As the Netherlands National Institute for Public Health and the Environment states: '*(..) ongoing nuisance or the sense that wind turbines diminish the quality of life or the surroundings can have a negative impact on the health and sense of well-being of those living in the vicinity of wind turbines.*'[2] For this reason, wind farms can infringe on the right of a person to live in an environment adequate to his or her health and well-being as stipulated in article 1 of the Convention.

5. The construction of a wind farm is an activity within the meaning of article 6, paragraph 1, sub a, by virtue of paragraph 20 of annex I of the Convention. Wind farms are included in annex II of the EC Environmental Impact Assessment Directive.[3] Consequently, there is an obligation to assess whether it is necessary to draw up an environmental impact assessment (EIA). Under Netherlands law, this EIA duty applies to all wind farms projects consisting of at least ten turbines or with a joint capacity of at least 15 megawatt (MW).[4] Wind farms of a smaller size are subject to a so-called 'duty to ascertain', which means that the competent authorities must decide, on the basis of the criteria set out in annex III to the EIA-Directive, whether an EIA is in fact necessary.[5]

5. Domestic remedies and other international procedures

6. To the extent that this communication concerns access to information, it is not possible to submit complaints to Netherlands administrative law courts as a denial of access to information is considered to be 'actual conduct'. According to Netherlands procedural administrative law only 'decisions' - that is: acts governed by public law that

[1] The term 'wind farm' also refers to a single solitary wind turbine.
[2] 'Wind turbines: influence on the perception and health of those living in the vicinity' ['*Windturbines: invloed op de beleving en gezondheid van omwonenden*'], RIVM Report 200000001 / 2013, page 21.
[3] Part 3(i): 'installations for the harnessing of wind power for energy productions (wind farms).'
[4] Category 22.2 of Annex D to the Environmental Impact Assessment Decree [*Besluit milieueffectrapportage*].
[5] Section 2, subsection 5, of the Environmental Impact Assessment Decree.

are intended to have legal effect - can be challenged in administrative law courts.[6] With regard to this Communication's submissions on inadequate access of the public to decision-making on specific projects: Netherlands administrative law courts have ruled that the Dutch practice - which offers public participation in relation to a plan to prepare an EIA for a proposed project and/or in relation to a set of draft decisions on that project - is in compliance with the requirement of the Convention that public participation take place when all options are open.[7] This aspect of the communication has been submitted to administrative law courts in vain.

7. Inadequate access to decision-making often occurs during the process of preparing a draft decision. However, in view of section 6:3 of the General Administrative Law Act [*Algemene Wet Bestuursrecht*] a complaint that no or inadequate public participation took place when all options are open is not independently admissible in administrative law courts, but has to be put forward as part of an appeal against the final decision. At that time, a court is authorised under section 6:22 of the General Administrative Law Act to disregard a (procedural) defect, if it is plausible that the interested parties have not been disadvantaged as a result of that defect. At that stage it is most difficult, if not impossible, for the party submitting the complaint to prove 'disadvantage' given the fact that Netherlands administrative law courts review the merits of administrative decisions most restrictively and in fact often refuse to engage in substantive review. This avenue to take legal action has also been pursued in vain.

8. To the extent that legal action before a Netherlands administrative law court specifically concerns the failure to offer adequate public participation in the formulation of plans and programmes (article 7 in conjunction with article 6, paragraph 4, of the Convention), such failures do not constitute legal acts under public law (paragraph 6) and are therefore not admissible in administrative law courts.

9. After 2011 the norms for the two most important environmental effects of wind farms for people (noise and shadow flicker) have been standardized in statutory rules; before 2011 local governments would set these norms on a case-by-case basis. As a result, for these issues the public no longer has a right of access to justice as generally binding regulations are excluded from appeal to a court of law.[8]

10. There are no other international legal remedies available to the NLVOW in relation to the issues addressed in this communication. It is conceivable to lodge a complaint against the Netherlands with the European Commission for breach of EC Directives 2003/4 and 2003/35. The NLVOW has not done so on the ground that essentially the European Commission is a political body.

6. Reduction of existing rights

11. Compared to the situation at the time of the ratification of the Convention opportunities for public participation and judicial review have been reduced by the Netherlands government. See paragraph 67 et seq. This is contrary to a 2005 Recommendation of the Parties to the Convention on the protection of existing rights.

II. ACCESS TO INFORMATION

1. In short

12. Article 5, paragraph 2 and paragraph 7 of the Convention require Parties to ensure, within the framework of national legislation, that authorities furnish environmental information to the public that is transparent, accessible and complete. The Netherlands does not comply with this obligation by systematically providing information on wind power and wind farms that is one-sided and far too positive and by not disclosing all information that is relevant to decision-making. Dutch practice is also not in compliance with article 3, paragraph 2, of the

[6] Cf. section 8:1 in conjunction with section 1:3 of the General Administrative Law Act.
[7] Administrative Law Division of the Council of State [*Afdeling Bestuursrechtspraak Raad van State*], 19 January 2001, ECLI:NL:RVS:2011:BP1342 (*Rondweg Zutphen-Eefde*) and 7 December 2011, ECLI:NL:RVS:2011:BU7002 (*Buitenring Parkstad Limburg*), 19 January 2011, ECLI:NL:RVS:2011:BP1342.
[8] Section 8:3, subsection 1, sub a, of the General Administrative Law Act.

Convention, which provides that authorities assist and provide guidance to the public in seeking access to information. Finally, Dutch practice is not in compliance with article 6, paragraph 6, of the Convention which requires that all information relevant to decision-making must be made available to the public as part of its right to participate in decision-making.

2. No analysis of the need, benefits and costs of wind power

13. So far the Netherlands government has refused to carry out an in-depth and independent analysis and assessment of the advantages and disadvantages of wind power for society at large, although requests for such a study have been made repeatedly for many years. In September 2013, the NLVOW requested the minister of Economic Affairs - with reference to the Government Information (Public Access) Act [*Wet openbaarheid bestuur*] - to disclose the document or documents that comprise an analysis of the advantages and disadvantages of wind power. Eventually, this resulted in the furnishing of an extensive set of documents, predominantly consisting of notes taken during meetings and meeting reports. However, none of these documents contains anything resembling an analysis of the advantages and disadvantages of wind power for society, even though the decision to introduce large-scale use of wind power must be considered a major environmental policy proposal as defined in article 5, paragraph 7 sub a, of the Convention.

3. Incorrect and incomplete information

14. Government websites play an important role in the furnishing of information to the public. See for example: www.windenergie.nl. Such websites however are mostly directed at entrepreneurs seeking information on how to start a wind power project or at civil servants seeking information on rules and regulations. The public is largely ignored. In addition, government websites often stress the advantages of wind power and remain silent on the disadvantages. That the government gave incomplete and biased information to the public was confirmed by a decision of the National Ombudsman in 2011 which states that the government had acted 'improperly'[9] by referring on one of its websites to a study that concluded that wind power could be fed into the national grid without difficulty while not referring to two other studies from independent advisory bodies to the government that foresaw problems. As a result the specific passages were corrected, but the overall practice of stressing the positive aspects and ignoring the negative aspects of wind power and wind farms has remained. It is systematic.

15. Government websites may also misrepresent the law. More specifically: section 3.14a of the Activities Decree [*Activiteitenbesluit*] allows the setting of stricter noise regulation norms than the overall statutory norms on the ground of 'special local circumstances'. The Explanatory Memorandum [*Nota van toelichting*] for section 3.14a, third subsection of the Decree reads: *'The methodology of the Activities Decree implies that the competent authorities can provide further protection through customized regulations in special local circumstances, for example quiet areas.'*[10] Note the 'for example' and the use of the term 'quiet areas' without any qualifications or restrictions.

16. And this is what the government's website provides by way of explanation: '(..) *it appears from the Explanatory Memorandum that the legislator means, for example, low-noise areas that have been designated as such by law. A rural, quiet environment is therefore not a condition that gives cause for drafting customized regulations for a varying norm at the location of a noise-sensitive object.'* [11] The discrepancies are obvious: the Explanatory Memorandum refers to 'quiet areas' in general and as an example, whereas the website limits the scope of the provision to 'low-noise areas designated as such by law'. It even categorically excludes 'quiet areas' as such. The website misrepresents the intention of the legislator as its wording defines the authority to set stricter norms more narrowly than the legislator intended.

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[9] National Ombudsman, report dated 1 August 2011, AB 2011, 284 with commentary from P.J. Stolk.
[10] Bulletin of Acts and Decrees [*Staatsblad*] 2010, 749, page 8.
[11] http://www.rvo.nl/onderwerpen/duurzaam-ondernemen/duurzame-energie-opwekken/windenergie-op-land/milieu-en-omgeving/geluid/bijzondere-omstandigheden.

4. Case: the introduction of new noise regulations in 2011[12]

17. The way new noise standards and norms were introduced in 2010/2011 is a clear example of how the government provided incorrect information to the public and on occasion even misled the public. The example as such concerns an important issue, but it is given as illustration of a consistent and systematic pattern.

18. Until 1 January 2011 multi-purpose general noise standards and norms applied to a range of noise sources, including wind turbines. These standards and norms were set forth in the Guide to Industrial Noise and Licencing [*Handreiking Industrielawaai en Vergunningverlening*], a government publication. The Guide recommended for low-noise rural areas noise limits of 40, 35 and 30 dB(A) during, respectively, day, evening or night time and for rural areas with much agricultural activity slightly higher limits of 45, 40 and 35 dB(A) during the same periods. On 1 January 2011 new norms became effective based on an amendment of the Activities Decree. This led to uniform noise standards and norms for wind turbines regardless of size, number or location: the maximum noise exposure on sensitive locations was universally restricted to Lden 47 dB and Lnight 41 dB.

19. Although the draft Order in Council [*algemene maatregel van bestuur*] amending the Activities Decree has been subject to public participation, the public concerned was informed incorrectly and incompletely on important points - as will be shown below.

4.1. No need for new noise standard under the EC-Directive

20. A first aspect of the public being misled arises from the government's suggestion that the new rules are prescribed by the European Environmental Noise Directive. In the draft of the new regulation the government stated: *'The 'Lden' is the noise indicator set out in the European Directive no. 2002/49/EC relating to the assessment and management of environmental noise. Scientific research has shown that this is the best indicator by which to predict annoyance and other effects on health.'*[13] However, the aim of the Directive is the reduction of exposure to noise in the EU through a uniform approach and to that end Member States are required to provide the Commission with noise maps that include information on existing noise exposure. For reasons of comparability Member States should use the same noise indicator when drafting noise maps and Lden became the noise indicator used for that purpose.

21. Contrary to what the government implies in the aforementioned passage, the Directive does not oblige the Member States to apply Lden and Lnight in the setting of national standards on exposure to noise. What is more, the Directive explicitly states that the Lden standard is not well suited as an indicator of noise exposure caused by wind turbines. Accordingly, the Directive allows the use of other standards when the noise source operates only for a small proportion of the time, when it concerns low-noise areas in open country, when extra protection is needed during the evening period or in the event the noise has a pulsating character or contains strong tonal components. These are precisely the circumstances and characteristics that apply in the case of wind turbines.

22. The position taken by the government when explaining to the public (and Parliament) that Lden is the most appropriate standard for wind turbine noise is incorrect and its use cannot be justified by the EG-Directive. The Netherlands is the only EU country that applies the Lden standard to noise exposure from wind turbines.

4.2. Incorrect information on protection level

23. In introducing the new noise standards and norms of Lden 47 dB and Lnight 41 dB the government stated repeatedly that these would offer people living in the vicinity of wind farms the same protection level against

[12] The term 'standard' refers to a unit that is used to measure noise. A 'norm' is a unit with an actual value. For example, dB(A) or Lden are standards, while db(A) 40 or Lden 47 dB are norms.
[13] Government Gazette [*Staatscourant*] 31 August 2009, no 12902, page 9

exposure to noise from wind turbines as the previously applicable standards. In the explanatory note to the draft decree the government states: ' (..) *it has been determined that permits granted in actual practice also correspond with a maximum level of 47 dB Lden. Therefore, a level of 47 dB Lden is in line with the current practical implementation of recent years.'*[14] As will be shown below, this position is incorrect and misleading

- First, the previous norms were simplified to one universally used norm. Above in paragraph 18 it was mentioned that in the 'old days' local norms were derived from the Guide mentioned there and that, as a result, they varied, in open country, between 40 to 45 dB(A) during day time, 35 to 40 dB(A) in the evening and 30 to 35 dB(A) at night depending inter alia on the level of background noise. Sometimes they were even stricter. Compared with these norms the new Lden 47 dB and Lnight 41 dB norms are a substantial relaxation, especially as experts agree that the Lnight 41 dB norm offers no extra protection.
- Second, although under section 3.14a, subsection 3 of the Activities Decree it is possible for municipalities to impose stricter norms in case of 'special local circumstances', the government has insisted that municipalities exercise restraint.[15] See also paragraph 15 et seq. This is especially important as a refusal to impose stricter noise norms through customized regulations is invariably endorsed by the highest administrative law court, the Administrative Law Division of the Council of State.[16] See paragraph 60 et seq. As a result, section 3.14a, third subsection of the Activities Decree is in practice of no consequence. Also less protection.
- Third, the new Lden 47 dB norm refers to a year-average noise level. Exceeding the norm at any given time is therefore allowed as long as this is sufficiently compensated by periods when noise exposure remains below the norm. This is a crucially important point as wind turbines are not, or only very limitedly, in operation in calm weather or with light winds. As a result, since the new standards and norms, wind turbines are allowed to produce (much) higher noise levels for much longer periods than would be allowed under the previous norms, which imposed limits that were not to be breached at any time. Much less protection.
- Fourth, the introduction of the new Lden and Lnight norms was preceded by an assessment by the National Institute for Public Health and the Environment. In its report[17] the Institute states: *'(..) that a target value of approximately 40 dB (lower limit) is consistent with the normative guidelines for other sources of environmental noise. This results in an annoyance protection that is similar to the one that applies to road and rail traffic noise. (..) From the point of view of nuisance and health problems, a value over 45 dB is unfavourable when setting a maximum noise limit.'*[18] The Institute considers a Lden 47 dB maximum limit value as inconsistent with the earlier standards and norms and with the standards and norms that apply to other sources of noise. Experts confirm that the new norms offer less protection than the old norms.

24. Notwithstanding the above facts and opinions, the government has maintained the position - both in relation to the public and in Parliament - that the Lden 47 dB and the Lnight 41 dB standards and norms provide a comparable level of protection to people living in the vicinity of wind turbines as before and as provided to those living near other industrial sources of noise, such as roads and railways. Even today the government continues to deny that people living in the vicinity of wind turbines are faced with a significantly higher risk of noise exposure.

III. PARTICIPATION IN DECISION-MAKING

1. In short

25. The Convention obliges its Parties to adopt procedures that allow the public to participate in decision-making on specific activities (article 6) and on plans and programmes (article 7) in an adequate, timely and effective manner and inform the public about these procedures. Public participation must take place at an early stage

[14] See footnote 13.
[15] Circular 2 April 2010, section 2.4
[16] For example, Administrative Law Division, 19 February 2014, 201303440/1/A4.
[17] See footnote 2.
[18] Page 9.

'*when all options are open and effective public participation can take place'* to quote article 6, paragraph 4, of the Convention, which, according to article 7, also applies to plans and programmes. The outcome of public participation must subsequently be taken into due consideration. The Netherlands does not comply with these obligations as, systematically, substantial decision-making takes place prior to public participation in close and closed consultation with a selected and invited group of participants from the commercial wind sector and from nature and environmental organisations. As a result, public participation is pro forma and devoid of any impact .

2. The organisation of decision-making on wind power

26. This communication concerns only wind farms located on the Dutch mainland including inland waters such as the IJsselmeer and the delta in Zeeland. In the Netherlands decision-making on wind power and wind farms on land[19] takes place at three levels: (1) nationally: by the national government; (2) provincially: by the 12 provincial administrations; and (3) locally: by the local authorities of approximately 400 municipalities.

27. The national government decides on the main policy elements such as: the extent to which wind power is needed with a view to making energy supply more sustainable and in which areas major wind farms will be located. The national government also decides on the applicable standards and norms regarding exposure to noise and shadow flicker. Insofar as is required, provinces and local authorities will further elaborate the plans, programmes and policies developed by the central government.

28. The authority to license and regulate the construction and exploitation of specific wind farms varies depending on the size of the wind farm in question.

- For wind farms with a capacity of 100 MW or more it rests with the national government, more precisely with the minister of Economic Affairs and the minister of Infrastructure and the Environment.
- For wind farms between 5 MW and 100 MW it rests with the provincial administrations.
- For a wind farm or wind turbine smaller than 5 MW it rests with municipalities.

29. It is up to the competent authority - national, provincial or municipal - to adopt a spatial zoning plan and to grant all necessary licenses, permits and exemptions. If the national government is in charge, provincial administrations, municipalities and other public authorities (such as regional water authorities) may still formally issue licenses, permits and exemptions, but on substance they must comply with instructions from the national government. Should they refuse to cooperate, the national government may take the necessary decisions itself.

3. Decision-making regarding national plans and programmes

3.1. No participation in plans and programmes

30. Decision-making on wind power projects was in the hands of municipal and provincial authorities until the beginning of this century. This changed in 2001 when the national government and the provinces entered into an agreement - the Administrative Agreement on the National Development of Wind Energy [*Bestuursovereenkomst Landelijke Ontwikkeling Windenergie] (BLOW)* - with the aim of installing at least 1.500 MW of wind power on the mainland by 2010. The provinces were made responsible for the choice of locations. Each province should realise a certain amount of MWs which together would achieve the goal of 1.500 MW.

31. Since then, the target of MWs to be installed has been repeatedly raised. In September 2007, the national government adopted the Work Programme Clean and Efficient [*Werkprogramma Schoon en Zuinig*], which aimed at installing 2.000 MW of additional wind power on the mainland by 2011 with a perspective for substantial growth in the years thereafter. Accordingly, in the autumn of 2007 two round-table conferences and several additional

[19] Below references to wind energy or farms on land will also include wind energy and farms in inland waters.

meetings took place.[20] Participants in these meetings were the ministries concerned (Economic Affairs and Infrastructure and the Environment), provincial and local authorities, nature and environmental organisations and the Netherlands Wind Energy Association [*Nederlandse Wind Energie Associatie*] (NWEA), which is an umbrella-organisation of for-profit businesses in the field of wind power in the Netherlands. These conferences and meetings led to the National Action Plan Wind Power [*Plan van aanpak Windenergie*] of January 2008. This plan expressed the intention to install yet another 2.000 MW of wind power on the mainland.

32. In 2007 and 2009 the national government entered into further agreements with provincial administrations and municipalities.[21] These committed themselves to the national government's policy objectives regarding wind power and agreed to a best efforts pledge to achieve a target of 4.000 MW by 2011 (which has meanwhile been changed to 6.000 MW by 2020). Each province was allocated its own share in MWs. To reach their targets provinces would make use of their power to designate locations, while they would also assist potential investors by granting permits swiftly and by removing bottlenecks and other impediments to the construction of wind farms.

33. In accordance with its obligations under Directive 2009/28/EC, the Netherlands incorporated all of the above plans and programmes on the future of sustainable energy, including wind power, into a National Action Plan for Energy from Renewable Sources [*Nationaal actieplan voor energie uit hernieuwbare bronnen*] (hereinafter: National Action Plan) in 2010. This plan was then submitted to the European Commission. It describes the way in which the Netherlands will meet the target of 14 percent renewable energy by 2020 as set out in the Directive - for wind power by having installed a total of 6.000 MW in 2020. The National Action Plan of 2010 continues to be one of the most important documents at the national level.

34. As earlier decisions of Your Committee make clear, many, if not all, of the above documents and administrative agreements should be considered a plan or programme in the sense of article 7 of the Convention.[22] Consequently, the Netherlands should have offered public participation in the drafting of these documents in accordance with the requirements set out in article 6, paragraphs 3, 4 and 8: early public participation when all options are open and effective public participation can take place, while taking due account of the outcome of the public participation. In actual fact there was no public participation at all: the above plans and programmes were all developed in close consultation with a small group of selected and invited participants from the commercial sector and nature and environmental organisations. This is also true for the National Action Plan of 2010, which, as mentioned, continues to be a most relevant framework for decision making. Accordingly, this document too has been adopted in a manner that is not in compliance with the Convention.

35. The involvement of nature and environmental organisations and the NWEA on behalf of commercial parties cannot be regarded as public participation in the sense of article 7, third sentence, of the Convention. This sentence stipulates that relevant 'public authorities' must identify the public that may participate '*taking into account the objectives of this Convention*'. To involve in public participation only the known supporters of, and the vested corporate interests in, wind power is clearly not in line with the objectives of the Convention and its requirements in relation to public participation.

3.2. Participation in decision-making has no effect

36. Public participation was offered for the first time in 2011 in relation to the National Policy Strategy for Infrastructure and Spatial Planning [*Structuurvisie Infrastructuur en Ruimte*], a plan in which the government sets out its spatial policies for the Netherlands as a whole. It also considered the spatial aspects of wind power. A draft of the Strategy was made available for public scrutiny during six weeks in August 2011. In this draft the

[20] National Plan of Approach Wind power, 30 January 2008, page 3.
[21] Climate-Energy Agreement between the National Government and Provinces, 14 January 2009; Climate Agreement Municipalities and National Government 2007-2011, 12 November 2007.
[22] ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12, 2 October 2012; ACCC/C/2012/68.

government confirmed once again its target of 6.000 MW installed wind power on land in 2020 and it designated selected areas as 'promising for wind power' without actually identifying specific locations.

37. Although many of the comments received from the public spoke out against the target of 6.000 MW of wind power, against the earmarking of areas for wind farms and/or proposed other methods to promote sustainable energy, the government did not take account of any of these comments and adopted the plan without any changes in March 2012. This is not surprising as the National Policy Strategy of 2011 was mostly a re-statement of the earlier plans and programmes discussed above in the paragraphs 30 et seq. The conclusion should be that public participation was finally offered at a stage when all decision-making in a substantive sense had already taken place. There was no public participation when all options were still open.

38. The National Policy Strategy for Infrastructure and Spatial Planning of 2012 has since been followed by a new plan specifically on wind power: the National Policy Strategy for Onshore Wind Power [*Structuurvisie Windenergie op Land*] *(*SvWOL*)* of March 2014. More specific and detailed than the earlier National Policy Strategy of 2012 the SvWOL designates specific locations for large-scale wind farms. The government's introductory note to Parliament states: '*The SvWOL is important for the realisation of the 14 percent target for renewable energy in 2020. (..) In 2013, the government additionally entered into performance agreements with the provinces, represented by the IPO*[23]*, on the location of larger and smaller projects to install at least 6,000 MW from wind power by 2020.* (..) *Both the government and the twelve provincial governments made a commitment to strive for the full implementation of these agreements. This is to be achieved through exercising the powers vested in each of the parties and through mutual consultation. A core team has been established to monitor progress consisting of representatives of the national government, IPO, the commercial parties involved (NWEA), nature and environmental organisations and grid managers.'*

39. This quote perfectly illustrates how decision-making on plans and programmes for wind power and wind farms systematically takes place in the Netherlands: through meetings between the various authorities concerned (national, provincial and municipal), supplemented with selected parties from the private sector and nature and environmental organisations. At no point in time is the public given the opportunity to participate in these early formative and most often decisive stages of decision-making. Public participation takes place at a time when decision-making in a substantive sense has already taken place. It is then extremely difficult, if not impossible, to change anything as the outcome of those earlier stages has been laid down in binding agreements between the national government, provinces and municipalities and/or between public authorities and the private sector.

40. The above is confirmed by the actual procedure with regard to public participation in the above mentioned SvWOL. Public participation took place in two rounds. The first round (in the fall of 2012) concerned the intention to draft a national policy strategy, as well as to carry out an environmental impact assessment. The second round (in the spring of 2013) pertained to the draft of the National Policy Strategy itself. In neither of these two rounds have the comments received as a result of public participation led to any substantive changes, not in relation to the plans for drafting a national policy strategy (fall 2012), nor in relation to that policy as such (spring 2013). All inputs from the public were essentially dismissed.

41. A brief survey of the Memorandum of Reply [*Nota van antwoord*] - a document through which the government responds to all comments submitted as a result of public participation - shows that all sorts of grounds were used to justify dismissal.

[23] The abbreviation IPO stands for Association of Provincial Authorities [*Interprovinciaal Overleg (IPO)*]. IPO is the umbrella-association of the 12 provinces of the Netherlands.

- Comments on possible negative consequences of wind farms made clear '*what concerns and opinions are on citizens' minds'*. However, these comments make no difference to the National Policy Strategy because, in the view of the government, they should be considered in decision-making on individual wind farm projects.
- The Memorandum of Reply also identifies a number of subjects put forward by the public that '*fall outside the scope of the National Policy Strategy and the related EIA*'. These subjects include: (1) benefits of, and need for, wind power; and (2) comparisons with other methods to generate sustainable energy.
- Comments on the standards and norms for noise exposure and their enforcement were dismissed on the ground that they have been laid down by statutory law. Which confirms what has been said in paragraph 17 et seq. and will be said in paragraph 67 et seq.
- And lastly, the government was not even prepared to consider comments that suggested a change in the locations: *'Opinions that requested not to include a certain area or to actually include an additional area in the National Policy Strategy have not been honoured. The government has agreed with the provinces that the provincial designations of areas are the starting principle of the EIA Plan and the National Policy Strategy.'*

42. To sum up: all fundamental choices put forward in the National Policy Strategy were kept outside the scope of public participation. It is therefore not surprising that the comments submitted as a result of public participation did not result in one single substantive amendment to the National Policy Strategy. At most, they resulted in (slightly) more thorough explanations or in the addition of a few examples.

4. Decision-making regarding specific wind farm projects

43. As noted in paragraph 28, the size of a wind farm project determines whether the national government, a provincial administration or a municipality decides on spatial planning permission[24] and on other licenses, permits and exemptions that are needed for the construction of a wind farm. Regardless of the public authority in charge, the procedure for public participation is essentially the same. Public participation is provided for, first, in respect of a draft notification on the scope of the environmental impact assessment [*Notitie reikwijdte en detailniveau*] and, second, in respect of the draft zoning plan and all draft licenses, permits and exemptions, submitted to public scrutiny as a single package.

44. So far this procedure has been followed twice for wind farm projects with the national government in charge, namely the *Windpark Zuidlob* and the *Windpark Noordoostpolder* (both near the town of Zeewolde). In both cases the comments arising from public participation did not lead to any significant changes in any of the draft documents on spatial planning and licenses, permits or exemptions. This is not surprising as the observations made in paragraph 34 apply to decision-making on specific projects as well: before public participation all essential decisions have already been taken. The location can no longer be changed as it is laid down in agreements between the national government and the province in question, while the developer and the national government have already settled most issues relating to spatial planning and licenses, permits and exemptions in formal and informal agreements. Accordingly, the government is no longer free to carry out changes even if public participation would convincingly call for them. Several other large wind farms are presently under development under the same regime of close(d) cooperation between the developers and the national government.[25] Public participation - when at last it will take place - will undoubtedly be in vain again.

45. The situation is the same for wind farms smaller than 100 MW for which provinces and municipalities are the competent authorities, perhaps even more so as provinces and municipalities are bound by the policies

[24] Normally, spatial planning permission is a matter for municipalities to decide. However, for wind farms national or provincial interests are considered at stake and for this reason the national government or a provincial administration may 'impose' its own spatial zoning plan on the municipal zoning plan. Hence the term 'government-imposed zoning plan' [*Rijksinpassingsplan*] or 'provincially-imposed zoning plan' [*Provinciaal inpassingsplan*].

[25] It concerns, at least the following, the *Windpark N33* near Veendam, *Windpark Drentse Monden and Oostermoer* (south of Stadskanaal), the *Windpark Wieringermeer* (west of the Afsluitdijk), the *Windpark Fryslân* (in the IJsselmeer, west of Makkum) and the *Windpark Krammer* (south of Goeree-Overflakkee).

formulated by the national government, while they have also committed themselves to a range of administrative agreements with the national government. The courts have ruled consistently that provincial and municipal administrations must take into account the spatial and zoning policies of the national government, with any deviation from these policies requiring proper and thorough justification.

46. After having studied the files of many (initiatives for) wind farms, the NLVOW has not managed to find one single example of a case in which a province or municipality relinquished its intention to approve the construction of a wind farm as a result of comments arising from public participation. Nor has the NLVOW found any cases where plans were substantially changed as a result of public participation.

5. Case: the drafting of National Energy Agreement in 2013

47. At present the most important national document on sustainable energy, including wind power, is the National Energy Agreement [*Energieakkoord*] of September 2013. It qualifies as a plan or programme in the sense of article 7. Its drafting and adoption provides a perfect example of how in the Netherlands the public is systematically excluded by the government from participation in decision-making.

48. The National Energy Agreement comprises a large number of measures to ensure that the Netherlands meets the EU target of 14 percent sustainable energy in 2020. It also sets goals beyond 2020: 16 percent sustainable energy by 2023 and a fully sustainable energy supply by 2050. On wind power the agreement confirms the target of 6.000 MW installed wind power by 2020, while it also commits the parties to an increase after 2020.

49. The Agreement was drafted in closed negotiations - 'by invitation only' - between representatives from the national government, provinces and municipalities and a range of private parties: employers' organisations, trade unions, the commercial wind sector, nature and environmental organisations, investors and grid managers. Organisations critical of wind power, such as the National Critical Platform on Wind Power [*Nationaal Kritisch Platform Windenergie*] (NKPW) and the NLVOW were not invited to take part in the discussions and negotiations, even though the NLVOW had explicitly requested a seat at the table. Input from the NKPW was refused. More importantly, no inputs were sought from the public at large, nor was the public consulted in any way. When a Member of Parliament asked the minister responsible why there was no representation or input from the public, his response was: *'The Netherlands is a representative democracy. Your House has broadly agreed to the National Energy Agreement on 2 October of this year. In addition, I am of the opinion that the agreement has broad public support as it has been signed by 40 parties.'* All carefully selected and invited by the government.

50. The response of the minister shows once again that the Netherlands government has no awareness of the obligations resulting from the Convention to provide for early public participation in plans and programmes such as the National Energy Agreement at a time when all options are still open and effective public participation can take place. In the government's view it suffices to submit such major plans and programmes to the Parliament once they have been adopted by a small, carefully selected group of like-minded organisations, that is, without any form of public participation. The non-compliance of the Netherlands with obligations under the Convention in relation to public participation is systematic, extending over a long period of time. It began with the first plans and programmes on wind power and wind farms (see paragraph 30 et seq.) in the early years of this century and it continues up to the present day with the National Energy Agreement.

IV. ACCESS TO JUSTICE

1. In short

51. Article 9, second paragraph, of the Convention obliges Parties to ensure, within the framework of national legislation, that the public concerned, to the extent it has sufficient interest, has the opportunity to submit a decision on a specific activity to a court of law to have its procedural and substantive legality reviewed. Pursuant

to article 9, paragraph 4 such a procedure should be effective, fair equitable, timely and not prohibitively expensive. Dutch legal practice is not in compliance with this right of the public concerned to a review of substantive legality, nor does that practice meets the requirement of fairness. In essence this results from a high degree of judicial passiveness by the courts with respect to the facts of a case and from the courts' most profound respect for the way in which authorities exercise discretionary powers.

52. The absence of adequate review of substantive legality is confirmed by research on judicial decisions on wind power and wind farms carried out by Marjolein Geling.[26] She analysed 67 judicial decisions on plans for wind farms and shows that ultimately just fifteen decisions were upheld. However, in six of those fifteen cases the court allowed the legal consequences of the disputed administrative decision to stand, while in the other nine cases the procedural defect that led to annulment was allowed to be remedied.

2. Judicial assessment of the facts

53. Expert knowledge is crucial in any legal proceeding concerning wind power and wind farms. For example, calculations of noise exposure and shadow flicker are required to determine whether turbines meet statutory standards and norms, visualisations and assessments of external appearances must be prepared to establish whether legal requirements of a spatial nature are met and the importance of ecological, historical, architectural or landscape values must be assessed as possible constraints on the building of wind farms.

54. Broadly speaking, in Netherlands case law it is accepted that a public authority may rely on an expert report in taking a decision, even if the report was commissioned by the applicant of a permit. Anyone who wishes to challenge before a court of law the findings of an expert is therefore advised to provide contrary evidence by an expert. However, even then it is neither easy nor straightforward for the public to challenge the facts as accepted and interpreted by a public authority. A few cases to illustrate the point.

- Supported by a scientific study of the University of Groningen and the University of Gothenborg appellants in *Windpark Duiven*[27] argued that the noise of wind turbines is of a tonal and pulsating character and that for this reason stricter norms were called for. The municipality submitted to the court a contrary study by the Ministry of Transport, Public Works and Water Management. Without any further explanation, the Administrative Law Division of the Council of State accepted the municipality's interpretation of the facts.
- The decision in *Windpark Tolhuislanden*[28] contains a similar discussion with a similar outcome. Again, the Administrative Law Division opted for the authority's interpretation of the facts although the obvious step to resolve the matter in dispute would have been to order one or both parties to submit additional evidence or, alternatively, to appoint an expert of its own.
- In *Windpark Duiven* (as in several other cases) the municipality and the developer of the wind farm project argued that noise standards and norms could be satisfied by '*reducing' the output of the turbines where necessary*.' Although appellants produced contrary evidence, the Administrative Law Division concluded without further ado: *'(..) there is no reason to conclude that there is no ground for the view that there is serious doubt whether the noise standards and norms set out in the Activities Decree can be satisfied.'*

55. The judicial decisions outlined above (and others) are typical of the passive attitude of Netherlands administrative law courts. They allow themselves to be guided (sometimes blindly) by the facts as presented and interpreted by public authorities which in turn rely (sometimes blindly as well) on experts contracted by the developers of wind farm projects as these in actual fact write the environmental impact assessment on which public authorities rely. Objections - even when based on contrary evidence - are brushed aside, often with no

[26] 'Fighting against a wind farm: a losing battle' ['*Vechten tegen een windmolenpark. Een kansloze strijd?*'], August 2013 (final thesis University of Groningen [*Rijksuniversiteit Groningen].*
[27] ECLI:NL:RVS:2011:BT2817.
[28] ECLI:NL:RVS:2012:BV0563.

more than the observation that the appellant has failed to sufficiently demonstrate that his or her view of the facts is correct.

56. A court of law that takes its dispute-settling responsibility seriously should carry out - directly or indirectly - its own inquiry into the facts of a case if these facts are in dispute. In practice, however, if an appellant questions an authority's presentation and interpretation of the facts, Netherlands administrative law courts most rarely challenge the view of the public authority concerned.

57. This passive attitude is remarkable given the fact that the legislator of the General Administrative Law Act took the view that an active administrative law court should strive to establish the substantive truth.[29] This principle of an active court of law is based on 'compensation for inequality', which traditionally is seen as an important feature of administrative procedural law in the Netherlands. The term 'compensation of inequality' refers to the responsibility a court of law has to assist citizens, for example by supplementing facts where necessary. Section 8:69 General Administrative Law Act explicitly provides the courts with the power to do so. Compensation for inequality should be regarded as one of the ways to give meaning and substance to the requirement set out in article 9, paragraph 4, of the Convention: that judicial review must be 'fair'.

58. The above characterization of the practice of Netherlands administrative law courts on the facts of a case - passive and no compensation for inequality - has also been confirmed by empirical research in which the Administrative Law Division of the Council of State was characterized as an entity that reviews the facts of a case marginally with an 'easy-does-it' attitude[30] and that does not make any serious attempt to find the truth as to how matters really are. The researchers conclude: *'Empirical studies have primarily shown that there exists disagreement between parties on the facts in approximately 90% of the proceedings that are brought before an administrative law court at first instance. It appears that the courts adopt a reluctant attitude in this discussion, contrary to what might be expected of them in view of the basic principles underlying the procedural law aspects of the General Administrative Law Act. Courts only make very limited use of the possibilities they have to inquire about the relevant facts of a case. (..).*[31] Today this characterisation is still as valid as it was then.

59. The practice outlined above, continuing to date, is not in compliance with the right of the public concerned to a review of the substantive legality of environmental decisions under article 9, paragraph 2, of the Convention. Such a review should also comprise a review of the accuracy of facts,[32] which implies that a court of law has to develop an opinion of its own and may not rely solely on the facts as presented and interpreted by public authorities. In essence, this is also the opinion of the European Court of Human Rights as is demonstrated by its case law on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - a provision that is comparable to article 9, paragraph 2, of the Convention.[33]

3. Judicial assessment of the merits

60. Respect for the discretionary powers of public authorities, exercised by them on the basis of political considerations, is a basic assumption underlying the practice of Netherlands administrative law courts. As a result, administrative courts only intervene if public authorities either exceed the boundaries of their discretionary powers or act contrary to the law.

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[29] Parliamentary Papers II [*Kamerstukken II*], 1991/92, 22 495, no 3, page 32 and page 36 et seq.

[30] This characterization comes from L.J. Damen, as cited by R.J.N Schlössels in: 'Administrative Law of Evidence: Legislator or Court of Law' ['*Bestuursrechtelijk bewijsrecht: wetgever of rechter*'], VAR-series 142, 2009, pages 37, where one can also find records of this empirical research in the footnotes.

[31] T. Barkhuysen, L.J.A Damen et al, 'Finding of Fact in Appeal Cases' ['*Feitenvaststelling in beroep*'], Den Haag 2007, xviii et seq.

[32] Cf. Communication ACCC/C//2008/33, 125.

[33] ECHR 17 December 1996, (*Terra woningen*). no 20641/92.

61. The highest administrative law court of the Netherlands, the Administrative Law Division of the Council of State, begins every decision on spatial zoning plans with the following mantra: *'In determining a zoning plan the [town or city] council has discretionary powers to designate such uses and provide such regulations as the council deems necessary from the point of view of proper spatial planning. The Administrative Law Division reviews such decisions restrictively, which means that, on the basis of the grounds of appeal, the Division assesses whether there has been reason for the view that the council could not have reasonably taken the position that the plan is designed for the purpose of proper spatial planning. The Division furthermore assesses on the basis of the grounds of appeal whether the disputed decision has been prepared or taken in violation of the law.'* The same restrictive review also applies to other planning decisions or decisions on licenses, permits and exemptions, such as a construction and environmental permit [*omgevingsvergunning*].

62. Netherlands administrative case law is most consistent: an administrative law court only intervenes when a public authority could not have reasonably taken the decision in dispute.[34] The terms 'manifest unreasonableness' or 'arbitrariness' are also used. This implies a most restrictive approach to judicial review - an approach based on a particular interpretation of section 3:4, subsection 2 of the General Administrative Law Act. This subsection states that '*the adverse consequences of an order for one or more interested parties may not be disproportionate in relation to the purposes served by the order*'. A few cases to illustrate how narrowly administrative law courts interpret this provision.

- In *Windpark Noordoostpolder*[35] the appellants argued on appeal before the Administrative Law Division that the project's benefits and need were questionable. After a brief survey of the general objectives pursued by the government in relation to wind power the Division considered that the arguments put forward by the appellants '*do not give ground for the opinion that the ministers should not have referred to the aforementioned basic premises when adopting the government-imposed zoning plan*'. And on the appellants criticism that the farm's contribution to national energy supply would be minimal:*'(..) the Division considers that, be that as it may, the ministers in this case could reasonably consider important the factor that the wind farm would make a considerable contribution to achieving the objectives of sustainable energy.'* In summary: *'In view of the foregoing, the ministers could reasonably assume the benefits and need of the plan.'*
- In *Windpark Ecofactorij*[36] appellants argued that the distance between the turbines and their homes was too small and that this did not comply with the Businesses and Environmental Zoning Brochure [*Brochure Bedrijven en Milieuzonering*].[37] The Administrative Law Division dismissed the argument on the ground that the distances in the Brochure were 'guidelines'. It also pointed out that the Brochure only provides guidelines for wind turbines with a rotor diameter of 50 metres, in which case a distance of 300 metres should be observed. According to the Division, the fact that the case concerned wind turbines with a rotor diameter of 90 metres is no reason to conclude '*that a distance of 320 metres between said wind turbines and the nearest residential buildings is unacceptable*'. This demonstrates how reluctant administrative law courts are to critically review the positions taken by public authorities. After all, it is most plausible that a wind turbine with a 90-metre rotor diameter causes more exposure to noise and shadow flicker over a far larger distance than a wind turbine with a rotor diameter of almost half the size.
- The decision in *Windpark Neeltje Jans*[38] clearly shows that the basic premise of compensation for inequality - one of the manifestations of the 'fairness' required by article 9, paragraph 4, of the Convention - is systematically ignored by Netherlands administrative law courts. The operator of a nearby theme park argued that the wind turbines would cause annoying shadow flicker and that stricter norms should be imposed to

[34] Administrative Law Division 9 May 1996, AB 1997, 93, ABKlassiek, Deventer 2009, page 417.
[35] ECLI:NL:RVS:2012:BV3215.
[36] ECLI:NL:RVS:2011:BU7930.
[37] A brochure of the Association of Netherlands Municipalities [*Vereniging van Nederlandse Gemeenten*] (VNG) that provides guidelines based on expert research and opinions on the distances to be observed between activities and environmentally sensitive objects. Although without statutory status, these guidelines are usually applied.
[38] 21 November 2012, ECLI:NL:RVS:2012:BY3735.

protect his employees from the effects of shadow flicker. The Administrative Law Division dismissed this argument because the theme park did not fall under the statutory definition of a sensitive object. In itself, this view is correct, but the Division did not consider that the operator's argument implied that the zoning plan is disproportionately detrimental to the work environment of its staff on the site and that, for this reason, it is inconsistent with 'proper spatial planning'.

63. Above (paragraph 57) it was mentioned that the legislator takes the view that an active administrative law court should strive to establish the substantive truth. It was also mentioned that section 8:69 of the General Administrative Law Act gives an administrative law court the authority to supplement the facts in dispute. That section also obliges the courts to supplement grounds of appeal. Which is precisely what de Administrative Law Division failed to do in the *Windpark Neeltje Jans* case, not by way of exception or error, but as a consequence of the courts' systematic reluctance to judge the merits of administrative decisions. And this not as the inevitable result of Netherlands administrative procedural law, but as a result of the interpretation of that law by the courts themselves. A more active attitude required by the fairness principle of the Convention is therefore very well possible.

64. The way Netherlands administrative law courts deal with manifest unreasonableness (the prohibition of arbitrariness) is quite similar to the so-called Wednesbury test, a test applied by courts of law in England and Wales that results in the annulment of an administrative decision if it is so unfair that no reasonably acting public authority could have taken the decision. In earlier decisions Your Committee has taken the view that this criterion may not be in compliance with the requirements of the Convention regarding the review of substantive legality.[39] Your Committee also stated that a proportionality test (review of proportionality) could well be more adequate under the Convention.[40] Considering its wording, the above-cited section 3:4 subsection 2 (paragraph 62) of the General Administrative Law Act does not preclude such a review of proportionality by Netherlands administrative law courts. However, in practice, Netherlands administrative law courts apply a test similar to the Wednesbury test. Administrative law courts therefore only assess whether or not a decision is manifestly unreasonable. In practice, this stricter standard has led to the creation of a practice in which administrative law courts approve a choice or decision of public authorities regardless of how disproportionate it may turn out for certain interests.

65. Case law shows that administrative law courts invariably review the outcome of the balancing of interests by public authorities so marginally that these administrations have in fact a free rein - 'anything goes'. In effect, the courts refuse to carry out a review of the substantive consideration on which an authority bases its decision. As a result, it is pointless to put forward any grounds of appeal to the effect that the interests of local residents were ignored by the public authority, that a wind farm conflicts with 'proper spatial planning' or, for example, leads to an environment that is not adequate to health and well-being as stipulated in article 1 of the Convention. In the Netherlands going to court on substantive aspects and issues is pointless. For this reason, the practice of judicial review by Netherlands courts is systematically inconsistent with the Convention, in particular its requirement that a court reviews the substantive legality of environmental decisions (article 9, paragraph 1). Essentially, the requirement of 'fairness' contained in article 9, paragraph 4, remains unfulfilled.

66. Support for this conclusion may also be drawn from a ruling by the European Court of Human Rights, dated 2 November 2006, on article 8 of the ECHR. This article embodies to a degree the fundamental right to live in a healthy environment, which makes this article similar to article 1 of the Aarhus Convention. In its ruling, the Court's considers: *'(..) the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.'*[41]

[39] ACCC/C/2008/33, 125 (for a further description of the Wednesbury test, see considerations 86 to 91).
[40] Ibidem, consideration 126
[41] Giacomelli vs Italy, 59909/00.

V. GENERAL RULES AND REDUCTION OF RIGHTS

1. In short

67. The most important environmental effects of wind turbines for people living in the vicinity of wind farms - noise and shadow flicker - are subject to maximum limits set forth in statutory provisions laid down in the Activities Decree (article 3.14a). Wind turbines are only allowed if the noise exposure of surrounding homes does not exceed Lden 47 dB and Lnight 41 dB. These are year-average norms, implying that, within the same year, periods with a high level of noise may be compensated by periods with no or little noise. As to shadow flicker, wind turbines may cause shadow flicker on a home for a limited number of hours in the course of a full year.

68. The two most important environmental effects for people living in the vicinity of a (planned) wind farm are therefore regulated by generally binding statutory provisions, implying that public participation or judicial review is not possible. This amounts to a reduction of rights compared with the situation when the Netherlands ratified the Convention as at that time noise regulations were adopted on a case-by-case basis allowing public participation and judicial review. This is not in compliance with the Convention's requirement that decisions with a substantial impact on the environment must involve effective public participation (article 6, paragraph 4) and subsequently be subject to judicial review (article 9, paragraph 2). It is also contrary to a 2005 Recommendation of the Parties to the Convention on the protection of existing rights.

2. Impact on public participation

69. It is possible to take the view that the above problem is mitigated by the Convention's obligation to offer public participation in the preparation of, in brief, (secondary) executive regulations on environmental standards and norms. Article 8 of the Convention stipulates that for these regulations Parties must provide best efforts to '*promote effective public participation at an appropriate stage, and while options are still open*'. In the Netherlands, this provision has been implemented in section 21.6, subsection 4 of the Environmental Management Act that stipulates that drafts of an Order in Council must be open for public review for at least four weeks. This form of public participation has also been arranged for the noise and shadow flicker regulations in question.

70. However, for public participation to be effective, it is essential that - in compliance with article 5, paragraph 2, of the Convention - all relevant facts and data for the assessment of the intended decision are made available to the public in a transparent and accessible way. As shown in paragraph 12 et seq., this requirement has not been satisfied by the Netherlands government as far as noise standards and norms are concerned. On the contrary, the government misled the public about the reasons for, and level of protection of, these standards and norms. Moreover, article 6 of the Convention, unlike article 8, sets forth mandatory and detailed rules for public participation, both in relation to the information to be supplied about an intended activity and in relation to the organisation of the public participation as such. By contrast, article 8 has been very cautiously drafted and does not offer safeguards regarding public participation similar to those offered by article 6. For this reason, public participation provided for in article 8 cannot be regarded as an alternative to public participation under article 6.

71. By regulating exposure to noise and shadow flicker in statutory law (the Activities Decree), the Netherlands gives the public concerned very little opportunity, if any, for public participation. As a result, only those environmental effects of wind farms that have not been regulated by law (in fact just the effects of a wind farm on the landscape and nature) may still be addressed in a public participation procedure. It is inconsistent with the Convention to withdraw the two issues most crucial to people living near wind farms (exposure to noise and shadow flicker) from decision-making by local authorities on a case-by-case basis and, accordingly, from public participation.

72. This is a fundamental issue as it relates to the overarching objective of the Convention: that a person may exercise his or her right '*to live in an environment adequate to his or her health and well-being*' (article 1). Precisely on the two issues that are most crucial to the health and well-being of people living near a wind farm, the Netherlands has denied public participation in decision-making by regulating noise and shadow flicker in statutory law. The decision to do so was taken in 2010/2011, that is several years after the ratification of the Convention by the Netherlands in 2004. Accordingly, a reduction of rights took place.

3. Impact on access to justice

73. Decision-making by the competent authority on exposure to noise and shadow flicker has become quite simple since 2011: if the initiator of a plan convinces the public authority in charge that the wind farm can meet the statutory standards and norms, no further action or decision is needed. The same simplicity applies to judicial review: an administrative law court may not test whether in a particular case the applicable standards and norms are appropriate considering all relevant interests and facts. The law is the law.

74. As was mentioned above (paragraph 23, second bullet point) municipalities may impose stricter norms in case of 'special local circumstances' (article 3.14a, subsection 3 of the Activities Decree). However, the exercise of this option is at the discretion of the municipal authority concerned - a discretion that is very difficult to challenge in view of the extreme reluctance of administrative law courts to review the merits of an administrative decision (paragraph 60 et seq.). Also, the government puts pressure on municipalities to refrain from adopting stricter norms (paragraph 16). That, as a result, the public cannot take legal action on the standards and norms for noise and shadow flicker caused by a wind farm is also quite unique: for all other industrial installations with a high noise profile, the public has the right to submit a complaint to a court of law. Wind farms are the exception.

75. Hypothetically, there is the option of 'exceptive review'. Under exceptive review a court addresses the question whether a generally binding rule should be set aside in a specific situation (such as a particular wind farm) as in this particular situation the rule is unlawful. Under established case law, administrative law courts are extremely reluctant to carry out such a review. Exceptive review has been tried in connection in the case of *Windpark Noordoostpolder* by arguing before the Administrative Law Division of the Council of State that the new noise standards and norms should not be applied on the grounds of their being unlawful. The Division did not honour this argument considering that it must take a most restrictive attitude on exceptive review.[42]

4. Enforcement of compliance with standards

76. Before the adoption of statutory norms in the Activities Decree of 2011, local residents could ascertain for themselves whether non-compliance with the norms existed by carrying out a direct immission measurement on the outer wall of their home. In case of non-compliance he or she could request the competent authority to take enforcement measures against the operator of the wind farm. He or she could also opt to bring an action against the operator of the wind farm before a civil court on the ground that the operator had acted illegally or unlawfully. This do-it-yourself option no longer exists: *'Enforcement by means of direct immission measurements is virtually excluded because only the Lden-norm is used. (...). Emission characteristics provided by the manufacturer of a wind turbine serve as the starting point for an acoustic investigation.'*[43]

77. Nowadays local residents are therefore completely dependent on the willingness of public authorities to enforce noise standards and norms, while these authorities must rely on data provided by the manufacturer of the turbine(s). On the basis of those data experts use a complicated algorithm to calculate the level of noise exposure on a home. These calculations do not take account of local circumstances. Accordingly, even if a public authority is willing to carry out an investigation when a local resident complains about excessive noise exposure, that

[42] 8 February 2012, ECLI:NL:RVS:2012:BV3215 and 21 November 2012, ECLI:NL:RVS:2012:BY3691.
[43] Bulletin of Acts and Decrees 2010, 749, page 11.

person has no choice but hope that the authority is willing to do something, that the data of the manufacturer are correct and that local circumstances do not differ too much from the algorithm used in the calculations.

78. The conclusion is that people living near a wind farm are totally side-lined with respect to the question whether noise standards and norms are being observed and whether enforcement by local authorities is appropriate. Article 9, paragraph 3, of the Convention requires that the public has access to a judicial procedure '*to challenge acts and omissions by private persons and public authorities which contravene the provisions of its national law relating to the environment*'. This implies that environmental standards and norms should be drafted in such a way that members of the public - if necessary with the help of experts - are able to establish for themselves (if necessary with the help of experts of their own) whether there exists an infringement of a particular standard or norm. The noise standards and norms that apply to wind turbines in the Netherlands do not satisfy this requirement.

VI. REQUESTS TO THE COMMITTEE

79. The NLVOW submits the following requests to Your Committee:

A. To establish that the practice and procedures of the Netherlands as outlined above in relation to access to information, participation in decision-making and access to justice with regard to wind power and wind farms are not in compliance with the Convention and, more particularly, are inconsistent with: article 3, paragraph 2; article 5, paragraphs 2 and 7; article 6, paragraphs 2, 4 and 8; article 7, the first three sentences; article 8; and article 9, paragraphs 2 to 4.

B. If and in so far as Your Committee grants this request, we hereby request to recommend to the Netherlands to take the following actions:

1. To organise the furnishing of information on wind power and wind farms to the public in such a way that it does justice to both the advantages of, and objections against, wind power and wind farms by, for example, having information assessed by an independent and broadly constituted forum of neutral experts.

2. To re-organize decision-making on wind power plans and programmes, in particular on the contribution of wind power to sustainability objectives, and on the locations of the wind farms that are needed for this purpose, by ensuring:
   (a) that choices to be made by public authorities in these areas are presented to the public without excluding any options in advance;
   (b) that subsequently due account is taken by public authorities of the input of the public when re-considering all choices that were previously made; and
   (c) that, finally, the results of the above re-considerations are incorporated in all plans and programmes that were previously adopted by the government.

3. To change relevant legislation and administrative practice to the extent that is needed to ensure that public participation on wind power and wind farms no longer is a pro forma exercise that takes place when all decisions that matter have already been made and set in administrative agreements, but, rather, that it takes place at a time when all options are still open.

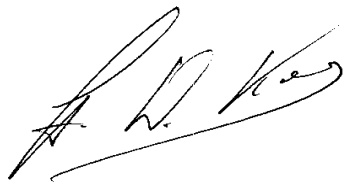
4. To change administrative procedural law to the extent that, in compliance with the Convention and with due respect for constitutional relationships, administrative law courts are obliged to review the substantive legality of decisions on wind power and wind farms.

5. To amend the rules and regulations applicable to wind turbines and wind farms so that in specific cases the norms for exposure to noise and shadow flicker may be tailored to local circumstances and conditions.

6. To amend the noise standards and norms for wind turbines and wind farms so that local residents are able to determine themselves whether or not these standards and norms are complied with.

7. To implement or propose every other measure that Your Committee considers fitting to ensure the Netherlands complies with the Convention.

Schettens, the Netherlands, 9 November 2015
On behalf of the NLVOW,



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