Response to questions from the Aarhus Convention Compliance Committee concerning communication ACCC/C/2015/133

Q:1. Could the communicant have brought a challenge under the General Administrative Law Act with regard to the following decisions, and if so, please explain under which provisions:
a. The 2010 Action Plan?
b. The 2014 National Policy Strategy for Onshore Wind Power?
c. The Energy Agreement dated 6 September 2013?

Access to justice is addressed in section D.4 of the initial statement submitted by the Government of the Netherlands.

Regarding the above-mentioned measures, the communicant could have challenged them by challenging a decision based on them. In line with the Aarhus Convention, the communicant can file actions against decisions on specific activities (for example local land-use plans permitting wind turbines) in the administrative courts (section 8.1 of the General Administrative Law Act (*Algemene wet bestuursrecht*)). Thus, the communicant could have challenged a decision based on the 2010 Action Plan, the 2014 National Policy Strategy for Onshore Wind Power or the Energy Agreement, and requested the court to decide whether the decision was wrongly based on these underlying measures because of an alleged breach of a higher rule of law or a general principle of law (indirect review). In such a case the court would not deliver a direct judgment concerning the lawfulness of the underlying measures, but could conclude that the contested decision should not have been based (either wholly or in part) on these measures and that the contested decision therefore lacks adequate reasoning.

The communicant could not have brought a direct challenge under the General Administrative Law Act with regard to the above-mentioned measures without challenging a decision based on them.[1] In these circumstances, however, as follows from the report of the Compliance Committee in case 2008/31,[2] the incidental challenge in the context of the review of a subsequent 'downstream' decision described above is adequate.

Q:2. Are there any challenges under the Civil Code (Burgerlijk Wetboek) that could have been utilized by the communicant with regard to each of the above decisions? If yes, what would the approximate costs of bringing such a challenge (filing fees etc.) have been?

Legal proceedings can always be brought to challenge the lawfulness of government action, under either administrative law or private law (or both); the administrative route is more usual in environmental matters in the context of decisions based on the measures (see question 1). Especially in situations where the option of instituting administrative proceedings is not available (for example if the applicant cannot be deemed to be an interested party (*belanghebbende*) in the decision at issue), proceedings are brought under private law. Access to a civil court is in compliance with the Aarhus Convention, the European Convention on Human Rights and the law of the European Union. It is accepted as an effective form of legal protection.[3]

The communicant has the opportunity to file a complaint for tort with a civil court (article 6:162, paragraph 1 of the Civil Code) concerning any aspect of the 2010 Action Plan, the 2014 National Policy Strategy for Onshore Wind Power or the Energy Agreement that he considered unlawful. The claimant in such a situation has at their disposal all the means available under civil procedure, such as the examination of witnesses, expert opinion, site visits, the submission of documents

[1] Since the NLVOW was not established until 19 September 2013, it could not in any case have challenged the 2010 Action Plan when that plan was adopted.
[2] ECE/MP.PP/2017/40, consideration 39.
[3] Judgment of the Council of State of 2 May 2012 (ECLI:NL:RVS:2012:BW4561, no. 201105967/1/R1).

(seizure of evidence), etc. The claimant must make a plausible case that they have an interest in the civil action (article 3:303 of the Civil Code) and possibly – if the claimant is an NGO – that they may act on the basis of article 3:305a of the Civil Code.

The civil court assesses the admissibility of the action with reference to whether the remedy could also be obtained by means of administrative proceedings. The civil court could declare the case inadmissible if the claimant could also have raised the question of law in the context of an indirect review by an administrative court (see question 1). In those circumstances it is up to the claimant to show that indirect review by an administrative court would be too narrow to do justice to the request to assess the underlying documents of the contested decision. The claimant would therefore have to show/establish satisfactorily that any proceedings before the administrative court would not constitute a sufficient judicial review. This does not happen often. If the option of instituting proceedings before an administrative court is not available, the option of bringing proceedings under private law always remains: in that manner, legal proceedings can always be brought at either an administrative or a civil court. The intensity of the review conducted by the civil court is not significantly different compared to the administrative procedure.

The civil court may reach the decision that the contested government action was (wholly or in part) unlawful. This can result in a declaratory judgment of unlawfulness, an order (to do something or refrain from doing something) and/or an order for damages. This is not a hypothetical procedure, as shown by several Dutch civil-law cases that have led to such outcomes, and it has also been used successfully by claimants in environmental matters.[4]

A civil action can entail costs, notably in respect of legal representation[5] and court fees.[6] Court fees and the lack of completely free legal representation in civil cases have not in themselves been found to contravene, *inter alia*, article 6 (right to a fair trial) of the European Convention on Human Rights.[7]

- The level of court fees is related to a number of factors: the case itself, the claimant's income and whether the claimant is a private individual or an organisation (legal person). A civil action brought before a district court (*rechtbank*), but not in a case heard by a limited jurisdiction judge (*kantonrechter*), entails court fees of €626 for a non-natural person in a case of indeterminate value. The fees payable by a natural person in an action of this kind are €291, or €79 for people on low incomes.[8]
- Rates for legal representation (in both civil and administrative proceedings) can vary and the final costs also depend on how the case unfolds. Depending on the applicant's income and assets, they may apply for legal aid to help pay for legal representation. A legal person bringing a civil action must make a contribution of its own of €823 for each stage in the proceedings.[9] An exception has been made for nature and environmental groups with legal personality (whose applications satisfy the requirements of the Legal Aid Act (*Wet op de rechtsbijstand*)): there is an ability-to-pay threshold of €10,000 and a 75% reduction in the contribution they have to make themselves. This means that small environmental groups with legal personality in fact pay a contribution of €205.75 for each stage in the proceedings.

If the civil court decides in favour of the communicant, the administrative authority against which the case was brought will in principle be ordered to reimburse their costs in the action

[4] See for example ECLI:NL:RBDHA:2015:7145.
[5] Although interim injunction proceedings for example may be instituted without any obligation to engage legal representation.
[6] Proceedings under administrative law also entail court fees.
[7] ECtHR 19 June 2001, *Kreuz v. Poland*, ECtHR 2001, 54; ECtHR 9 October 1979, *Airey v. Ireland*, NJ 1980, 376.
[8] https://www.rechtspraak.nl/Uw-Situatie/Onderwerpen/Kosten-rechtszaak/Griffierecht/Paginas/Griffierecht-civiel.aspx
[9] Article 2, paragraph 5 of the Legal Aid (Own Contribution) Decree.

(*proceskostenveroordeling*). The order covers the successful party's court fees and a flat-rate reimbursement of their legal representation costs.

Q:3. Would the communicant have been able to challenge the alleged lack of quality of the information provided online?

If a member of the public is of the opinion that the information provided on the website www.bureau-energieprojecten.nl about environmental projects being coordinated by central government is not correct or complete, they can contact Bureau Energie Projecten by email or by telephone, as stated on the website, and raise their concerns. If the matter is not handled satisfactorily, they can subsequently register a complaint by filling in the contact form on the website or by sending a letter to Bureau Energie Projecten, as also stated on the website.

Furthermore, on the basis of section 8 of the Government Information (Public Access) Act *(Wet openbaarheid van bestuur*), the competent authority is obliged to provide, of its own accord, information on its policies and the preparation and implementation thereof, whenever the provision of such information is in the interest of effective, democratic governance. If a member of the public is of the opinion that information provided by administrative authorities (*bestuursorganen)* is not complete in this respect, they can ask the administrative authority to provide the missing information on the basis of the Government Information (Public Access) Act. The provisions of the Aarhus Convention have been incorporated into – *inter alia* – the Government Information (Public Access) Act, leading to a broader obligation to disclose information on environmental matters.

A member of the public can also inform the National Ombudsman if they believe that the information provided online by the government is of poor quality. The National Ombudsman can (either on the basis of a complaint or on his own initiative) start an investigation into the manner in which public sector authorities fulfil their statutory responsibilities, and write a report containing recommendations for the competent authority.

As described in the answer to question 1, a perceived problem concerning underlying information can be addressed in actions against decisions on specific activities. If documents which are necessary to assess a draft decision (like a local land-use plan) are not made available online or not made available correctly, interested parties, such as the communicant, can address this as a breach of section 3:11 of the General Administrative Law Act in the action that they can file against the contested draft decision.