REPLY OF THE NLVOW TO QUESTIONS OF

THE COMPLIANCE COMMITTEE OF THE

AARHUS CONVENTION

A. The context

Before addressing the specific questions of the Committee it may be useful to briefly outline the procedure that must be followed in the Netherlands by a competent authority when a private party seeks permission to build a wind farm. That procedure provides, after all, the context of the answers to be given below by the NLVOW to the questions of the Committee.

A decision on permitting the building of a wind farm is usually prepared and made by a competent authority in accordance with Section 3:4 of the General Administrative Law Act. This implies that the procedure begins with a preparatory stage ending with a draft decision or set of decisions. In this preparatory stage the competent authority often has extensive contacts with the party seeking permission to build the wind farm, but the public has no right of participation and is in most cases not consulted at all. The draft decision(s) at the end of this stage is (are) usually most detailed and specific (often running into hundreds of pages) and is (are) in fact most often identical to the final decision emerging from the second stage.

In this second stage the draft decision(s) is (are) made available to the public and the public has the right to submit comments on the draft decision(s) to the competent authority, most often a municipality or a provincial governments, but for very large wind farms, the national government. After reviewing the comments received from the public the competent authority takes the final decision(s). In our Communication we submit and show that for wind farms these final decisions are, virtually without exception, materially identical to the draft decision, implying that public participation has no or very little effect.[1]

After the final decision(s) the public has the right to appeal to the Council of State, in the case of wind farms acting as a single and final court of law.[2]

Resulting from a request under the Open Government Act, the picture on the next page illustrates how frequently and intensively a competent authority usually communicates with the private party seeking permission to build a wind farm in the preparatory stage when all material decisions are made and how little, if any, communication there is at this stage with the public. The picture shows the volume of documents exchanged in the preparatory stage between a competent authority and the private party seeking permission to build a wind farm and the volume of documents between that authority and the public. And, no, the picture does not refer to an exceptional situation, but to what is typical for decision-making on all wind farm projects.

To the left: all documents exchanged in a two-year period between the competent authority (in this case the Province of Friesland) and the private party concerned and to the right all communication between the Province and the general public.

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[1] See Chapter III, section 3.2. of the Communication of the NLVOW of 9 November 2015. Also, see the study mentioned in paragraph 46 of the Communication.

[2] A rule introduced in 2010 by the "Crisis and Recovery Act" (Crisis en Herstelwet) to expedite decision making on large infrastructural projects so as to combat the economic crisis of that time.

All documents exchanged in the period 2015 to mid-2017 between the Province of Friesland and the parties seeking permission to build a wind farm.

All documents exchanged in the period 2015 to mid-2017 between the Province of Friesland and the general public, including letters, etc. from the public.

B. Question 4

Question 4 reads as follows:

> *4. Please provide your comments on the submission by the Party concerned that NLVOW could have brought a challenge against a governmental decision on a specific wind farm project but did not do so. In particular, please provide your views as to whether there would be anything that would prevent NLVOW bringing a claim to the Council of State to annul a decision on a wind farm in the same way as occurred in the Council of State's judgment of 27 May 2015 (ECLI:NL:RVS:2015:1621) on the wind farm "Den Tol" in Netterden (see paras. 7 and 8 of the response to the communication by the Party concerned)?*

The answer to this question has all to do with the difference between theory and practice.[3] It is true that <u>in theory</u> for each wind farm project the NLVOW could have challenged in court any governmental decision to approve such a project, the Council of State specifically. That the NLVOW decided not to pursue this option <u>in practice</u> is based on the fact that in numerous decisions on similar or identical cases the Council of State has ruled consistently that the Netherlands legal regime on public participation and its application in practice are in accordance with the requirements of the Aarhus Convention. See for example the decisions of the Council of January 19, 2011(ECLI:NL:RVS:2011:BP1342), of September 16, 2015 (ECLI:NL:RVS:2015:2938 and of May 27, 2015 (ECLI:NL:RVS:2015:1702).

In all these decisions the Council of State held: (1) that the provisions of the Aarhus Convention had been correctly implemented in the appropriate Directive of the EU[4]; (2) that this EU Directive had been correctly implemented in Netherlands national legislation; and (3) that the provisions of national legislation had been correctly applied in practice. Any and all grounds of appeal that challenged this ruling have been consistently rejected, even if it was submitted by the applicant that both the Aarhus Convention and the 2011 EU Directive establish requirements in relation to the quality of public participation, whereas Netherland law and practice do not do so, merely providing a procedure without any requirements as to the quality of public participation. As a result, the Council of State has consistently rejected grounds of appeal to the effect that the public

[3] As also reviewed in Chapter IV, sections 2 and 3 of the Communication of the NLVOW of 9 November 2015.
[4] Directive 2011/92/EU of 13 December 2011.

has not had an opportunity "for early participation, when all options are open and effective public participation can taken place".[5]

Recent decisions of the Council of State - that is: after the NLVOW submitted is Communication to the Aarhus Convention Compliance Committee - confirm: (1) that any challenge against a governmental decision on a wind farm project on the ground of inadequate public participation would have been in vain; and (2) that that the NLVOW therefore rightly concluded that no effective national legal remedies were available to it (and the public at large). After November 9, 2015 (the date on which the NLVOW submitted its Communication), the Council of State issued several decisions in which it, once again, rejected any grounds of appeal based on the Aarhus Convention and its provisions on public participation. See for example the decisions on Wind farm Wieringermeer (May 4, 2016, ECLI:NL:RVS:2016:1228), Wind farm De Veenwieken (December 20, 2017, ECLI:NL:RVS:2017:3504), Wind farm Spui (January 17, 2018, ECLI:NL:RVS:2018:141), Wind farm Drentse Monden (February, 21 2018, ECLI:NL:RVS:2018:616) en Windpark Den Tol (March 14, 2018, ECLI:NL:RVS:2018:860).

The last decision is a sequel to the decision referred to in the question of the Compliance Committee and in the Communication by the Netherlands. As noted in that Communication, in its 2015 decision the Council of State annulled the governmental decision to approve the wind farm on the ground of non-compliance with the EU Habitats Directive. Apart from the fact that this is just about the only Council of State decision on wind farms with any substantive benefit for the applicant,[6] fact also is that in this case applicants did not submit any grounds based on the Aarhus Convention. However, in the follow-up case against a new (and corrected) decision to approve the wind farm applicant did submit that public participation did not meet the Aarhus requirements, but, as noted above, that ground for appeal was rejected in the decision of March 14, 2018.

Accordingly, in the end the Den Tol case also confirms that there simply is no point in challenging in a court of law governmental decisions on wind farms on the ground that public participation does not comply with the Aarhus Convention.

Summarizing the above, the NLVOW submits that it would have been pointless - and still is pointless - to appeal to the Council of State on the ground that the Netherlands legal regime on public participation and/or its application in practice are/is not in compliance with the Aarhus Convention. No national legal remedies were and are available to the NLVOW for as long as the Council of State maintains its consistent position that from an Aarhus perspective all is well with the Netherlands legal regime and its application in practice.

C. Question 5

Question 5 reads as follows:

> *5. Please specify the reasons why there is in your view "little chance of success" when bringing a claim against a final decision on permitting a wind farm alleging that the public participation procedure during the preparatory stages of the permitting procedure was inadequate (see para. 35 of your letter dated 23 November 2015)?*

Under article 6:3 of the General Administrative Law Act it is not possible to appeal to an administrative law court against any procedural decision taken by a competent authority in the

[5] Article 6, para. 4 for projects and by virtue of article 7 also applicable to plans and programmes.
[6] See Chapter IV of the Communication of the NLVOW of 9 November 2015.

preparation of a final decision.[7] Complaints against the manner in which a competent authority acts in preparing a draft decision - for example, by not providing the public any opportunity to participate - are therefore inadmissible and may only be advanced in an appeal against the final decision.[8] With very little chance of success as materially all major issues have already been decided in the draft decision(s) without public participation.

The Council of State has ruled consistently that it suffices when, at the end of the preparatory stage, the draft decisions are made available to the public and when the public has the opportunity to submit comments on these draft decisions to the competent authority. The Council attaches no weight to the fact that materially all decisions have already been made, often in great detail, in the preparatory stage when preparing the draft decisions in close consultation with the private party seeking permission to build a wind farm. Once again: there is no appeal on an administrative law court against whatever is done or not done by the competent authority in preparing a draft decision. See for example what the Council of State states in a decision of April 12, 2017 (ECLI:NL:RVS:2017:1036):

> *Providing public participation prior to making a draft zoning plan available to the public is not part of the procedures laid down in the Spatial Planning Act or in the Spatial Planning Decree. The manner of public participation prior to making the zoning plan available to the public can therefore have no effect on the legality of the zoning plan.* (translation by NLVOW)

Summarizing the above: the Council of State has consistently refused to review the manner in which competent authorities organize public participation, even accepting that there is no public participation when all material decisions are made, that is: in the preparatory stage ending with a draft decision or set of draft decisions. For the Council it suffices that the public can submit comments on a draft decision or set of decisions. Never did the Council examine the question whether or not this is in accordance with the requirements of the Aarhus Convention that the public must have an opportunity "for early participation, when all options are open and effective public participation can take place".[9]

D. Question 6

Question 6 reads as follows:

> *6. Do you agree with the statement of the Party concerned that, with respect to issues for which no complaint could be submitted to an administrative court of law, your organization could have filed a complaint for tort with a civil law court (see para. 9 of the response to the communication by the Party concerned)? Please give reasons for your answer.*

No, we do not agree. It is true that in the Netherlands legal system it is possible to seize a civil law court when there is no competent administrative law court. So, yes, in theory - once again - the NLVOW could have challenged wind farm plans, programmes and regulations in a civil law court, submitting that decision-making on these plans, programmes and regulations did not meet the requirements of the Aarhus Convention on public participation. However, in practice such action would have zero chance of success as civil law courts always follow the case law of administrative

[7] That is: in the preparatory stage as outlined above in paragraph A.
[8] At the end of the second stage as outlined above in paragraph A.
[9] Nor did it do so in relation to the requirements of article 6, para 4 of the 2011 EU Directive to the effect that: "The public concerned shall be given early and effective opportunities to participate in the environmental decision- making procedures .. when all options are open ... ".

law courts when deciding on issues that by their nature fall within the domain of administrative law.

Civil law courts recognize that in administrative law issues administrative law courts are in the lead and this is also true for any legal challenge based on the Aarhus Convention. As the Council of State has held consistently that the Netherlands legal regime on public participation and its application in practice are in compliance with the Aarhus Convention, chances are nil that a civil law court would rule differently.

In this context it is also relevant that in an appeal to the Council of State an applicant may submit (if certain conditions are met) that a decision must be annulled on the ground that it is based on a plan, program or regulation that has been adopted in violation of a legal norm of a higher order. In a case against Wind farm Wieringermeer applicants submitted that the decision to apply a specific procedure[10] was illegal as it was based on earlier plans and programmes[11] that were established without public participation as required by the Aarhus Convention. The Council of State rejected this ground of appeal as in this case too it considered the Netherlands public participation regime and practice to be in accordance with the Aarhus Convention. No civil law court would rule differently if the NLVOW (or any other party) would have requested annulment of a wind farm decision on the ground that it is based on a regulation that violates the public participation requirements of the Convention.

The same holds true if the NLVOW or any other party were to seize a civil law court with a ground for appeal to the effect that a decision must be annulled as it based on incorrect and/or incomplete information. The Council of State did not accept that ground in several decisions. See for example, Wind farm Noordoostpolder, February 8, 2012, ECLI:NL:RVS:2012:BV3215, and Wind farm Drentse Monden en Oostermoer, February 21, 2018, ECLI:NL:RVS:2018:616). Once again, civil law courts are sure to follow those rulings.

Summarizing the above: as in administrative law matters civil law courts consistently (and understandably) follow the case law of administrative law courts and as that case law is quite clear on the question of whether or not the Netherlands legal regime and practices on public participation are in conformity with the Aarhus Convention, there is no point for the NLVOW to seize a civil law court. This regardless of the expenses (in civil law courts legal representation is obligatory) and efforts involved

E. Finally

If there is one common thread in the above answers, it is that in the Netherlands there is a huge gap between the legal remedies that are available <u>in theory</u> and the value of such remedies <u>in practice</u>.

Yes, the NLVOW could have seized the Council of State for each and every wind farm project on the ground that the competent authority concerned did not meet the public participation requirements of the Aarhus Convention, but what would have been the point in the face of consistent rulings of the Council that all is well in this land? Likewise, the NLVOW could have used

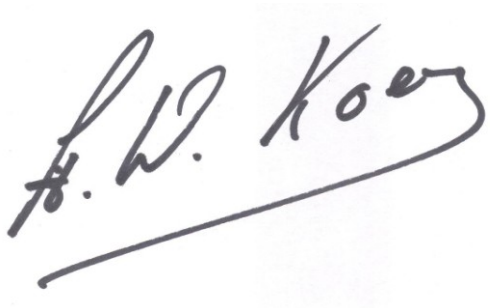
[10] The "Rijksinpassingsplan", a zoning plan imposed by the national government; see NLVOW Communication, footnote 24, p. 9.

[11] More specifically, the National Action Plan for Energy from Renewable Sources of 2010; (b) the National Policy Strategy for Onshore Wind Power of 2013; and (c) the National Energy Agreement of 2013; see NVOW Communication, Annex, p. 19.

every opportunity to engage a civil law court, but what would have been the point if these courts consistently follow the case law of administrative law courts, the Council of State in particular.

The NLVOW would surely have availed itself of any national legal remedy that offered any chance of success, but it refrained from pursuing a Don-Quichote-like strategy by going to court whenever this was possible in theory, even if there was no chance of success at all. This as such a strategy would not only result in wasting the (limited) resources of the NLVOW, but also as it would burden the court system with cases that are meaningless as their outcome is a given.

Hence, the NLVOW's Communication to the Compliance Committee of the Aarhus Convention as a remedy of last resort.



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