COMMENTS OF THE NLVOW ON THE REPLY

OF THE NETHERLANDS TO THREE QUESTIONS

OF THE COMPLIANCE COMMITTEE OF THE

AARHUS CONVENTION

A. Introduction

In our Memo of 3 April 2018 we attempted to answer as best as we could the Questions that the Compliance Committee had submitted to us in March. We ended that Memo with the observation that in procedures of the Netherlands for decision-making on wind farms there is a huge gap between the legal remedies that are available in theory and the value of such remedies to citizens in practice. The law as written down in legislation is quite different from what the public experiences in practice.

We find that observation confirmed in the replies given by the "Party concerned" (hereinafter: the Netherlands) to the Questions submitted to it by the Compliance Committee. As it did in relation to the NLVOW Communication of 9 November 2015, in its reply to the three Questions submitted to it, the Netherlands consistently refers to options and opportunities that are available in theory - that is: in the law as written down in legislation - and it hardly ever, if ever, concerns itself with the true value of these options and opportunities in practice - that is: for the public that is affected by government decisions on wind farms.

We find that dichotomy most relevant, not only for us, but also for the Compliance Committee. Most, if not all, core issues raised in our Communication concern the practices of the Netherlands in relation to decision-making on wind farms, rather than the formal legislation in relation to such decision-making. To us compliance with the Convention's provisions on public participation is something that must be achieved in the application of the law, in practice, rather than by just having Acts and other forms of legislation with the right legal texts. We are convinced that this view finds support both in the Convention itself, as well as in earlier decisions of the Compliance Committee.

Accordingly, our overall comment on the replies given by the Netherlands to the three Questions of the Compliance Committee is this: once again theory prevails over practice. See below for further details.

B. Reply to Question 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?

In its reply the Netherlands confirms that the NLVOW could not have brought a direct challenge under the General Administrative Law Act against: (a) the 2010 Action Plan; (b) the 2014 National Policy Strategy for Onshore Wind Power; and (c) the Energy Agreement dated 6 September 2013. On this point the Netherlands and the NLVOW are in agreement. However, once again the Netherlands points out that indirectly the NLVOW could have challenged these decisions by challenging in court a specific follow up decision by submitting that this specific follow-up decision must be annulled as it is based on an higher set of rules that are unlawful, being adopted in

violation of the Aarhus Convention.[1] The Netherlands then submits that in view of Report ECE/MP.PP/2017/40 of the Compliance Committee this form of "indirect review" meets the requirements of the Convention.

In reply we submit, first, that on this point the Report of the Compliance Committee is much more balanced and nuanced than the interpretation given to it by the Netherlands and, second, that the focal point of the NLVOW Communication is not the (theoretical) ability to challenge these (and similar) decisions in court, but: (a) the fact that all three decisions were adopted without adequate public participation as required by the articles 6 and 7 of the Convention; and (b) that administrative law courts, the Council of State in particular, have consistently ruled that the Netherlands practice of engaging the public only when all decisions that really matter have already been made, is in accordance with the Convention. The fact that there exists an option of "indirect review" does not have any practical effect or impact on that reality.

In support of this conclusion we also refer to Section V of our Communication, paragraph 75 in particular. Section V shows how extremely reluctant Netherlands administrative law courts are in reviewing the facts and the merits of (windfarm) cases before them, while paragraph 75 shows that this applies *a fortiori* to incidental/exceptive review. A more recent decision confirms that this is still the case. In our Memo of 3 April 2018, p. 5, second full paragraph (in which we reply to Question 6 of the Compliance Committee), we observe:

> *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 was illegal as it was based on earlier plans and programmes that were established without public participation as required by the Aarhus Convention.[2] 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.*

Summarizing the above: in its reply the Netherlands (once again) refers to an option that exists in theory, but that in practice offers no effective legal remedy. Also, that option has little to do with the issues that really matter in the NLVOW Communication to the Compliance Committee.

C. Reply to Question 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 cost of bringing such a challenge (filing fees etc.) have been?

We already addressed this issue in our Memo of 3 April 2018 under paragraph D, dealing with Question 6 of the Compliance Committee, and we stand with the observations made in that paragraph. Accordingly, while we agree with the Netherlands that in principle civil law courts may be seized to challenge the lawfulness of government action, we disagree with the Netherlands if it suggests that this mechanism meets the requirements of article 9, paragraphs 2 and 4 of the Convention.

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[1] In its reply the Netherlands refers to this mechanism as "indirect review", while the NLVOW Communication refers to "exceptive review"; see paragraph 75 of that Communication. Same thing - different terminology.

[2] Which were precisely the same three decisions as the decisions being discussed here.

In its reply to Question 2 the Netherlands sets out the parameters of a civil law procedure to challenge the lawfulness of government action in terms that appear to suggest that this procedure is quite common and easily accessible to any interested party. In our Memo of 3 April we show that this is not the case.

- First, as the Netherlands acknowledges, the civil law procedure is only accessible if there is no administrative law procedure. It follows from the reply of the Netherlands to Question 1 that the civil law option was and is therefore not available to the NLVPW. As the Netherlands observes in that reply, under administrative law the NLVOW could have used the administrative law mechanism of "indirect review" to challenge the lawfulness of the three decisions in question (the 2010 Action Plan, the 2014 National Policy Strategy for Onshore Wind Power and the Energy Agreement dated 6 September 2013). Accordingly, any civil law court would have declared the NLVOW inadmissible. As most likely the government itself would have argued forcefully before that court.
- Second, even if a most unlikely scenario were to happen and a civil law judge would admit the NLVOW, even then there would have been no chance of success given the fact that the Council of State has explicitly ruled that for the three decisions concerned the Netherlands public participation regime and practices are in accordance with the Aarhus Convention. See the quotation above at the end of paragraph B. No civil law court would deviate from that ruling.

That all this is not just theoretical speculation, but a fact of legal life in the Netherlands, is shown by a decision of the Netherlands Supreme Court, the highest court in civil law and criminal law cases. In a case submitted by the "Stichting Privacy First"[3] the Supreme Court declared[4] the Foundation inadmissible on the ground that citizens could challenge a refusal to issue a passport (if they refused to submit fingerprints) by arguing that the refusal was based on legislation that violated higher norms, that is: the European Convention on Human Rights and EU Directives on privacy. The availability under administrative law of indirect review therefore closed the door to review by a civil law court. If the NLVOW would nevertheless have attempted to challenge the lawfulness of the three decisions in question, there can be no doubt at all that the NLVOW too would have been declared inadmissible. The ruling of the Supreme Court in the Stichting Privacy First case is crystal clear and leaves no room for doubt.

As mentioned in the reply of the Netherlands, there is indeed one rather notorious case in which a private interest group used the civil law route to obtain a ruling that the government had failed to implement its international obligations.[5] However, crucial in this context is that for this particular subject matter there was and is no access to any administrative law court, be it directly or indirectly. Otherwise, the civil law court in question would never have heard the case given the Supreme Court ruling just mentioned.

The above suggests that from a NLVOW perspective the issue of the costs of a civil law procedure is rather moot and not really very relevant. Nevertheless, a few observations to make clear that on this issue as well the Netherlands reply presents a picture that is far too positive.

- First of all, the NLVOW is essentially an organization that represents the interests of people living in the vicinity of a wind farm, rather than a general nature and environmental organization. This makes it most unlikely that the NLVOW can claim the special reduction of

[3] The "Stichting" - a Foundation - challenged the lawfulness of a legal requirement to submit fingerprints when applying for a passport on the ground that this requirement was in violation of the European Convention on Human Rights and EU privacy rules.
[4] 22 May 2015, ECLI:NL:HR:2015:1296
[5] The "Urgenda case" in which the Urgenda foundation successfully argued that the government had not done enough to fulfill its international obligations to reduce CO2 emissions. See ECLI:NL:RBDHA:2015:7145

court cost to which nature and environmental organizations are entitled that is mentioned in the reply of the Netherlands.

- Second, legal aid financial support is available only if there is a reasonable chance of success. If one message emerges from the original NLVOW Communication, from the Memo of 3 April and from this Memo, it is that for the NLVOW there are in the Netherlands no effective legal remedies that offer a "reasonable chance of success". Applications for legal aid would therefore also have little chance of success.

If, then, the NLVOW itself would have to bear the costs of a civil law procedure to challenge the lawfulness of the three decisions concerned, the total bill would easily run into several 10.000 euro's just for a single procedure in the first instance.[6] That amount quickly doubles or triples if there is an appeal procedure and, ultimately, recourse to the Supreme Court. The NLVOW once requested a reputable law firm to present a cost estimate for a civil law procedure against a wind farm enterprise from the first instance to appeal and lastly the Supreme Court and the reply was that the NLVOW better have a "war chest" filled with € 60.000 to € 70.000.

Summarizing the above: challenging the three decisions concerned in a civil law court is an exercise in futility, first, because any civil law court would have declared the NLVOW inadmissible as there are administrative law alternatives and, second, as any civil law court would have followed the ruling of the Council of State that these decisions have been adopted in compliance with the Convention. On the issue of costs: prohibitive for a low budget organization like the NLVOW.[7]

D. Reply to Question 3

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

We can be brief here: the reply of the Netherlands to Question 3 is correct. However, we wish to point out that in two separate procedures the National Ombudsman has found that government agencies had provided inaccurate and/or incomplete information on the effects of wind farms on people living in the vicinity of wind farms. One of these procedures was initiated by the NLVOW.

E. Finally

It is only logical that at this stage of the procedure there is much focus on the question of whether or not the NLVOW utilized all national legal remedies that are available to it. Hence, the Questions submitted by the Compliance Committee to the Netherlands and to the NLVOW. However, that focus should not result in losing sight of the merits of the issues at stake in the NLVOW Communication of 9 November 2015.

When I had the honor of introducing that Communication in a brief oral intervention before the Compliance Committee in December 2015, I said that the NLVOW had filed its Communication not for the sake of winning a legal dispute, but for the sake of people living in the vicinity of a wind farm - existing or planned - who have been denied, and are still being denied, the right to

[6] In the Netherlands € 200 to € 250 is a common hourly fee for an experienced lawyer.

[7] The 9 November 2015 NLVOW Communication to the Compliance Committee, the 3 April Memo and this memo have been prepared with support from individuals who generously contributed time and expertise for free and with the support of a single senior lawyer specialized in administrative law. Convinced of the importance of the case, this lawyer has accepted a considerably reduced hourly fee, but even so the NLVOW has spend up to now approximately € 25.000 on professional support for its "Aarhus case" (legal advice, translation services, communication, etc.). This amount was raised exclusively from private sources, that is: concerned citizens. A civil law case with professional legal advice would be much more expensive, with financial support from public sources being most unlikely. The Netherlands reply presents theoretical options and opportunities not available in practice.

participate in the decision-making on that farm in a manner that is in compliance with the Convention. As I then said: “People are the real victims here”.

In essence the merits of the case are quite simple: regardless of what the law says, in the Netherlands the public has in the practices of decision-making on wind farms no opportunity “for early participation, when all options are open and effective public participation can take place”.

- In the Netherlands the competent authority (municipality, provincial government or the national government) prepares in close cooperation with the party or parties that wish to build a wind farm a set of draft decisions dealing in great detail with all zoning, environmental and nature issues. In this process (which may take years of negotiations to complete) there is no right of public participation, nor is there public participation in practice. See the picture in the NLVOW Memo of 3 April 2018 (reproduced below): it illustrates how intensive a competent authority communicates with commercial parties and how little communication there is with affected people and communities.
- Once the competent authority and the commercial parties are in agreement, the public authority publishes a set of draft decisions (often involving more than 2.000 or 3.000 pages) and the public has then six weeks to submit comments. After reviewing these comments, the competent authority takes the final decisions. Considering this procedure (which creates mutual commitments between the competent authority and the commercial parties), it is not surprising that the NLVOW Communication shows that comments from the public rarely, if ever, lead to any material changes in the final decisions when compared with the draft decisions. Public participation is bound to be ineffective as virtually all material decisions are already made in closed-door negotiations between a competent authority and commercial parties.

For decision-making on wind farms the Netherlands is not in compliance with the Convention, not because its formal laws and legal remedies are no good, but because its practices are no good.

The NLVOW fails to understand why the highest administrative law court, the Council of State, considers these practices in compliance with the Convention. The NLVOW also fails to understand why successive Netherlands governments have not acted to bring these practices in line with the requirements of the Convention.

As they should have done in any democratic country.

[signature redacted]

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