

SUMMARY

1. The Aarhus Convention

The Aarhus Convention was signed at the Danish city of Aarhus on 25 June 1998. It entered into force on 30 October 2001 and the Netherlands ratified the Convention on 29 December 2004. The Convention was drawn up at the fourth ministerial conference on the European environment organised by the European Economic Commission of the United Nations in Geneva. At present, almost 50 countries are Parties to the Convention.

The Convention consists of three “pillars”:

- The first pillar deals with access to information on the environment. The Convention requires the State Parties to ensure that citizens have access to environmental information in a way that is both transparent and effective. Information must therefore be complete and accurate.
- The second pillar concerns public participation in decision-making. The Convention requires the State Parties to ensure that citizens have an opportunity to participate in decision-making at a time when all options are open and that due account is taken of the outcome of such participation.
- The third pillar sees to access to justice. Under the Convention, the State Parties must ensure that their citizens have the opportunity to challenge the substantive and procedural legality of all decisions by public authorities in a review procedure before a court of law.

At a meeting in October 2002, the State Parties to the Convention decided to set up a Compliance Committee. State Parties, as well as the Convention’s Secretariat may bring alleged violations of the Convention to the attention of the Committee. Uniquely, that opportunity is also given to individual citizens or groups of citizens. The Compliance Committee is located in Geneva and is part of the European Economic Commission of the United Nations.

A complaint lodged by citizens with the Compliance Committee may result in one or more recommendations by the Committee to the Meeting of the State Parties on the action to be taken. Although formally the Committee does not deliver a legally binding decision, both the procedure and the Committee’s decisions are substantially comparable to legal proceedings before a court of law and to a decision of a court of law. Decisions of the Compliance Committee therefore carry much weight politically, as well as in further legal proceedings before national courts and before the EU Court of Justice in Luxembourg.

The NLVOW Communication requests the Compliance Committee to establish that the Netherlands did not comply with all three “pillars” of the Convention in the past, that it still continues to do so, and that the Netherlands must therefore fundamentally change its modus operandi in relation to access to information, access to decision-making and access to justice in so far as these relate to wind power and wind farms.

2. The NLVOW Communication

The Communication contains a summary of its own in the paragraphs 40 to 50. The requests submitted to the Committee by the NLVOW are set out in paragraph 51.

For the sake of convenience, paragraphs 40 to 50 are reproduced below.

“

OVERALL ASSESSMENT

40. In summarising the preceding sections and paragraphs, the unavoidable conclusion is that in the Netherlands the public and, more precisely, that section of the public most affected by the construction of wind farms, is side-lined from the outset in the decision-making process and that it moreover has no serious chance of subsequently finding support for its views and concerns in a court of law.

41. This begins with the way in which the public is informed about wind power and (plans for) wind farms: one-sided, incomplete and sometimes misleading. This is also detrimental to the right to effective public participation.

42. The decision-making process, especially when fundamental choices are made, takes place in closed meetings. At such meetings, the public authorities concerned, together with businesses with vested interests in wind power and other supporters of wind power, such as environmental organisations and property developers, decide to what extent wind power is needed for the transition to sustainable energy and where the wind farms needed for that purpose should be located. These closed meetings result in administrative and other agreements, programmes and the like that set forth exact objectives and locations.

43. The public has no opportunity to participate until the consequences of the programmes and plans so established have been translated into policy strategies or spatial plans, that is, when real choices have already been made and set in binding agreements among the parties that participated in the closed door sessions. As a result, public participation and the comments it generates do not lead to changes of any significance. Subsequent decision-making on specific wind farms is also carried out with strict adherence to the aforementioned administrative and other agreements, programmes etc., implying that in this stage too public participation cannot have any real impact.

44. Anyone who then decides to challenge the outcomes of the above decision-making process in a court of law will soon discover that an administrative law court relies on the facts as presented and interpreted by public authorities, often based on what developers provide, and that it is most reluctant to review the substantive merits of a case. Only formal defects that might influence the outcome of decision-making have a chance of success. There simply is extremely little chance, if any, of an administrative law court deciding that certain interests of the public concerned have been prejudiced disproportionately and that, for this reason, the granting of a licence, permit or exemption for a wind farm is not justified.

45. In addition, opportunities for public participation and possibilities for judicial review cannot pertain to the two environmental effects of wind farms that are most important to people living near a wind farm, i.e. exposure to noise and shadow flicker. As the standards and norms for these two issues have (almost) exclusively been laid down in statutory provisions, public participation must necessarily be limited to the scenic and economic effects of wind farms. But these are precisely the aspects where public authorities have a large measure of discretion.

46. Once a wind farm has been constructed and it then becomes apparent that there is a high level of exposure to noise, it proves impossible for local residents to verify whether noise standards and norms are being observed. As a consequence, they are barred from convincingly arguing that an infringement of the norms actually occurs. As the burden of proof of an infringement initially lies with local residents, this leads to a substantial impediment to the exercise of the right, as safeguarded in article 9, paragraph 3, of the Convention to also challenge the party responsible for an infringement or, alternatively, to request enforcement in administrative proceedings.

47. This practice of decision-making and judicial protection in relation to wind power and wind farms is not in compliance with a range of provisions of the Convention, including article 3, paragraph 2; article 5, paragraphs 2 and 7; article 6, paragraphs 2, 4 and 8; article 7, the first three sentences; and article 9, paragraphs 2 to 4. It therefore constitutes a substantial impediment for the citizens of the Netherlands to give effect to the fundamental right laid down in article 1 of the Convention - the right to live in an environment that is adequate to their health - by invoking the rights, safeguarded in the Convention, to participation in decision-making and access to justice.

48. Such a practice is also contrary to a fundamental assumption underlying the Convention, that is, citizens have the right to participate in the formulation of decisions that affect their living environment - a right that is fundamental if and when decisions relate to wind farms as these have major impacts on the living environment of all who (must) live in their vicinity.

49. As the public cannot, or only to a very limited extent, exercise the right it has under the Convention, the Netherlands also does not profit from the benefits to be derived from effective public participation and judicial protection as described in items 9 and 10 of the preamble to the Convention, being an enhanced quality of decision-making and implementation and more awareness of, and support for, decisions on the environment.

50. Perhaps even worse, the practice and procedure outlined in this communication have negative implications for the legitimacy of the government and public authorities. Legitimacy requires the furnishing of adequate and correct information; a decision-making process that is open, honest and transparent; and an effective judicial assessment of the outcome of such decision-making. For wind power and wind farms none of these conditions exist in the Netherlands.

“