



**Statement of the Government of the Netherlands
concerning communication ACCC/C/2015/133**

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A. Introduction

1. On 9 November 2015, the Netherlands Association of People Living in the Direct Vicinity of Wind farms (*Nederlandse Vereniging van Omwonenden Windturbines*, NLVOW) re-submitted a communication to the Compliance Committee (Committee) under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Convention). This communication was forwarded to the Government of the Netherlands (Government) on 11 March 2016.
2. The Government notes that NLVOW first submitted a communication to the Committee on 30 June 2015. Since the original communication did not meet the Committee's required format for communications, NLVOW re-submitted its communication on 9 November 2015 at the request of the Committee. The Government observes that, although the revised communication meets the exceptional limit for communications of a complex nature, the annex to the communication is in fact used for an additional submission, contrary to the Committee's view on the purpose of annexes as expressed in its letter to the communicant of 22 October 2015.
3. The issue before the Committee is whether the Convention has been complied with in connection with access to information on, public participation in decision-making on and access to justice in matters concerning wind turbines located on the Dutch mainland, including inland waters.
4. The Government is of the opinion that the Convention is correctly implemented in connection with access to information on, public participation in decision-making on and access to justice in matters concerning wind turbines. In order to demonstrate this, the Government will make statements concerning the implementation of the relevant provisions of the Convention in domestic law, and the application of those provisions in connection with access to information on, public participation in decision-making on and access to justice in matters concerning wind turbines. These statements will be preceded by observations on the admissibility of the communication.

B. Admissibility

5. The Government notes that, in accordance with paragraph 21 of the annex to Decision I/7 of the Meeting of the Parties to the Convention, the Committee "should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress". The failure by a communicant to make use of available domestic remedies might be grounds for the Committee to determine that the matter should be pursued at the level of domestic procedures rather than through the compliance mechanism of the Convention.

6. NLVOW alleges that in the Netherlands there are no legal remedies in relation to the quality of information on wind power, that there is no possibility to challenge plans/programmes in respect of wind power and wind farms, and that, in cases where there is the possibility to challenge decisions on wind farm projects before a court of law, the results are negligible.
7. The Government does not agree with the communicant's contention that challenging a decision on a specific wind farm project with the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, the Council of State), which is the highest administrative court in the Netherlands, is ineffective because the results have been negligible. In its judgment of 27 May 2015 (ECLI:NL:RVS:2015:1621), the Council of State annulled a decision on a wind farm "Den Tol" in *Netterden* for being in violation of Article 6, paragraph 3, of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.¹ This shows that the assessment by the Council of State provides for a review of the substantive and procedural legality of decisions, acts or omissions in respect of wind power and wind farms. The Government therefore considers an appeal with the Council of State to be an effective and sufficient remedy.
8. Furthermore, it should be noted that NLVOW has not actively filed any appeal with the Council of State against a governmental decision on a specific wind farm project. A legal entity such as NLVOW is admissible in legal proceedings when representing a general or collective interest, which must be apparent from its factual activities as well as laid down in its statutory objectives. In a case before the Council of State on a wind farm "Noordoostpolder" (8 February 2012, ECLI:NL:RVS:2012:BV3215, considerations 2.3 to 2.4.2), nonprofit legal entities were admitted as parties concerned in the procedure. NLVOW had the opportunity to file an appeal against a governmental decision on a specific wind farm project on its own account, but failed to do so.
9. Moreover, NLVOW had the opportunity, with respect to issues for which no complaint can be submitted to an administrative court of law, to file a complaint for tort with a civil law court. Access to a civil court is in compliance with the Convention, the European Convention on Human Rights and the law of the European Union. It is accepted as an effective form of legal protection.²
10. In view of the availability of domestic remedies and the general nature of the complaints of NLVOW, the Government therefore considers that paragraph 21 of the annex to Decision I/7 provides the Committee with a legal basis not to proceed with the consideration of the communication (in whole or in part).

¹ Official Journal of the European Communities, L 206, 22 July 1992, pp. 7-50.

² Judgment of the Council of State of 2 May 2012 (ECLI:NL:RVS:2012:BW4561, no. 201105967/1/R1).

11. Should the Committee come to a different conclusion and proceed with the consideration of the communication, the Government presents a short summary of the issues raised by NLVOW in its communication, before making observations on the merits of these issues.

C. Summary of the issues raised

12. In its communication NLVOW claims, in sum, the following:
- People living in the vicinity of wind turbines are not properly and timely informed, they are not involved in decision-making on projects and decisions concerning wind turbines when all options are open, and they don't have a fair chance in obtaining justice in court;
 - Public information on wind power in the Netherlands is one-sided, sometimes incorrect or even misleading;
 - Real decisions on wind turbines are taken behind closed doors between governments, the wind sector and other partners that are favorable to wind power;
 - Complaints with administrative law courts are futile since the administrative judge, including the Council of State, almost always declares (competent) authorities right;
 - People living in the vicinity of wind turbines are completely sidelined when it comes to two of the most negative consequences of wind turbines for the environment – noise and shadow flicker – since these aspects are regulated by generally binding statutory provisions.
13. NLVOW complains therefore about general failures of the Netherlands to implement, or to implement correctly, certain of the provisions of the Convention in matters concerning wind turbines. The communication concerns the whole system of decision-making on wind turbines, not a specific case, and is therefore very broad. The complexity of the matter induces the Government to explain first, how the Dutch system of decision-making works and how the Convention is implemented in general (Section D), before explaining in detail (Section E) Dutch law, regulations and policy on wind turbines and, finally (Section F), setting out the Government's reaction to the issues raised.

D. Dutch system of implementation of and decision-making under the Convention

D.1 Introduction

14. The Convention has been implemented in the Netherlands through the Act on the Implementation of the Aarhus Convention (*Wet Uitvoering van het Verdrag van Aarhus*).³ This Act led to amendments of existing Dutch laws, such as the Environmental Management Act

³ State Bulletin 2004, 519.

(*Wet milieubeheer*)⁴ and the Act containing regulations governing public access to government information (*Wet openbaarheid van bestuur*, the Government Information (Public Access) Act).⁵ The basic principle of the Government Information (Public Access) Act is access to information, both by providing citizens the possibility to ask the government for (environmental) information and by active disclosure of information.

15. In addition, the General Administrative Law Act (*Algemene wet bestuursrecht*) (GALA)⁶ is relevant. The GALA provides for general rules for governmental acts in administrative affairs, for the preparation of decisions, and for the possibilities for appeal to administrative law courts. Both the Government Information (Public Access) Act and the GALA apply to a broader range of issues than merely environmental issues. However, both Acts are highly relevant for the implementation of the Convention in the Netherlands. The laws applicable to NLVOW's communication mostly refer to the GALA. For this reason, the Sections of the GALA that are relevant for the implementation of the Convention are introduced below. Additional laws relevant to this case are discussed in Section E of this statement.
16. In addition to the laws and regulations set out in Sections D and E, there are other laws and regulations that are relevant for the implementation of the Convention, but not for this case. These laws and regulations are not covered by this statement, but can be found in the Dutch implementation reports.

D.2 Access to information

17. On the basis of Section 8 of the Government Information (Public Access) Act, the administrative authority directly concerned is obliged to provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance. The administrative authority shall ensure that the information is supplied in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them sufficient time to submit their views to the administrative authority.
18. The Government provides for environmental information to the public in comprehensible yet diverse ways. An important form of providing information is through the internet. General environmental information from the (central) government can be found, amongst others, on the following websites:
 - www.rijksoverheid.nl. This is the collective website of eleven ministries. The website provides information on legislative proposals, regulations and policy plans of the ministries. Once adopted, the website explains legislative acts. With respect to wind

⁴ Appendix 1: English translation of relevant parts of the Environmental Management Act.

⁵ Appendix 2: English translation of the Government Information (Public Access) Act.

⁶ Appendix 3: English translation of Division 3.4 and other Sections of the GALA.

power and wind farms, one of the questions that is answered concerns the way in which the Government promotes sustainable energy.

- www.overheid.nl. This website is the guide to information and services of all governmental organisations in the Netherlands. It contains information on laws and regulations, policies, publications of permits, relevant addresses and websites of other administrative bodies.
- www.infomil.nl. This is the website of the knowledge center on all environmental laws and regulations for all governments.
- www.atlasleefomgeving.nl. This website uses maps to provide current information on the environment and public health.
- www.risicokaart.nl. Through this website one can easily view current risks on a specific spot, for example with respect to an aviation accident or flooding, by introducing a postal code or place of residence. Advice on how to deal with these risks is also provided.
- www.rivm.nl. This is the website of the National Institute for Public Health and the Environment. This Institute promotes public health as well as a clean and safe environment. Part of the website is a (temporary) knowledge platform for wind power that issued a notice on wind power and noise in 2015. NLVOW participated in this temporary platform.

19. In addition, essential environmental information is stored in electronic databases that are easily accessible to the public. Governmental information concerning wind power can be found, amongst others, on the following websites:

- www.windenergie.nl;
- www.rvo.nl/onderwerpen/duurzaam-ondernemen/duurzame-energie-opwekken/windenergie-op-land;
- www.windopzee.nl.

20. Spatial plans and general rules on the spatial planning of the Government can also be found on www.ruimtelijkeplannen.nl.

21. The texts of all acts, orders and decrees are published in the State Bulletin (*Staatsblad*) or State Journal (*Staatscourant*). Moreover, all legislation, in place since 1995, is made available free of charge online (www.wetten.overheid.nl). All older legislation is available on paper. Provincial regulations can be found on the provincial websites. Municipalities are presently in the process of publishing their regulations and policy plans on their municipal websites.

22. In addition, there are several specific provisions to implement the Convention's obligations. The provisions that are relevant to this case are set out below.

Assistance in seeking access to information (Article 3, paragraph 2)

23. Measures to ensure that officials and authorities provide and assist in providing the required guidance, also in the event of objection or appeal procedures, are explicitly incorporated in Section 3, paragraph 4, of the Government Information (Public Access) Act in conjunction with Sections 3:45 and 6:23 GALA.⁷
24. If someone is unable to find an answer to his or her question, this person can contact the Public Information Service (*loket Informatie Rijksoverheid*) by phone, via email and on Twitter.

Collection and dissemination of environmental information (Article 5)

25. The collection and dissemination of environmental information is provided for by the GALA which contains general provisions on the collection and active dissemination of information. Section 3:2 GALA requires that administrative bodies acquire and assess all relevant information prior to decision-making. Section 3:46 GALA also requires that all decisions of administrative bodies be reasoned. Pursuant to these provisions, administrative bodies are required to collect and assess (environmental) information. Besides these general requirements, there are additional provisions on the collection and dissemination of environmental information in specific environmental laws.
26. To secure transparency and effective public accessibility, Section 3 of the Archive Act 1995 (*Archiefwet 1995*) obliges government bodies to keep all documents held by them in a good order and accessible to the public. Administrative bodies appoint officials who provide general information and support to the public seeking access to information.

D.3 Public participation

Provisions concerning public participation

27. The GALA contains general provisions for administrative decision-making procedures that are applicable in the case of environmental decision-making. One of the procedures for decision-making is the uniform public preparatory procedure (*uniforme openbare voorbereidingsprocedure*), which is set out in Division 3.4 GALA (Sections 3.10 to 3.18). It contains general provisions on public participation in decision-making, which have to be taken into account when the provisions of this Division apply by law or when the decision is taken to apply these provisions in accordance with a law. Specific environmental laws refer to this procedure for the preparation of decisions and plans.⁸

⁷ See national implementation reports of the Netherlands concerning Article 3, paragraph 2, of the Convention, <http://apps.unece.org/ehlm/pp/NIR/index.asp>.

⁸ As indicated in communication ACCC/2014/104, Division 3.4 GALA complies with the requirements of Article 6 of the Convention.

28. If, according to these specific environmental laws, different or supplementary requirements apply, this is indicated in these laws. One example is the fact that specific environmental laws provide for “everyone” to submit their views on a (draft) decision. This differs from the general rule in the GALA where it is stated that only “persons concerned” can submit their views.
29. The main steps to be taken under the uniform public preparatory procedure are presented below.

Informing the public early in the decision-making procedure and envisaged procedure (Article 6, paragraphs 2 to 4)

30. The competent authority makes the draft decision available for examination together with the relevant documents which are necessary to assess the draft (Section 3:11 GALA).
31. Before these documents are made available for examination, the competent authority publishes a notice of the draft decision in one or more daily or weekly newspapers, local papers that are delivered at home free of charge, or in another suitable manner (Section 3:12, subsection 1, GALA).
32. Section 3:12 GALA contains additional requirements on the timely public notice of the draft decision, the content of the notice, and the relevant information that is made available to the public. For instance, if the decision is made by an authority forming part of the Central Government, the notice will have to be published in the State Journal (Section 3:12, subsection 2, GALA).
33. In most cases, the draft decision and related information is not only physically made available for examination, but also through the internet. Environmental projects being handled by the Central Government are open for online public consultation via the websites www.platformparticipatie.nl and www.bureau-energieprojecten.nl. All information pertaining to wind farm projects that are coordinated by the Central Government, is available on the website www.bureau-energieprojecten.nl. The organisation responsible for this website, the so-called Energy Projects Desk (*Bureau Energieprojecten*), is part of the Ministry of Economic Affairs. It supports governments, initiator's of wind farm projects and people living in the vicinity of wind farms that are involved in the, at times complicated, decision-making procedure on large energy projects. The Energy Projects Desk provides access to relevant information for each project and receives the related views submitted by the public. For every project, a description is provided of its substance, the phases of the procedure and its current status, as well as access to the documents corresponding to each phase of the project. All studies and reports that are relevant for decision-making are made available as well. This includes, in the event that an environmental impact assessment is carried out, the environmental impact assessment report and its underlying studies.

Providing for early public participation (Article 6, paragraphs 4 and 7)

34. The procedure for public participation that allows persons concerned to submit views (in writing or orally) is implemented in Sections 3:15 to 3:17 GALA. Most relevant (environmental) laws broaden this right to submit views to everyone (see, for example, Section 3.12 of the Environmental Permitting (General Provisions) Act, *Wet algemene bepalingen omgevingsrecht*). The time limit for submitting views for members of the public is six weeks, unless a longer period is specified by law. The term for the submission of views starts on the day that the draft decision is made available for examination (Section 3:16 GALA).

Information relevant to decision-making must be made available to the public (Article 6, paragraph 6)

35. The competent authority has to add any new relevant documents and information to the documents made available for examination (Section 3:14, subsection 1, GALA).

Due account of the outcome of the public participation (Article 6, paragraph 8)

36. Division 3.7 GALA contains the requirements for the reasoning of a decision. Section 3:46 GALA requires that a decision shall be based on sound reasons. This means that it should indicate what has been done with the views as expressed in the participation procedure. Section 3:47 GALA requires that these reasons are made public together with the decision.

Informing the public when the decision has been taken (Article 6, paragraph 9)

37. Sections 3:43 and 3:44 GALA contain provisions on the public notice of the decision. The persons who stated their views during the preparation of the decision shall be informed in writing when the decision is notified to the applicant, or as soon as possible thereafter (Section 3:43 GALA). Pursuant to Section 3:44 GALA, a copy of the decision will be sent to those who have expressed views on the draft decision.

Public participation concerning plans, programmes and policies relating to the environment (Article 7)

38. Most environmental laws refer to the preparatory procedure of the GALA for the preparation of plans and programmes. If reference is made to Division 3.4 GALA, the points above are applicable. This means that a draft plan will be made available for examination allowing everyone to submit views (Section 3:11 GALA in conjunction with Section 3.8 of the Spatial Planning Act (*Wet ruimtelijke ordening*)⁹ and Section 7.11 of the Environmental Management

⁹ Appendix 4: English translation of relevant parts of the Spatial Planning Act.

Act). The draft plan is made available for examination together with the relevant documents which are necessary to assess the draft, as is required by Article 7.

39. Public participation concerning policies relating to the environment is not required by law, but is nevertheless being provided for on a regular basis. For it is only with proper consultation of all parties concerned that broadly supported policies can be developed. The Central Government makes use of a website (www.internetconsultatie.nl/veelgestelde vragen) to consult the public on papers concerning policies relating to the environment.

Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments (Article 8)

40. In the Netherlands, on draft legislation and regulations prepared by the Government or the Parliament, the public is consulted through a system of internet consultation on www.internetconsultatie.nl.
41. Apart from the parliamentary procedure applicable to the preparation of acts (advice of the Council of State, an independent advisory body, followed by a procedure in the Parliament, consisting of a House of Representatives and the Senate), several acts provide for public participation during the preparation of regulations. This is, for example, the case in Section 21.6, paragraph 4, of the Environmental Management Act, which provides for parliamentary participation in the preparation of draft governmental decrees relevant to the environment. This implies that draft decrees are presented to both Houses of Parliament and published in the State Journal. Members of the public are given the opportunity to submit written comments on the drafts to the Minister of Infrastructure and the Environment within a period stated therein of at least four weeks. These comments have to be taken into account in the subsequent procedures.

D.4 Access to justice

42. In the Netherlands, persons affected can request the competent authorities to enforce general rules when these rules are violated. Persons affected may request an administrative authority to apply executive coercion, impose an order for a monetary penalty or withdraw a permit or an exemption. They can file requests for enforcement if they are of the opinion that general rules are violated or specific permit regulations and are affected by such violation.
43. If a request for enforcement is not adequately addressed according to the applicant, an action can be filed in accordance with the provisions in the GALA. Any such actions against decisions of administrative bodies can be filed in an administrative law court. This may also concern decisions on requests for information, or decisions that should be or should have been subject to public participation.

44. Accordingly, actions can be filed against decisions which are subject to the uniform public participatory procedure in Section 3:4 GALA (as explained above in Section D.3). This applies to decisions on the activities listed in Annex I of the Convention and to decisions on activities not listed in Annex I which may have a significant effect on the environment.
45. In most cases, an action against a decision can be filed in a district court and an appeal can be lodged with the Council of State. In administrative environmental cases, the Council of State is the highest court.
46. An appeal may be lodged by persons who are affected by the decision (Sections 8:1 and 1:2 GALA). It is required that they have participated in the uniform public participatory procedure regarding the draft decision in question (Section 6:13 GALA).
47. As for the review by the court, Section 8:69 GALA provides that the administrative court renders a judgment on the basis of the notice of the action, the submitted documents, the proceedings during the preliminary investigation, and the investigation during the court hearing. Case law shows that the administrative court reviews the substantive and procedural legality of the decisions under review. This will be explained in further detail in Section F.3 on the basis of judgments of the Council of State.
48. Section 8:69 GALA further provides that the administrative court supplements the grounds *ex officio* and has the possibility to supplement the facts *ex officio*. The court can supplement the facts on the basis of, for example, the hearing of witnesses (Section 8:46 GALA), advice of an expert (Section 8:47 GALA), or an investigation on the ground (Section 8:50 GALA). As will be explained in further detail in Section F.3, the Foundation for Advice on Administrative Law for the Environment and Spatial Planning (*Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening*, StAB) is frequently asked by the administrative court to give advice as an independent and impartial expert in disputes relating to the environment. StAB gives advice on technical and factual aspects of such disputes.
49. Provisions on effective access to justice (procedures that provide for effective remedies, including injunctive relief, and that are fair, timely and not prohibitively expensive) are embedded in the provisions of the GALA (Sections 8:41, 8:72, 8:66, 8:67 and 8:81).
50. Adequate information on access to justice is to be found in Sections 3:45 and 6:23 GALA. Removal or reduction of financial barriers is legally guaranteed by a special act on legal aid (*Wet op de rechtsbijstand*).
51. If no action can be filed in an administrative law court, an action can be filed in a civil law court. Access to a civil law court is in compliance with the Convention, the European

Convention on Human Rights and the law of the European Union. It is accepted as an effective form of legal protection.¹⁰

52. In addition, when there is the possibility of review of a specific decision by an administrative law court, a person concerned can request the court to verify whether the public authorities relied on plans,¹¹ decisions¹² or regulations¹³ that preceded the specific implementation decision. In this respect, the court can review the plan or policy and, in the case of regulations, declare them non-binding when the regulation is in contradiction with a higher rule of law or general principle of law. This is an indirect review of a general rule (*exceptieve toetsing*, indirect review).
53. In view of the foregoing, in the Netherlands, legal rights are safeguarded in accordance with the Convention.

E. Domestic laws, regulations and decision-making on wind turbine projects

E.1 Introduction

54. Wind power is an important pillar for the fulfillment of the Government's ambition to make the Dutch energy supply more sustainable and to comply with international agreements to reduce CO2 emissions. This includes the UN Framework Convention on Climate Change (1992) and the Kyoto Protocol (1997). In addition, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (Directive on renewable energy) sets a mandatory target of 14% for the Netherlands for the share of energy from renewable sources in gross final consumption of energy in 2020, meaning sustainable energy.
55. In the Dutch Energy Plan of 6 September 2013 for sustainable growth, agreements were made between governments, the umbrella organisations of provinces and municipalities, and more than forty civil society organisations on how to achieve this goal. Part of this Plan is the agreement to realise 6,000 MW of onshore wind power in 2020. At the end of 2015, 2.950 MW of this goal was realised (www.windenergie.nl).

¹⁰ Judgment of the Council of State of 2 May 2012 (ECLI:NL:RVS:2012:BW4561, no. 201105967/1/R1).

¹¹ In its judgment of 20 April 2016 (ECLI:NL:RVS:2016:1072, considerations 12-12.1 and 15 and following), the Council of State extensively discusses, in the context of an appeal against a provincial structure scheme, the choices that were made, also on the basis of a project-environmental impact assessment, in a policy strategy that was established ahead of the structure scheme. In its judgment of 10 June 2015 (ECLI:NL:RVS:2015:1837, consideration 14.2), the Council of State applies an indirect review to a generally binding statutory provision and explains the extent of this review.

¹² In its judgment of 25 February 2015 (ECLI:NL:RVS:2015:585, consideration 3.5), the Council of State reviews a structure scheme of the Central Government for a switch and transformer station. There is no possibility of appeal against the decision to apply Central Government coordination (Section 3:35 of the Spatial Planning Act), but the Council of State applies an indirect review of the decision and finds that the decision has not been properly made public.

¹³ In its judgment of 8 February 2012 (ECLI:NL:RVS:2012:BV3215, consideration 2.55.2) on the wind farm *Noordoostpolder*, the Council of State applies an indirect review with respect to Article 3.14a, first paragraph, of the Activities Decree.

56. In this Section, the Dutch system of (spatial) decision-making is described, in particular with respect to decision-making on wind power projects.

E.2 Legal norms that are relevant for wind turbine projects

57. Decision-making on wind power projects takes place on the basis of national, provincial or municipal regulations. With respect to the public preparatory procedures, the publication of decisions and the possibilities for appeal, these regulations all refer to the GALA.

58. The different norms that apply can be described in a short, non-exhaustive manner as follows.

Spatial Planning Act

59. The Spatial Planning Act contains rules on spatial planning. The most important instrument in this respect is the local zoning scheme, through which the municipal council shall prescribe the destination of the entire area within its jurisdiction in the interests of effective spatial planning. The local zoning scheme shall contain the main elements of the spatial policy to be pursued by the municipality. The exact location of wind turbines can be determined in such a local zoning scheme. In the interests of effective provincial spatial planning or national spatial planning, provinces respectively the Central Government can adopt a zoning scheme with basically the same function as a local zoning scheme. In addition, the Spatial Planning Act provides for rules to coordinate the preparation and adoption of a spatial decision and several other related decisions in respect of one project (the Central Government coordination, the provincial coordination and the municipal coordination). Coordination is applicable if it is required by law or if the competent authorities decide thereto in the interests of the realisation of national, provincial or municipal spatial policy. If coordination is applied, the possible court proceedings are also coordinated in first and only instance by the Council of State. The objective of Central Government coordination is to streamline and expedite the decision-making on spatial planning procedures of national importance. It is a procedural arrangement without consequences for substantive requirements.
60. An instrument preceding the (local) zoning scheme is the policy strategy. A policy strategy sets out the main elements of the spatial policy. An implementation plan is linked to the strategy. Such policy strategies can apply to part of the territory or to one aspect of the spatial policy in particular, for instance wind power. A policy strategy gives internal structure to the competent authority while deciding on spatial planning. The strategy is not legally binding for local governments or citizens. However, local authorities should take policy strategies of higher authorities into account in the weighing of interests relating to spatial decision-making and may not deviate from them without proper justification.

61. Relevant regulations based on the Spatial Planning Act are the Spatial Planning Decree (*Besluit ruimtelijke ordening, Bro*)¹⁴ and the Decree on General Rules for Spatial Planning (*Besluit algemene regels ruimtelijke ordening, Barro*). These decrees contain further governmental rules on spatial decision-making.¹⁵
62. General rules of provinces are laid down in provincial regulations. This is why the spatial possibilities for the construction of wind turbines vary among the provinces.

Environmental Management Act

63. The Environmental Management Act contains provisions on environmental impact assessments as defined in Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment¹⁶ and in Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.¹⁷
64. The Environmental Impact Assessment Decree (*Besluit mer*) and the Environmental Management (General Rules for Establishments) Decree (*Activiteitenbesluit milieubeheer, Activities Decree*)¹⁸ are relevant decrees that are based on the Environmental Management Act. The Activities Decree contains general rules on the exploitation of wind turbines.

Environmental Permitting (General Provisions) Act

65. The Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) (*Wabo*) contains rules for the adoption of implementing decisions, like the granting of a permit for the construction and establishment of wind turbines.
66. The Electricity Act 1998 provides for the application of Central Government coordination provided for in the Spatial Planning Act to the construction and expansion of larger production installations for sustainable energy. The Central Government coordination applies to the construction of wind farms with a capacity of 100 MW or more.

¹⁴ Appendix 5: English translation of Article 2.1.1 of the Spatial Planning Decree.

¹⁵ The Central Government and the provinces have the possibility to set general or specific requirements for spatial decisions of local governments. Such general requirements can be set to achieve the spatial policy as included in policy strategies and are legally binding for local governments when they take spatial decisions. General instructions can relate to general topics, like rules on the argumentation of spatial decisions, but can also relate to specific topics, like rules on locations for wind turbines. General instructions from the Central Government are set in the Decree on General Rules for Spatial Planning, for example by specifying that wind turbines cannot be placed in the *Waddenzee*, and in the Spatial Planning Decree.

¹⁶ Official Journal of the European Communities, L 197, 21 July 2001, pp. 30–37.

¹⁷ Official Journal of the European Union, L 124, 25 April 2014, pp. 1–18.

¹⁸ Appendix 6: English translation of Article 3.14a of the Activities Decree.

E.3 Steps in the decision-making procedure and compliance with the Convention

67. This Section describes the steps that are generally taken in the decision-making procedure relating to the setting up of wind turbines. Each step describes which provisions, if relevant, of the Convention are relevant for the instruments used in that phase.

Step 1: policy development

68. Realising onshore wind power is a complex playing field with as many rules of play as players. The last decennia the Government has taken up the issue of onshore wind power in different ways. Through policy papers, research programmes, (financial) aid programmes, and covenants, the Government has tried to promote the development and use of wind power and to achieve the goals that were set. At times, the focus was on technical or industrial issues, on other occasions the focus was on spatial planning. Sometimes, goals were not met.

69. In the early 1990s, the Government started to set targets for the realisation of wind power by provinces. Subsequently, specific tasks for every province were introduced. In 2009, this led to the decision by the Central Government, the Association of the Provinces of the Netherlands (*Interprovinciaal Overleg*, IPO) and the Association of Netherlands Municipalities (*Vereniging Nederlandse Gemeenten*, VNG) to carry out a study on the increase of onshore wind power for a total minimum of 6,000 MW. The increase of wind power capacity necessitates spatial accommodation for more and larger wind turbines and more clustering of wind turbines. The study included issues, such as the likelihood of wind in certain parts of the Netherlands as well as the feasibility of wind farms. The outcome of the study was that there is enough space in the Netherlands for an increase of the national capacity to 6,000 MW in 2020. This also led to the conclusion – seen the scale and urgency of the task in the light of climate change and economic chances – that the Central Government should take the lead in realising the wind ambitions through large scale wind farms.

70. This led to the conclusion on 18 June 2013 of an agreement between the Central Government and the IPO on the realisation of 6,000 MW operational wind capacity in 2020. This agreement was reflected in the Energy Plan of 6 September 2013, which also specified that this realisation is a shared responsibility of the Central Government, provinces, municipalities and other parties involved. In the 2013 Energy Plan, more than forty organisations expressed their intention to make the sustainability of the society and the economy a common effort.

71. Also after 2020, the Netherlands will be confronted with the task of making the energy supply more sustainable and to considerably reduce CO₂ emissions. The Central Government is cooperating with many organisations to achieve this and many inhabitants and companies develop their own initiatives to save energy, promote sustainability and reduce CO₂ emissions. To profit from all this knowledge and experiences, the Minister of Economic Affairs organised the Energy Dialogue between 7 April and 4 July 2016. Both online

(www.MijnEnergie2050.nl) and offline, during meetings all over the country, people were invited to participate in the discussion on the choices that are necessary to take further steps in making the energy supply more sustainable from 2023 to 2050. The results of the Energy Dialogue will be used in the autumn of 2016 for setting the Energy agenda with energy proposals for the longer term.

72. In the paragraphs above, it is set out how Dutch policy on sustainable energy in general and on wind power in particular developed over the years. In all these phases, the Central Government did not operate in isolation, but always entered into dialogue with local authorities, social organisations, as well as other parties and persons concerned.
73. The Government is of the opinion that policy developments, such as those described above, are not subject to the provisions of the Convention. Should the Committee come to a different conclusion, the Government is of the opinion that the policy developments described above qualifies as “the preparation of policies relating to the environment” under the last sentence of Article 7 of the Convention.

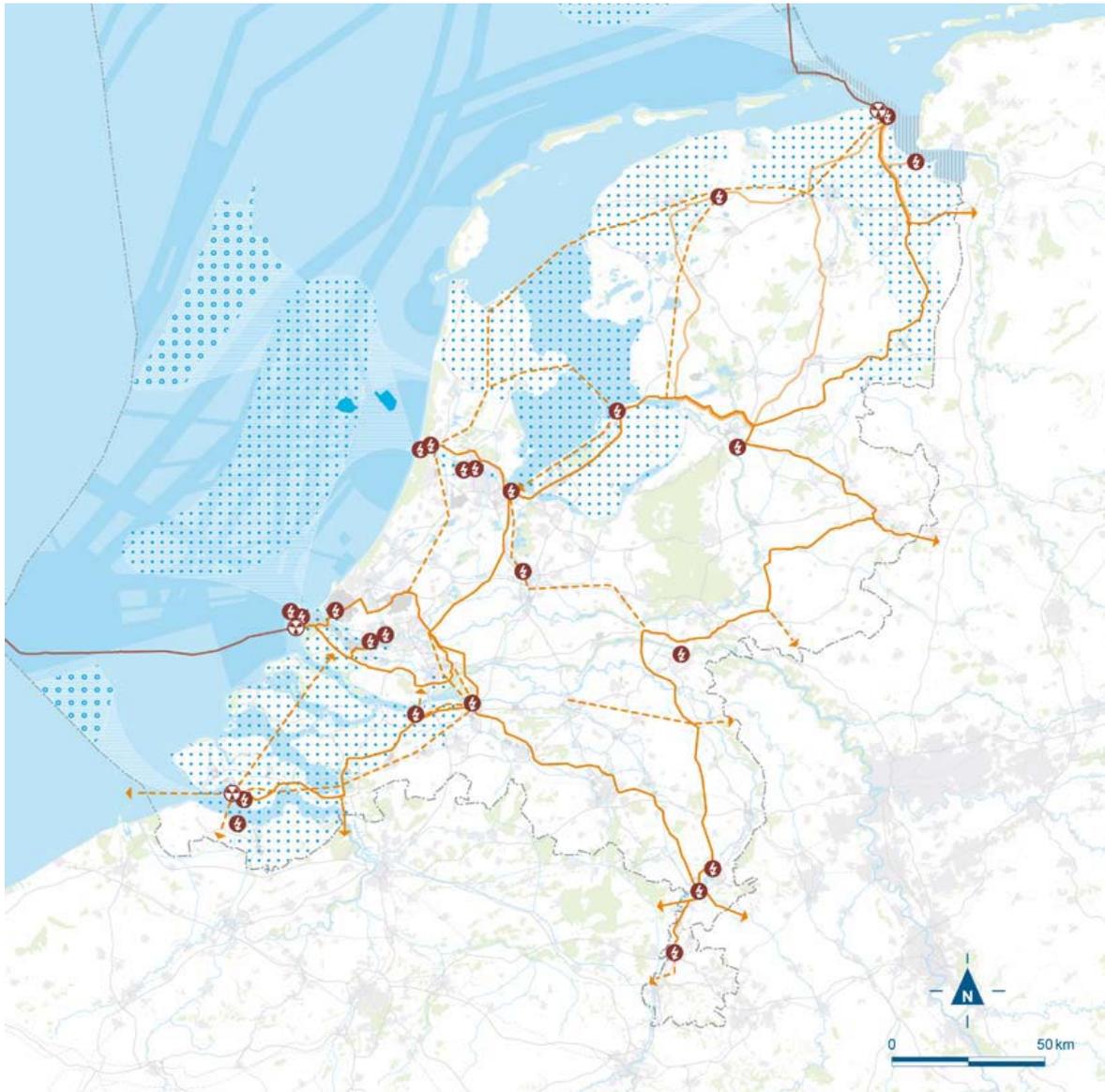
Step 2: non-legally binding policy strategy

74. Spatial decision-making with respect to (the realisation of) wind power projects normally starts with the determination of a policy strategy. On the level of the Central Government, two of these policy strategies are relevant with respect to wind power projects. First, the National Policy Strategy for Infrastructure and Spatial Planning (*Structuurvisie Infrastructuur & Ruimte*, SVIR),¹⁹ adopted by the Minister for Infrastructure and the Environment on 13 March 2012. Second, the National Policy Strategy for Onshore Wind Power (*Structuurvisie Windenergie op Land*, SVWoL) of 28 March 2014, adopted by the Minister for Infrastructure and the Environment and the Minister for Economic Affairs. With respect to all national spatial interests, the SVIR provides the general outline for the policy in the longer term. Both the Central Government as well as provinces will enable the increase of onshore wind power to a minimum of 6,000 MW in 2020. However, not all parts of the Netherlands are suitable for large scale wind power installations. In the SVIR, the Central Government indicates which areas are suitable by combining characteristics of the landscape and the environment as well as the average wind speed. Within these areas, specific locations for large scale wind farms are identified by the Central Government in cooperation with the provinces.
75. In the SVWoL, specific locations suitable for large-scale wind farms are identified. In identifying these locations, the parliamentary dialogue was taken into account as well as the

¹⁹ This Policy Strategy provides for the spatial policy for onshore wind power. The SVIR indicates that the Central Government and the provinces should create the space for the increase of onshore wind power to a minimum capacity of 6,000 MW in 2020. The SVIR further indicates that not all parts of the Netherlands are suitable for large-scale winning of wind power. Therefore, the SVIR indicates favourable onshore areas on the basis of a combination of characteristics of landscape and nature as well as the average wind speed. Within these areas, the Government identifies locations for large-scale wind power projects, in cooperation with the provinces. These areas are elaborated in the SVWoL.

views received from the public, the developments since June 2013, and the project-environmental impact assessment that had been carried out. The areas examined in the project-environmental impact assessment for the SVWoL have been identified by the Central Government and the provinces by comparing the suitable areas for large-scale wind energy identified in the SVIR and the areas for wind energy identified by provinces. Provinces have identified these areas on the basis of their own research and the preferences or policy documents of municipalities. The municipal policy documents have been developed following research of locations, consultation with stakeholders, participation procedures and, where required, a project-environmental impact assessment.

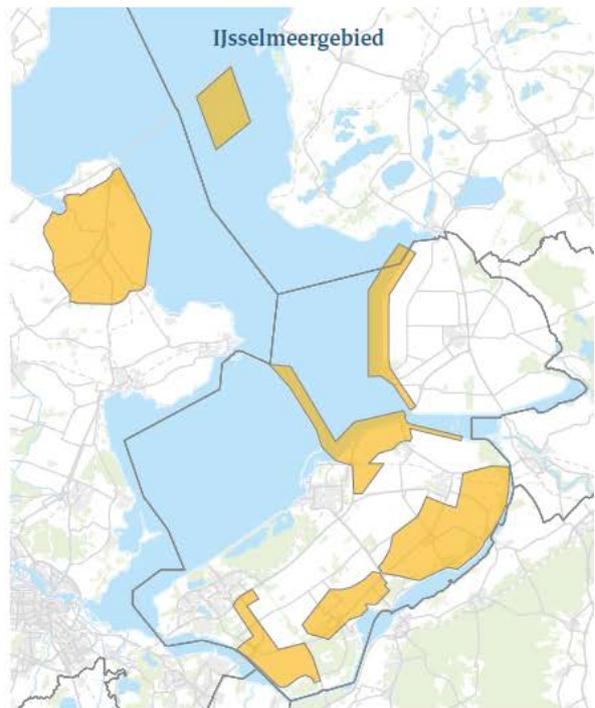
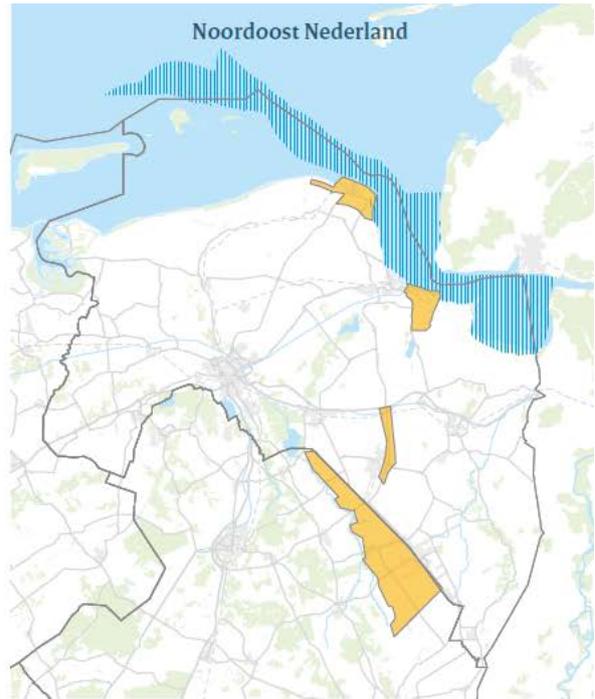
76. The SVIR includes the following map with suitable areas for wind power as indicated by the third item in the second column:



Kaart ruimte voor energievoorziening

- | | | | |
|---|---|---|--|
|  | (Mogelijke) vestigingsplaats kerncentrale |  | Gerealiseerd windturbinepark op zee |
|  | (Mogelijke) vestigingsplaats elektriciteitsproductie vanaf 500 MW |  | Aangewezen windenergiegebied op zee |
|  | Hoogspanningsverbinding 220 kV |  | Kansrijk gebied windenergie * |
|  | Hoogspanningsverbinding 380 kV |  | Zoekgebied elektriciteitskabels naar aanlandingspunt |
|  | Hoogspanningsverbinding 450 kV |  | Verkeersscheidingsstelsel |
|  | Nieuwe hoogspanningsverbinding (indicatief) | | |
- * Weergegeven gebieden zijn feitelijk kansrijk voor grootschalige windenergie, opgenomen als illustratie

77. The SVWoL includes the following map with specific locations in which large scale wind farms may be realised (100 MW or more) as indicated in yellow:



Kaart 1: Gebieden voor grootschalige windenergie

- Gebieden voor Grootschalige Windenergie
- Ems Dollardverdraggebied



78. Evidently, the indication of locations in the SWoL does not mean that these locations will be completely filled with wind farms. Subsequent decisions will have to be taken to determine the exact locations of wind farms.

79. Depending on their substance, policy strategies relating to the environment can be considered to be policies within the meaning of Article 7 of the Convention. According to the Government, in certain cases policy strategies relating to the environment can be considered to be plans or programmes within the meaning of Article 7. This is the case when these strategies are considered to be plans or programmes within the meaning of the Directive on plans and programmes.
80. Public participation in policy strategies is obligatory in the event of policy strategies for which an environmental impact assessment has to be made in accordance with the Directive on plans and programmes. The public participation provided has to be accounted for in the policy strategy itself (Section 2.1.1 of the Spatial Planning Decree). The SVIR and the SVWoL have been subject to public participation.
81. Persons concerned may file actions against implementing decisions in administrative law courts and request the court to review them if the competent authority's decision was based on the policy strategy (indirect review). Persons can also file an action in civil law courts.

Step 3: legally binding spatial plans

82. During the following phase, legally binding spatial plans are determined, including rules on the use of the land and the constructions that are situated on it. As described in Section E.1 above, in general municipalities are competent to determine these plans (Section 3.1 of the Spatial Planning Act), i.e. the local zoning schemes. However, as described above, such schemes may be established by the Central Government or the provinces if this is in their interest (Section 3.28 respectively Section 3.26 of the Spatial Planning Act). These plans are called zoning schemes.
83. This means that decision-making on the specific location of wind turbines in the Netherlands can take place on three levels: through a Central Government zoning scheme, through a provincial zoning scheme or through a municipal zoning scheme. This will be explained in further detail below.
84. The Electricity Act 1998 provides for specific rules with respect to the level (national, provincial or municipal) at which spatial decision-making on the installation of wind farms has to take place. According to Sections 9b and 9c of this Act, Central Government coordination as provided for in the Spatial Planning Act is applicable to the construction and expansion of wind farms larger than 100 MW. The Minister of Economic Affairs, together with the Minister of Infrastructure and the Environment, is competent to determine Central Government coordination. This determination is done on the basis of the request of a producer who has the obligation to notify his or her intention to construct a wind farm to the Minister of Economic Affairs (Section 9b of the Electricity Act 1998). This also means that the Minister of Economic Affairs is competent for the preparation and coordination of the other required permits.

85. Section 9e of the Electricity Act 1998 sets out that provincial coordination can be applied to the realisation of wind farms between 5 and 100 MW. This means that the municipality is generally competent to decide on the planning of wind farms up to 100 MW, but that the province has *the possibility* to take over the decision-making for wind farms between 5 and 100 MW. The province has *the obligation* to take over the decision-making by provincial coordination if a municipality refuses to amend a local zoning scheme in favour of the realisation of a wind farm.
86. The Government is of the opinion that local zoning schemes and zoning schemes relating to the environment, in principle, fall within the scope of Article 7 of the Convention. However, irrespective whether such a zoning scheme may be found to fall within the scope of Article 6 or Article 7 of the Convention, the procedures for both schemes comply with the requirements of Articles 6 and 7 of the Convention as they provide for public participation for everyone and access to justice for persons concerned.
87. Division 3.4 GALA applies to both local zoning schemes (Section 3.8 of the Spatial Planning Act) and zoning schemes (Sections 3.26 respectively 3.28 in conjunction with Section 3.8 of the Spatial Planning Act) with some extra requirements originating from specific environmental and spatial planning laws, such as the possibility for everyone to submit their views (Section 3.8 of the Spatial Planning Act) and an electronic notice on the internet (Section 3.8 of the Spatial Planning Act). Division 3.4 GALA applies to schemes providing for one or two wind turbines as well as to schemes relating to wind farms (of three or more wind turbines).
88. If an environmental impact assessment (EIA) is required for a (local) zoning scheme, additional requirements for public participation apply in the context of the EIA procedure. If it concerns an EIA within the meaning of the Directive on plans and programmes, such additional requirements are set out in Sections 7.8 to 7.15 of the Environmental Management Act. This means that with the preparation of an EIA relating to a plan, the competent authority, as soon as possible after it has decided to prepare a plan, publishes a notice of the draft decision in one or more daily or weekly newspapers, or in another suitable manner. If the decision comes from the Central Government, the notice is published in any event in the State Journal, unless a specific law provides otherwise (Section 7.9, paragraph 1, of the Environmental Management Act in conjunction with Section 3:12, paragraphs 1 and 2, GALA).
89. Actions against these plans may be filed in administrative law courts by persons concerned (Section 8.1 GALA).
90. In case of Central Government coordination or provincial coordination, the zoning scheme and related permits and exemptions (see step 4 below) are prepared at the same time by applying

the uniform public preparatory procedure provided for in Division 3.4 GALA, which means that everyone can submit their views.

91. Actions against the zoning scheme and related permits and exemptions may be filed simultaneously in first and only instance with the Council of State.

Step 4: implementing decisions

92. Wind turbines are not included as an activity in Annex I to the Convention, nor are they included in Annex I to the Directive on environmental impact assessment. In the Netherlands, there is no obligatory environmental impact assessment for wind turbines within the meaning of point 20 of Annex I to the Convention. Activities for which an obligatory environmental impact assessment is prescribed are designated in part C of the Annex to the EIA Decree. The construction of a wind turbine or wind park is not explicitly mentioned. Therefore, point 20 of Annex I to the Convention does not apply.
93. With respect to the construction of a wind farm of three or more wind turbines, an assessment has to be conducted whether the activity might have adverse effects for the environment. Such an assessment has to be conducted with respect to activities designated in part D of the Annex to the EIA Decree. The construction of a wind farm is explicitly mentioned in point 22.2 of part D of the Annex to the EIA Decree.
94. Whether a wind farm might have considerable adverse effects for the environment – and therefore a significant effect on the environment within the meaning of Article 6, paragraph 1(b), of the Convention – is, amongst others, assessed in the framework of the required permit (*omgevingsvergunning beperkte milieutoets*, OBM). This assessment assures implementation of Article 6, paragraph 1(b), of the Convention and Annex II of the Directive on environmental impact assessment. If the result of this assessment is that a wind farm might have considerable adverse effects for the environment, an EIA is required (Sections 7.17 and 7.18 of the Environmental Management Act). In that case, a permit is required for the construction and the operation of an installation within the meaning of Section 2.1, paragraph 1(e), of the Wabo (*omgevingsvergunning milieu*, OMWabo). Such a permit falls within the scope of Article 6, paragraph 1(b), of the Convention, without falling within the scope of point 20 of Annex I to the Convention.
95. If there are no significant effects on the environment and there is no need for an EIA, the OBM may be granted (Section 2.1, paragraph 1(i), of the Wabo). The OBM will be refused in the opposite situation where, as indicated above, a OMWabo is required.
96. The Government is of the opinion that implementing decisions on one or two wind turbines do not fall within the scope of Article 6 of the Convention. For the construction and/or exploitation of one or two wind turbines, the Dutch system does not provide for an EIA assessment within the meaning of the Directive on environmental impact assessment and consequently, an EIA is never performed in such cases. In this respect, it is noted that the

“cutting up” of a large wind farm in smaller parts is not allowed (part A of the Annex to the EIA Decree).

97. In all cases of construction of a wind turbine, including for the construction of one or two wind turbines, a construction permit is required within the meaning of Section 2.1, paragraph 1(a) of the Wabo (*omgevingsvergunning voor bouwen*). For the granting of such a permit, the construction is tested against the local zoning scheme or the zoning scheme of the Central Government or the province. For specific situations, other permits or decisions may be required on the basis of the local zoning scheme or other regulations, such as a water permit or an exemption on the basis of the Flora and Fauna Act (*Flora- en faunawet*).
98. Various procedural rules apply to the realisation of the aforementioned implementing decisions. With respect to the present communication, only the procedure for the OMWabo is relevant, because only wind farms that may have a significant effect on the environment fall within the scope of Article 6 of the Convention and require such a permit. Section 3.10 of the Wabo declares Division 3.4 GALA applicable to these permits, with some additional requirements from specific environmental laws, like the fact that everyone can submit views (Section 3.12, paragraph 5, Wabo) and that a notice should be published electronically on the internet (Section 3.12, paragraph 2, Wabo).
99. Since the OMWabo requires an EIA, there are supplementary obligations for public participation in this procedure set out in Sections 7.27 to 7.38 of the Environmental Management Act. This means that with the preparation of an EIA relating to a decision, the competent authority, as soon as possible after it has decided to prepare a decision, publishes a notice of the draft decision in one or more daily or weekly newspapers, or in another suitable manner (Section 7.27, paragraph 3, of the Environmental Management Act). If the decision comes from the Central Government, the notice is published in any event in the State Journal, unless a specific law provides otherwise (Section 7.27, paragraph 3, of the Environmental Management Act in conjunction with Section 3:12, paragraphs 1 and 2, GALA).
100. The preparation and publication of the OMWabo and the other implementing decisions can be incorporated in the different possibilities for coordination as described in step 3 above.
101. In case of Central Government coordination, provincial coordination or municipal coordination of the OMWabo with the other implementing decisions, actions against these decisions can be filed, as explained above, in first and only instance with the Council of State by persons concerned (Section 8.1 GALA). Actions against the OMWabo and the other implementing decisions is being dealt with simultaneously.

F. Allegations of NLVOW and reaction of the Government

F.1 Access to information in connection with wind turbines

Allegations of NLVOW with respect to access to information

102. NLVOW alleges, in sum, generally the following:

- The public is not assisted by the Dutch authorities in obtaining correct and complete information on wind power and wind turbines, as required by Article 3, paragraph 2, of the Convention;
- Information on wind power and wind turbines is not in compliance with Article 5, paragraphs 2 and 7, of the Convention, because the information is not accessible to the public and not transparent; and the information on wind power and wind turbines that is available is one-sided and only presenting the advantages of wind power;
- The requirement of Article 6, paragraph 6, of the Convention, that all information relevant to decision-making on wind turbines must be made available to the public, has not been fulfilled.

103. NLVOW specifically states that the following situations do not comply with the above-mentioned provisions and, according to NLVOW, these situations are part of a systematic infringement of the Convention:

- An analysis of the need, benefits and costs of wind power is missing;
- Information on the website www.windenergie.nl is incomplete;
- Information about Article 3.14a of the Activities Decree is incorrect.

Reaction of the Government to the general allegations

104. NLVOW substantiates its allegations with some examples. However, the Government finds, as demonstrated below, that these examples do not demonstrate any infringement of Article 3, paragraph 2, Article 5, paragraphs 2 and 7, and Article 6, paragraph 6, of the Convention.

105. NLVOW's statement that Article 3, paragraph 2, and Article 6, paragraph 6, of the Convention have not been complied with is not substantiated. The Government does not agree with NLVOW's statement since relevant information is actively made public in the Netherlands by all governments or can be asked for on the basis of the Government Information (Public Access) Act (see Section D.2 above).

106. As explained in Section D.3 above, the website www.bureau-energieprojecten.nl offers all relevant information on specific projects of the Central Government. Information on (local) zoning schemes is available on the website www.ruimtelijkeplannen.nl and also physically available in town halls whenever there is the possibility to submit views relating to the projects or to object against these projects. The Government notes that the public concerned

has ample opportunity in more than one instance to participate in the consultation process and to submit comments.²⁰

107. It may be noted that, in communication ACCC/C/2012/68,²¹ the Committee stated that, based on Article 5 of the Convention, Parties have the obligation to possess and update environmental information which is relevant for their functions; and that this implies that public authorities competent for the development of plans, policies, strategies or projects in relation to wind energy should be in possession of all relevant available information. The Committee added that it has neither the mandate nor the capacity to assess the environmental information in question as to its accuracy or adequacy.

Reaction of the Government to the specific allegations

An analysis of the need, benefits and costs of wind power

108. As explained in step 1 in Section E.2, the policy to substantially reduce CO₂ emissions with the aid of wind power has been introduced over the last decennia. This policy dates back to before the entry into force of the Convention. The Paris Climate Agreement (2015) has given a new boost to the process initiated by the Kyoto Protocol (1997). Climate change is expected to have an enormous impact on the world, including the Netherlands. To limit the increase of the average global temperature under the target of two degrees Celsius as contained in the Paris Climate Agreement, it is essential for the Netherlands to reduce CO₂ emissions and to enhance the use of sustainable energy.

109. In the National Policy Strategy on Wind Power (2008), it is identified that the costs of offshore wind turbines are twice as high as the costs of onshore wind turbines. The costs of one KWh generated by a solar cell are nearly seven times as high as one KWh generated by an onshore wind turbine. In the case of solar energy, the time to recover the ecological costs is longer and the required space is larger. In the case of heating biomass, the discussion on the sustainability of the different types of biomass plays an important role. Carbon capture and storage as a serious alternative is still under development and this alternative cannot be applied on a large scale in the coming years.

110. Only recently, the gap between the costs of offshore wind power and onshore wind power is narrowing. When comparing sun and wind, wind is still more cost-efficient. A combination of all technologies is still needed to achieve a carbon-low energy system in 2050 and, therefore, wind power will continue to play an important role.

²⁰ Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland, adopted by the Compliance Committee on 24 September 2013, ECE/MP.PP/C.1/2014/5, para. 98.

²¹ *Ibid.*, para. 85-86.

Information on the website www.windenergie.nl

111. In its communication, NLVOW refers to information that is available on www.windenergie.nl. This is a website that is managed by the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*, RVO.nl), an agency that is part of the Ministry of Economic Affairs. Until recently, when visiting the website www.windenergie.nl, every person was directed to www.rvo.nl/onderwerpen/duurzaam-ondernemen/duurzame-energie-opwekken/windenergie-op-land. This website provides information relevant for those who are involved in the realisation of wind power, i.e. the construction of wind turbines. However, the Central Government manages more websites with information on sustainable energy and wind power. Recently, the website www.windenergie.nl changed to an independent website of the Central Government on onshore wind power. Different aspects of onshore wind power are presented, such as its purpose and necessity, European and national agreements relating to sustainable energy supply, fitting wind turbines in the landscape and laws and regulations.

112. The website www.windenergie.nl is not the only governmental source of information to the public on wind power. The Central Government also informs the Parliament, through letters and parliamentary debates. All this information is made available to the public on the website www.overheid.nl.

113. With respect to the preparation of decisions that are needed for the realisation of a wind farm, all information is available for examination both physically and online (see Section D.3 above).

114. The examples presented by NLVOW in its communication are not up to date and far from proving any systematic deficiencies.

Information about Article 3.14a of the Activities Decree

115. With respect to information on Article 3.14a of the Activities Decree on Environmental Management (*Activiteitenbesluit milieubeheer*), NLVOW alleges that both the explanation as presented by the legislator in the Explanatory Memorandum as well as the explanation on the website of RVO.nl is incorrect.

116. Since 1 January 2011, the environmental rules for the exploitation of a wind turbine are included in the Activities Decree, a governmental decree, and the Activities Regulation on Environmental Management (*Activiteitenregeling milieubeheer*), a ministerial regulation. These instruments provide for rules on the safety of operation, the prevention and limitation of shadow flicker and light, the prevention and limitation of risks for the vicinity and unusual events, noise standards and external safety.

117. The basic assumption of the rules of the Activities Decree is that they are applicable to everyone. However, the legislator acknowledges that there are situations in which these

general norms may lead to undesirable situations. This is why the legislator has enabled – as a custom-made prescription – the application of lower standards providing for more extensive protection. This situation occurs when, through an accumulation of noise, the standards would be exceeded or if exceptional local circumstances so require. This custom-made option has been used for a number of locations.

118. The presence of a “silence area” could present such an exceptional local circumstance. Although the Explanatory Memorandum to the Activities Decree does not explicitly determine that it should concern a formally recognised silence area, it follows from the logic of the Activities Decree that the custom-made option is not to be applied on every location where there is silence. The fact that an area outside the city is relatively silent because of the absence of background noise is inherent to all areas outside the city. Therefore, this is not a reason to adopt a custom-made option. Custom-made is the exception to the rule requiring a thorough argumentation. An exceptional local circumstance should not be presumed easily.

119. The explanation of the custom-made option by the Central Government on its website corresponds to the text of the Activities Decree and its Explanatory Memorandum.

120. During the preparatory phase and the public participation procedure of the Activities Decree, many questions were asked about the introduction of the Lden and Lnight standards. Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise²² does not oblige to use Lden as a standard for wind turbines.

121. However, the Directive leaves Member States the option of applying this standard. The Netherlands chose to use this option and expressed this in the draft decision. Reference can be made to the Explanatory Memorandum stating that it is “desirable” to adapt the standard,²³ and the answer to question 22 of the related parliamentary questions.²⁴ The Government has not misled the public on this point. The alleged relaxation of the standards has been broadly discussed during the development of the Activities Decree. The Explanatory Memorandum indicated that the conversion of the 50/45/40 dBA standard to the 47 dB Lden and 41 dB Lden is a codification of practice. This practice was based on the standards in the Activities Decree and the way in which the guidance for its implementation (contained in a guidance document from the competent Minister to local authorities, *Handreiking Industrielawaai en vergunning*) was applied in practice. This Guidance Document contained lower noise standards that were so restrictive that high wind turbines were in fact no longer possible. However, with a reference to the possibility for the application of higher noise standards provided for in the Guidance Document, all applications for a permit were in practice granted. The introduction of the 47 dB Lden was in line with this practice.

²² Official Journal of the European Communities, L 189, 18 July 2002, pp. 12–25.

²³ State Journal 2009, nr. 12902, 31 August 2009; see also State Bulletin 2010, 749, p. 6.

²⁴ Parliamentary records, Kamerstukken 2009-2010, 31 209, nr. 99, p. 7.

122. From research of TNO (*Hinder door geluid van windturbines*, report Nr. 2008-D-R1051/b), it follows that the noise of wind turbines is experienced as causing more nuisance than the noise of car and rail traffic, or industrial activity. This is related to the fact that wind turbines produce interrupted noise, which some people experience as a nuisance. When comparing the standard of 47 dB Lden with the measure-effect relation, it turns out that with this value around 8-9% serious nuisance can be expected. This level of nuisance is comparable to the maximum norms set for car and rail traffic, or industrial activity. The standard of 47 dB Lden that is in line with the current implementation in practice is therefore sufficient for the protection against noise nuisance. This is why a standard of 47 dB Lden was chosen for noise from wind turbines.

123. In a recent judgment,²⁵ the Council of State came to the conclusion that with Article 3.14a of the Activities Decree, the legislator has not crossed its margin of appreciation in relation to determining the level of environmental protection.

F.2 Public participation in connection with wind turbines

Allegations of NLVOW with respect to public participation

124. NLVOW alleges, in sum, the following:

- In spite of Article 6, paragraphs 3, 4 and 8, and Article 7, of the Convention, no public participation was provided for in the drafting and adoption of the following national plans: *Bestuursovereenkomst Landelijke Ontwikkeling Windenergie* (2001), *Werkprogramma Schoon en Zuinig* (2007), *Plan van aanpak Windenergie* (2008), *Nationaal actieplan voor energie uit hernieuwbare bronnen* (2010), *Energieakkoord* (2013). In cases where public participation did take place, only a restricted number of participants was invited, namely representatives from the Central Government, provinces and municipalities, employers' organisations, trade unions, the commercial wind sector, and environmental organisations. However, organisations that are critical of wind power and the public in general were not allowed to participate;
- There is no effective public participation in decisions on wind turbines when all options are open, since all substantive decisions have already been taken earlier during the drafting of national plans and programs on wind power. This is the case for the SVIR in 2012 and the SVWoL in 2014, and the spatial plans for specific projects. This is not in compliance with Article 6, paragraph 4, and Article 7 of the Convention;
- By introducing general rules relating to noise and shadow flicker in the Activities Decree in 2011, the possibilities for participation decreased, while these two aspects are most crucial to people living in the vicinity of wind turbines. Where these aspects used to fall within the scope of Article 6 of the Convention, they now fall within the scope of Article 8 of the Convention. Article 8 provides less protection than Article 6. This means that the existing rights decreased since the entry into force of the Convention for the Netherlands.

²⁵ Judgment of 4 May 2016 (ECLI:NL:RVS:2016:1228, *Windpark Wieringermeer*, considerations 44.4 and 44.6).

Reaction of the Government

Public participation

125. NLVOW presents several national administrative instruments in respect of which NLVOW suggests that their preparation has not been in accordance with Article 6, paragraphs 3, 4 and 8, and Article 7, of the Convention, since there was no (complete) public participation with respect to the preparation of these instruments. In step 1 of Section E.2 above, these instruments were presented in the description of the wind power policy. However, not all instruments presented by NLVOW are of relevance to that policy. Although it is correct that, in respect of some of these instruments, participation of all members of the public was not provided for, this does not mean that their preparation was not in accordance with Article 6, paragraphs 3, 4 and 8, and Article 7, of the Convention. Not all of these instruments are within the scope of the Convention. To the extent they fall within the scope of the Convention, they were considered to be preparation of policies as referred to in the last sentence of Article 7. They should be subjected to an effort to provide opportunities for public participation to the extent appropriate.
126. Nearly all of these instruments were developed by the Central Government in close cooperation with local authorities, since the latter have a key position when it comes to the realisation of wind farms. Also, many civil society organisations concerned with environmental protection were involved. In recent years, also the public is more and more involved. When preparing the National Spatial Perspective for Onshore Wind Power (*Nationaal Ruimtelijk Perspectief Windenergie op Land*) (2010), the public was involved. This instrument was of relevance to the SVIR (2012) and the SVWoL (2014) respectively. Public participation was possible with respect to these instruments and also with respect to the related environmental impact assessment in accordance with the legal provisions in the GALA.
127. As described in Section E.2, the SVIR and the SVWoL are the most important documents for the establishment of the exact location of large-scale wind farms of 100 MW or more in zoning schemes. In the same period, the Energy Agreement (*Energieakkoord*) was concluded between more than forty parties, including the Central Government, IPO, the Association of Netherlands Municipalities, and several nature and environmental organisations. In recent months, the Energy Dialogue was convened on the transition of energy from 2013 to 2050. Everyone could participate in different ways (see www.energedialoog.nl). This initiative must lead to setting the Energy Agenda for the future, and the public will be included in the implementation of this agenda.
128. In addition, the Government notes the following with respect to the public participation in the preparation of the instruments mentioned by NLVOW:

- The *Bestuursvereenkomst Landelijke Ontwikkeling Windenergie* (2001) was concluded before the entry into force on 29 March 2005 of the Convention for the Netherlands. Therefore, the Convention was not applicable to the preparation of this instrument.
- The *Werkprogramma Schoon en Zuinig* (2007) is a governmental programme with ambitious targets that were set after consulting academic research institutions, actors from the industry, and environmental and social organizations.
- The *Plan van aanpak Windenergie* (2008) addresses the question how to implement the goal to (more than) double the wind power capacity and the question how to develop the wind power policy in the longer term. The plan was prepared by the Minister of Housing, Spatial Planning and the Environment, the Minister of Economic Affairs and the Minister of Agriculture, Nature and Food Safety. During the preparation, the Minister of Defense, the Minister of Transport, Public Works and Water Management, IPO, the Association of Netherlands Municipalities, SenterNovem, the Netherlands Environmental Assessment Agency, the World Wide Fund for Nature, the provincial environmental federations and the environmental organization *Natuur&Milieu*, the landscape advisor, the Organisation for Sustainable Energy (we@sea), and the Dutch Wind Association (NWEA) were also involved.
- With respect to the *Nationaal actieplan voor energie uit hernieuwbare bronnen* (2010), the Government notes that, in communication ACCC/C/2010/54,²⁶ the Committee found that Ireland's National Renewable Energy Action Plan (NREAP) constitutes a plan or programme relating to the environment subject to Article 7 of the Convention. Like the Irish Plan, the Dutch Plan has been developed on the basis of the provisions of the Directive on renewable energy, in particular Article 4, paragraph 1. However, the Dutch Plan was established by an outgoing Government, which meant that the Plan had a provisional, non-binding, character. This Plan mostly contained existing policies. In the case of new policies, these were only announced and not adopted. The Government indicated in the Plan that decision-making on the most preferable mix of sustainable options, as well as on if, and how many, extra resources were provided to achieve the mandatory target of 14% for the Netherlands for the share of energy from renewable sources in gross final consumption of energy in 202, set by the Directive on renewable energy, was left to future governments. As a result, the Plan did not contain any new policies and did not initiate the development of any new plan or programme.
- The *Energieakkoord* (2013) was concluded on 6 September 2013 between more than forty organisations. Together, they wanted to make the society and economy more sustainable. NLVOW states that it was not included in this project without, however, explaining that this was not possible because NLVOW did not exist at the time of the

²⁶ Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, prepared by the Compliance Committee and adopted on 29 June 2012, ECE/MP.PP/C.1/2012/12; see also Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland, prepared by the Compliance Committee and adopted on 24 September 2013, ECE/MP.PP/C.1/2014/5.

preparation of the Agreement and its conclusion. NLVOW wasn't established until 19 September 2013.

Effective public participation

129. When applying Articles 6 and 7 of the Convention, the Government assumes that public participation can only be provided with respect to specific *draft* projects, plans, programmes or policies. In the Government's view, this follows from the wording of these provisions. In order to be able to ask for effective participation, at least the contours of the envisaged policies or the choices to be made in plans or programmes should be clear. Public participation cannot be provided with respect to a completely open question, nor is this required under the Convention or feasible. Adequate public participation is public participation with respect to specific projects, plans, programmes or policies that are practicable and useful. This means that the judicial, climatological and spatial planning outline of any project, plan, programme or policy should be clear and incorporated in a specific proposal for a decision.

130. It may be noted that the Council of State has concluded that the Dutch legislation that provides everybody with an opportunity to submit views with respect to a draft plan is a correct implementation of Article 6, paragraph 4, of the Directive on environmental impact assessment.²⁷ This provision of the Directive substantively reflects Article 6, paragraph 4, of the Convention which provides that each Party shall provide for early public participation, when all options are open. Following the submission of views and taking into account those views, the competent authority still has the discretion and opportunity to revise a proposal for a decision, including the draft project, plan, programme or policy concerned.

131. Furthermore, the provisions of the Convention do not incorporate a right to change a decision on an activity, plan or programme following public participation. With respect to communication ACCC/C/2012/68,²⁸ the Committee stated: "In this regard, the Committee confirms that the requirement of article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to a right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always required."

F.3 Access to justice in connection with wind turbines

Allegations of NLVOW with respect to access to justice

132. According to NLVOW, the judicial review is not sufficiently substantive, fair and equitable as provided for in Article 9, paragraphs 2 and 4, of the Convention, because of the alleged

²⁷ Judgment of 27 May 2015 (ECLI:NL:RVS:2015:1702, *Windpark Autena*, considerations 6.2 en 6.3).

²⁸ Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland, adopted by the Compliance Committee on 24 September 2013, ECE/MP.PP/C.1/2014/5, para. 93.

passive attitude of administrative law courts in the Netherlands with respect to the facts of a case and the respect for the discretionary powers of public authorities; and because the administrative law courts appear to have total confidence in the facts of a case as presented by public authorities and in the expert assessment as presented by the applicant for a permit.

133. All this is, in the view of NLVOW, not in accordance with the right of every person to live in an environment adequate to his or her health and well-being, as stressed in Article 1 of the Convention.

Reaction of the Government

Review by the administrative law court

134. Administrative law courts review, in accordance with the Committee's findings in case ACCC/C/2008/33,²⁹ the substantive and procedural legality of a decision, insofar as this decision is challenged. On the basis of the grounds presented, the administrative law courts review whether the decision was prepared or taken in violation of the law (Section 8:69 GALA). This involves a full review of the laws and general principles of law, such as legal certainty.

135. If, however, the public authority has discretionary power on the basis of legal provisions, administrative law courts need to respect this discretionary power. This follows from the separation of powers. This means that the court may not replace the policy choices made by the public authority within its discretionary power with its own choices. In this respect, the court should exercise restraint. The court reviews whether the administrative authority could have reasonably come to its decision and whether the boundaries of its competencies were not crossed. Such a review should also take place when judging whether an administrative organ was in a position to use its discretionary power.³⁰ However, such a review is without prejudice to the full judicial review of the legal requirements, including the requirements of proportionality and proper reasoning.

136. Hence, appropriate judicial or administrative procedures are available in the Netherlands, as required by Article 9, paragraphs 2 and 3, of the Convention, in which the substantive and procedural legality of decisions, acts and omissions within the scope of the Convention can be subjected to a full judicial review.

Supplementing of facts

137. The administrative law court can appoint an expert for a (technical) investigation into the facts of a case and other information that is necessary to form a proper judgment (Section

²⁹ Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, adopted by the Compliance Committee on 24 September 2010, ECE/MP.PP/C.1/2010/6/Add.3.

³⁰ See, for example, a judgment of the Council of State of 24 June 2015 (ECLI:NL:RVS:2015:1952, consideration 6.1) on the granting of a license for the deviation of a local zoning scheme.

8:47 GALA). In spatial planning and environmental procedures, the administrative law courts can involve StAB. StAB is an independent bureau that issues impartial reports (expert reports) on technical and factual aspects of disputes to administrative law courts.³¹ An expert report is included in the file and is also provided to the parties in the proceedings. The administrative law courts provide the opportunity, in accordance with the judgment of the European Court of Human Rights in the case of *Mantovanelli v. France* (appl. no. 21497/93), to respond to the report. More information on StAB and its methods can be found on its website www.stab.nl.

138. The fact that the administrative law courts, in reviewing a decision, base themselves on expert reports that are developed in the context of the preparation of the decision, does not mean that administrative law courts assume a passive attitude in general. If expert advice is used in the preparation of a decision, this is generally of importance in court proceedings. Parties concerned, therefore, cannot exclude an expert report from court proceedings merely on the basis of a statement that it contains deficiencies. It is, however, possible to exclude such report on the basis of proper arguments, for example, by providing a countercheck by an expert.³²

139. NLVOW presents the argument³³ that persons who seek justice against wind farms before the Council of State stand little chance of success in court proceedings. However, the Government notes that the administrative law procedures, in particular the proceedings before the Council of State, are in compliance with Article 9, paragraphs 2 and 4, of the Convention. As described above, administrative law courts take into account whether the decision and the assessment made is in accordance with the law, is based on sufficient knowledge of the relevant facts and is properly reasoned. In addition, the court verifies whether the decision does not have disproportionate consequences for one or more persons concerned in view of the aims pursued by the decision.

140. For more information on the implementation of the right to access to justice in the Netherlands, the Government refers to Section D.4 above.

F.4 General rules in connection with wind turbines

Allegations of NLVOW with respect to public participation in general rules

141. According to NLVOW, the fact that standards for shadow flicker and noise of wind turbines are incorporated in general rules, i.e. a governmental decree, is not in accordance with the Convention. In NLVOW's view, these aspects are thereby excluded from public participation as

³¹ In the Netherlands, there have been legal proceedings concerning three large wind farms, *Windpark Noordoostpolder*, *Windpark Krammer* and *Windpark Wieringermeer*. In all these proceedings, advice was requested from StAB. See judgments by the Council of State of 8 February 2012 (ECLI:NL:RVS:2012:BV3215, *Windpark Noordoostpolder*), 16 March 2016 (ECLI:NL:RVS:2016:709, *Windpark Krammer*) and 4 May 2016 (ECLI:NL:RVS:2016:1228, *Windpark Wieringermeer*).

³² See, for example, the judgment of the Council of State of 27 May 2015 (ECLI:NL:RVS:2015:1621, consideration 23.5).

³³ NLVOW draws this argument from a thesis of Marjolein Geling (see footnote 26 of the communication). A copy of the thesis was not provided with the communication and is not available on the internet. Therefore, the Government is unable to verify its contents.

provided for in Article 6 of the Convention, since public participation provided for the development of general rules is not similar to the participation provided under Article 6 for the decision-making on permits granted by local authorities.

142. All this is, in the view of NLVOW, not in accordance with the right of every person to live in an environment adequate to his or her health and well-being, as stressed in Article 1 of the Convention. Moreover, according to NLVOW, the standards for shadow flicker and noise offer less protection than the ones at the time of ratification by the Netherlands of the Convention, which would be contrary to the Almaty Declaration adopted at the second meeting of the Parties in 2005.³⁴

Reaction of the Government with respect to public participation in the development of general rules

143. The Convention does not prescribe in which instrument environmental standard-setting should take place. It is up to the national legislator to choose for either general rules or permit prescriptions as an instrument for environmental standard-setting. The Convention does prescribe, for the instruments chosen, what requirements should be fulfilled.

144. As indicated above in Section D.3, public participation in the development of general environmental rules, such as the Activities Decree, is provided for in the Netherlands. This (public participation) procedure complies with Article 8 of the Convention. The Convention does not give directions for the level of environmental protection. In this context, the Government reiterates, as set out in Section F.1. above, that a standard for noise of a wind turbine of 47 dB Lden that is consistent with the implementation in practice, offers sufficient protection against noise nuisance. Hence, the current regulations do not offer less protection than those in force at the time of ratification of the Convention by the Netherlands. Even if this would be the case, this is not contrary to the Convention since the Convention is not concerned with the level of environmental protection.

Allegations of NLVOW with respect to enforcement of general rules

145. According to NLVOW, there is no enforcement of general rules and indirect review is not applied by the national judge.

Reaction of the Government with respect to enforcement of general rules

146. As set out in Section D.4, persons affected can request the competent authorities to enforce general rules when these rules are violated by an operator of a wind turbine.³⁵ If the competent authority refuses to take enforcement measures, the applicant has access to

³⁴ Almaty Declaration, adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005, ECE/MP.PP/2005/2/Add.1, para. 5.

³⁵ See judgments of the Council of State of 21 November 2012 (no. 201204164/1) and more recently 4 May 2016.

administrative law courts. In addition, competent authorities have the possibility to take enforcement measures *ex officio*.

147. In the context of an implementing decision, administrative law courts can also review the general rules indirectly (review of plans, decisions or rules, see Section D.4). Contrary to NLVOW's allegation, indirect review is not a hypothetical option. The Council of State applies indirect review on a regular basis. Section D.4 refers to some examples.³⁶ The examples show that the Council of State examines in detail the choices that were made in a policy strategy preceding the determination of a zoning scheme, as well as the noise standards set in Article 3.14a, paragraph 1, of the Activities Decree.

Allegations of NLVOW with respect to enforcement of compliance

148. NLVOW is of the view that the authorities, competent to enforce compliance with standards, are dependent on studies on noise nuisance of wind turbines made by the producers of these wind turbines. The studies allegedly do not take into account the local circumstances. In NLVOW's view, persons living in the vicinity of wind farms are dependent on the willingness of the competent authorities to take action. NLVOW is of the opinion that, following Article 9, paragraph 3, of the Convention, standards for noise should be designed in such a way as to enable the public, possibly with the aid of experts, to determine for themselves whether a norm is exceeded or not.

Reaction of the Government with respect to enforcement of compliance

149. Article 9, paragraph 3, of the Convention does not concern the possibilities for the public to collect information to support a judicial procedure, nor does it indicate the way in which standard-setting should take place.

150. Persons concerned, who are of the view that noise standards are not met, can submit a request for enforcement to the local authorities. Enforcement measures relate to checking the noise capacity through an emission measuring. In addition, members of the public can request an acoustic bureau to measure noise emissions. The Council of State has already judged that the standards as laid down in Article 3.14a of the Activities Decree are subject to enforcement.³⁷

G. Conclusion

151. On the basis of the considerations above, the Government concludes that: (a) the application of paragraph 21 of Decision I/7 to this communication provides a legal basis for the

³⁶ See judgments of the Council of State of 20 April 2016 (ECLI:NL:RVS:2016:1072, considerations 12 to 12.1 and 15 and following) and 8 February 2012 (ECLI:NL:RVS:2012:BV3215, *Windpark Noordoostpolder*, consideration 2.55.2).

³⁷ Judgment of the Council of State of 4 May 2015 (ECLI:NL:RVS:2016:1228).

Committee not to proceed with the consideration of the communication (in whole or in part); and (b) the Convention has been complied with in connection with access to information on, public participation in decision-making on and access to justice in matters concerning wind turbines located on the mainland, including inland waters, in the Netherlands.