

Plan of action for decision VII/8m (Netherlands)

Through paragraph 4 (a) of decision VII/8m concerning the compliance of the Netherlands, the Meeting of the Parties to the Aarhus Convention has requested the Party concerned to submit a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the recommendations contained in that decision.

The text of decision VII/8m is available at: <https://unece.org/env/pp/cc/decision-vii8m-concerning-netherlands>

In preparing its plan of action, the Party concerned was invited by the Compliance Committee to take into account the Committee's information note for Parties on preparing their plan of action. The Committee's information note, which contains step-by-step guidance for Parties on how to complete their plan of action, is available at: <https://unece.org/env/pp/cc/implementation-decisions-meeting-parties-compliance-individual-parties>

A. Description of the process by which the plan of action has been prepared

- The Netherlands chose to involve the communicant prior to preparing the plan of action. To this end, in early April 2022, an online meeting took place with a representative of Greenpeace, the communicant in compliance cases C104 and C124, in order to explain the process and obtain input for the plan of action.
- From 22 April 2022, a draft version of the plan of action was published on the website www.platformparticipatie.nl for a period of three weeks for the purpose of public participation; the communicant and the public were informed accordingly. Everyone was given the opportunity to submit their views on the draft plan of action.
- No views were received via that public participation website during the consultation period. The consultation therefore did not lead to any adjustments being made to the plan of action.
- The final version of the plan of action has been translated into English and was submitted to the secretariat of the Aarhus Convention on 30 June 2022.

B. General character of the measures that will be needed to implement the recommendations in the MOP decision

The information note published by the Aarhus Convention Compliance Committee (ACCC) asks in relation to this section whether any of the recommendations require a fundamental change to the legislative framework or to administrative or judicial practice, and if there is a common issue that recurs in the recommendations.

If such a fundamental change is required, it asks which recommendations this would specifically concern. It also asks for the relevant subparagraphs of the MOP's decision to be indicated.

Answer re. case C104:

Yes, a fundamental change is required according to paragraph 3 (a) of decision VII/8m.

Answer re. case C124:

The decision in compliance case C124 has been implemented through case law. In addition, a fundamental change has been made to the legislative framework by virtue of the introduction of the Open Government Act (*Wet Open Overheid*; WOO) on 1 May 2022. This process ran parallel to the compliance proceedings in case C124.

No common issue can be identified in the two cases. Both cases concern different areas and laws. The recommendations are therefore being implemented in different manners.

C1. Detailed plan of action in relation to compliance case C104

**Recommendation:
Para. 3 (a) of decision
VII/8m**

In paragraph 3 (a) of decision VII/8m, the Meeting of the Parties recommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that:

- (a) When a public authority reconsiders or updates the duration of any nuclear-related activity within the scope of article 6 of the Convention, the provisions of article 6 (2)–(9) are applied;

Proposed measures to fulfil
recommendation

1. The amendment to the Nuclear Energy Act (*Kernenergiewet*) entered into force on 10 February 2022.

Pursuant to the ACCC's recommendation in its findings on communication ACCC/C/2014/104, the government has implemented an amendment to section 17 of the Nuclear Energy Act. The amendment entails that in future, for permits related to revision or amendment of the duration of a nuclear activity, the uniform public participatory procedure of part 3.4 of the General Administrative Law Act (*Algemene wet bestuursrecht*; AWB) will always apply.

2. Amendment to article 11a, paragraph 1 of the Nuclear Facilities, Fissile Material and Ores Decree (*Besluit kerninstallaties, splijtstoffen en ertsen*, the 'Nuclear Facilities Decree') (additional measure)

In addition, the draft article 11a of the Nuclear Facilities Decree contains (further to article 11) the requirements for an application to amend, supplement or withdraw restrictions or conditions subject to which a permit has been granted, if this may have significant consequences for the environment. The draft article 11a, paragraph 1 contains the requirements set out in article 6 (6) of the Aarhus Convention: a description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions; a description of the significant effects of the proposed

	<p>activity on the environment; a description of the measures envisaged to prevent and/or reduce the effects, including emissions; a non-technical summary of the above; an outline of the main alternatives studied by the applicant; and the main reports and advice issued.</p> <p>Paragraph 2 of the draft article 11a contains a demarcation provision for the purpose of the information required by article 11 of the Nuclear Facilities Decree. Paragraph 3 of the draft article 11a contains similar provisions for ex officio amendments by the competent authority of conditions or restrictions attached to the permit as referred to in section 19, subsection 1 of the Nuclear Energy Act. Under article 6 (10) of the Convention, such amendments must also comply with the requirements of article 6 (6) of the Convention, which are reiterated in article 11a, paragraph 1 of the Nuclear Facilities Decree in relation to amendments to restrictions or conditions at the request of the permit holder (section 19, subsection 3 of the Nuclear Energy Act).</p> <p>In response to MOP decision VII/8m, the planned amendment to article 11a of the Nuclear Facilities Decree as described in subparagraph 2 above will be revised and further amended. The following steps will be undertaken for this purpose.</p>
<p>Outline of the steps necessary to implement the proposed measures</p>	<p><u>In relation to the implementation of article 6 (10) of the Aarhus Convention by article 11a of the Nuclear Facilities Decree:</u></p> <ol style="list-style-type: none"> 1. The Netherlands submitted written questions to the ACCC seeking practical guidance on the scope of the discretionary power in article 6 (10) of the Convention (timetable: request submitted on 22 April 2022; ACCC's response to be received). 2. The Netherlands at the same time informed the communicant and granted the communicant six weeks to submit their views. 3. The Netherlands will analyse the ACCC's written guidance on the scope of the discretionary power and any views received from Greenpeace. If necessary, further guidance may be requested from the ACCC (perhaps during an 'open session'); in that case the communicant will be informed of any such request made by the Netherlands. Once the scope of the discretionary power (article 6 (10) of the Aarhus Convention) has been established, the following steps are expected to be taken for the purposes of implementation: <ul style="list-style-type: none"> - Preparing a draft decree to amend the Nuclear Facilities Decree (article 11a) and informing the ACCC. - Submitting the draft decree for public consultation online. - Prior publication of the draft decree and submission to parliament for preliminary scrutiny, under the preliminary parliamentary scrutiny procedure applicable on the basis of section 76 of the Nuclear Energy Act. - Requesting an advisory opinion from the Council of State (<i>Raad van State</i>), to be incorporated in the report; any necessary adjustments will be made to the decree and the accompanying explanatory memorandum. - Publication and entry into force of the decree.
<p>Actors involved</p>	<p>Ministry of Infrastructure and Water Management, Authority for Nuclear Safety and Radiation Protection (ANVS), Greenpeace.</p>

Final date by when implementation of recommendation will be completed	As soon as possible. On 22 April 2022 the Netherlands submitted written questions to the ACCC requesting further guidance (see above). The timing of the implementation of the amendment to the Nuclear Facilities Decree will depend on when that request is answered. On average it takes 18 months to amend a decree (in this case, the Nuclear Facilities Decree).
C2. Detailed plan of action in relation to compliance case C124	
Recommendation: Para. 3 (b) of decision VII/8m	<p>In paragraph 3 (b) of decision VII/8m, the Meeting of the Parties recommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that:</p> <p>(b) Public officials, including the judiciary, are under a legal and enforceable duty to ensure that documents relating to, or referring to, the imperative reasons of overriding public interest regarding a Natura 2000 site are considered to be environmental information within the meaning of article 2 (3) (b) of the Convention;</p>
Proposed measures to fulfil recommendation	<ul style="list-style-type: none"> • Until 1 May 2022 the situation was as follows: The Government Information (Public Access) Act (<i>Wet openbaarheid van bestuur</i>; WOB), in conjunction with the Environmental Management Act (<i>Wet milieubeheer</i>; WM), regulated the implementation of the provisions of the Aarhus Convention concerning public access to environmental information and information on emissions. The relevant WOB provisions for these purposes were section 1 (definition of the term 'document'), section 6 (time limit for decisions), and sections 10 and 11 (grounds for assessment). The current case law confirms that for the purposes of section 11, subsection 1 of the WOB (concerning internal consultation), third parties who have their own interest in the decision-making (such as permit holders) cannot be deemed to be participants in internal consultations. In a judgment of 20 December 2017 the Administrative Jurisdiction Division of the Council of State considered 'that – unlike in the past – it is of the opinion that a consultation loses its internal character if it involves an external third party that is promoting its own interest and, as such, plays a role in the consultation' (ECLI:NL:RVS:2017:3497). This new line has now further crystallised, and has been reaffirmed in judgments such as ECLI:NL:RVS:2018:3459 (24 October 2018). In this judgment the Administrative Jurisdiction Division established that documents of external parties could be deemed internal consultation only if the external third party had no interest in the matter other than giving the administrative authority its opinion on an administrative matter on the basis of its own experience and expertise. This has now become established case law. • In the legislative history it was affirmed that an applicant is entitled to factual information in a draft document if this information is not incorporated in the final version. This legal framework established in case law will continue to apply under the Open Government Act (WOO). The instructions on applying the WOO specifically mention this point in relation to environmental information. • The WOO entered into force on 1 May 2022, repealing the WOB. • The obligations applicable under the Aarhus Convention have been re-implemented by the WOO. In doing so, the decision has been made to reframe the exceptions specifically applicable to environmental information under the WOB in more general terms. When protection is invoked in relation to data concerning companies and manufacturing processes that was provided to the government in confidence and also includes environmental information, the WOO provides for a weighing of interests (section 5.1,

	<p>subsection 6), which is not required for other information that is not environmental information (in relation to such other types of information, data concerning companies and manufacturing processes provided to the government in confidence is not public; the same applied under the WOB). The WOO also reiterates that in relation to documents intended for internal consultation, it is necessary to weigh the interest in publication against other interests (section 5.2, subsection 4 of the WOO; in relation to environmental information, the interest in protecting personal opinions on policy is weighed against the interest in publication). In this case too, it is necessary to examine whether it is possible to separate personal opinions on policy and environmental information. With respect to this weighing of interests, a new transparency policy has applied since 2021 and in many cases government information, including personal opinions on policy, has been published in full without applying section 11 of the WOB. This has now been enshrined in the WOO.</p> <ul style="list-style-type: none"> • In accordance with the Aarhus Convention, section 5.1, subsection 7 of the WOO provides that the exceptions (to the publication of information) do not apply to information on emissions. Environmental information related to this matter will be published. • In addition to the statutory framework, implementation instructions for the WOO have been published. These instructions include a model decision on applications for information under the WOO. The instructions devote attention to the specific weighing of interests to be made by the competent authority in the case of environmental information and information on emissions. They also address the matter of environmental information included in draft documents. With reference to the findings of the ACCC, the instructions specify that environmental information contained in draft decisions must always be published if it is not published in the final version.
Outline of the steps necessary to implement the proposed measures	<ul style="list-style-type: none"> • Entry into force of the WOO: 1 May 2022. • The implementation instructions were published in anticipation of the Act's entry into force. See: https://www.rijksoverheid.nl/actueel/nieuws/2022/04/01/de-nieuwe-woo-komt-eraan. • In order to bring all of the measures to the general attention of government bodies and the public, the information provided on websites concerning the Aarhus Convention and the legal framework for the publication of environmental information and information on emissions will be updated.
Actors involved	<ul style="list-style-type: none"> • Ministry of the Interior and Kingdom Relations (as the party responsible for the WOO) • Ministry of Infrastructure and Water Management (as dossier holder for the Aarhus Convention) • Greenpeace (communicant)
Final date by when implementation of recommendation will be completed	<ul style="list-style-type: none"> • Entry into force of the Open Government Act: 1 May 2022 • Publication of implementation instructions: 1 April 2022