

From: Jan-Marcel van de Riet [REDACTED]
Sent: Monday, June 12, 2023 10:55 PM
To: ECE-Aarhus-Compliance <aarhus.compliance@un.org>
Cc: michelle.duim [REDACTED]; nicolette.bouman [REDACTED]; DPS real estate [REDACTED]; Maurice Bakker <[REDACTED]>
Subject: Questions from the Compliance Committee to the communicants (ACCC/C/2020/181)

Dear Ms Marshall,

Thank you for your letter of May 24, 2023, in which the Committee gave the communicants the opportunity to answer 2 questions. In connection with the internal organization, I hereby send you the response later than planned and only by this email on behalf of the communicants.

Question 1:

Do you allege that Windpark Autena is an activity subject to article 6 of the Convention and if so, on what legal basis?

Answer communicants:

Yes.

Wind turbines can infringe on the right of a person to live in an environment adequate to his or her health and well-being as stipulated in article 1 of the Convention. For the purpose of safeguarding this right, the Convention safeguards amongst others public access to the decision-making process.

The construction of Wind farms is an activity within the meaning of section 20 of annex I to article 6, paragraph 1 sub a of the Convention, namely an activity 'that is not (covered) by paragraph 1 to 19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation. This is the case. Wind farms are namely included in annex II of the Environmental Impact Assessment Directive (part 3(i): 'installations for the harnessing of wind power for energy productions (wind farms)'. Consequently, there is an obligation to assess whether it is necessary to draw up an environmental impact assessment (milieueffectrapport) (EIA). Under the Dutch law, this EIA duty applies at any rate to decisions on wind farms consisting of at least ten turbines or with a joint capacity of at least 15 megawatt (MW), as recorded in category 22.2 of Annex D to the Environmental Impact Assessment Decree (besluit milieueffectrapportage). The requirements applying to an EIA are set out in article 7.16 et seq. of the Environmental Management Act (Wet milieubeheer). Wind farms of a smaller size are subject to a so-called 'duty to ascertain', which means that the competent authorities have to assess on the basis of the criteria set out in annex III to the EIA Directive whether an EIA is, in fact, necessary (article 2, paragraph 5, of the Environmental Impact Assessment Decree). Said assessment has no prescribed form but it has to be expressly stated in the corresponding decision to grant consent for the wind farm concerned.

Additionally, there always is an obligation to draw up an environmental impact assessment in relation to such overall plans as spatial policy strategies (ruimtelijke structuurvisies), general policy plans (beleidsplannen) and zoning plans (bestemmingsplannen).

In the case of Windpark Autena it has been established that the draft zoning plan has been available for inspection for six weeks from 18 June 2014. A form-free EIA assessment as mentioned above was part of this. The notification of the deposit for inspection has been published in the 'Staatscourant'

i.e. a formal gazette, and in a local door-to-door newspaper. This is stated in ECLI:N:RVS:2015:1702, in legal consideration 6.4 (first sentence), attached as annex 12 in respond of your earlier question 9 (last paragraph).

The Administrative Jurisdiction Division (Raad van State/ ECLI:NL:RVS:2016:3331) explicitly ruled on whether article 6 or 7 of the Convention had been violated and would not have arrived at an assessment if the Convention did not apply to Windpark Autena (attached as **Appendix 13** to the questions).

Question 2:

Please provide English translations of the relevant excerpts of any documents which, in your view, demonstrate that, by the time of the first revision to the PSSV on 10 March 2014, the location for Windpark Autena had already been definitively decided and could not be changed.

Answer communicants:

A letter of the municipality of Vianen to the wind turbine company (enclosed as **Appendix 8** to the questions) dated 20 June 2012:"

On 14 September 2011, we received your request in principle for cooperation for the realisation of 3 wind turbines along the A2 near Autenasekade. (...) On 3 April [2012] we decided in principle to cooperate with your request. It is only possible to cooperate with your plan if a new zoning plan is drawn up for the wind turbines. Due to the political sensitivity surrounding wind turbines, we have also submitted your plan to the council and asked them to make a decision... The council decided in its meeting last night that the zoning plan can be drafted. So you can now get started on the preliminary zoning plan. (...) We will prepare a draft anterior agreement and send it to you."

The Anterior Agreement:

'the Operator has rights for the development of a wind farm with appurtenances on the land located at the Autenasekade,..."

(...)

Article 4 – Obligations of the Municipality

1. For the purpose of realising the Construction Plan, the Municipality will conduct the procedure as referred to in Article 3.8 of the Spatial Planning Act (*Wet Ruimtelijke Ordening*) and will then endeavour to issue the necessary zoning plan revision and environmental permit(s), as well as any other municipal permits or authorisations or exemptions that are directly or indirectly required for or expedient to the Construction Plan, to the Operator in a timely manner in accordance with the Schedule, provided that admissible applications to this end have been submitted to the Municipality by the Operator in a timely manner and moreover that the provisions of this Agreement have been satisfied.
2. If public-law obstacles arise which do not allow for the unaltered implementation of the Construction Plan and/or the implementation of the associated public utility facilities, or do not allow for them in a timely manner, the Parties will immediately consult with each other regarding the measures to be taken at that time.

In this context, obstacles are understood to include: the consequences of appeal procedures instituted against resolutions of the Municipality that are necessary for the implementation

of the Construction Plan and the related implementation of public utility facilities, as well as the consequences of a responsive instruction by higher authorities.

In the event of necessary measures to be taken, as referred to above, the Parties will endeavour to limit the adverse consequences thereof as much as possible.

3. In the event of damage or additional costs on the part of the Operator in relation to the provisions of Article 7 of the Agreement, as a consequence of the occurrence of the obstacles referred to in paragraph 2 above, these are to be borne entirely by the Operator, unless there is an attributable shortcoming on the part of the Municipality.
4. If the Parties do not reach agreement regarding the measures to be taken as referred to in paragraph 2, either Party has the right to dissolve this Agreement in whole or in part.

The Memorandum of Reply (at the bottom of page 5) in a response (**Appendix 9**, to the questions) the province states:

On 11 May 2012, the Municipal Executive of the municipality of Vianen requested the inclusion of the location for wind energy via an opinion on the draft structural vision 2013-2028 (PSSV). The partial revision of the PSSV that is now under review is a result of this. On 19 June 2012, the Municipal Council of Vianen decided to cooperate with Eneco's initiative and decided to amend the zoning plan. On the basis of these decisions, we presume administrative support from the municipality.

On page 6 of the Memorandum of Reply regarding the partial revision, the province tellingly adds:"

The utility and necessity of wind energy has been established nationwide. It was also thereby established that for the realisation of this, the provinces are the competent authority for locations between 5 and 100 MW and that they are assigned the task in this regard. They can leave the provision of the planning space (the zoning plan) to the municipality. The conflict between Government policy and the Aarhus Convention concerning the utility & necessity of wind energy and the scope of the task is not addressed in this partial revision of the PSSV.

The Memorandum of Reply PSSV of 4 February, 2013, p. 44:"

Petitioners ask for new wind energy search locations to be included at the Everdingen junction. This location is also very suitable in landscape terms. The request in principle for this location was positively received by the municipality of Vianen and it will soon be submitted to the municipal council. The PSSV asks for support from the municipal administration and concrete elaboration via initiatives from the market. Both conditions apply at this location and it would be a shame for this to not be possible on the basis of provincial policy. (62) The possibilities for realising wind turbines are much less extensive in this PSSV than in the previous. On the basis of the province's previous wind energy policy, the petitioner (municipality of Vianen) has decided to cooperate in the construction of three wind turbines in the south-eastern cavity of the Everdingen junction. Considering the municipal support and that a market player wants to realise turbines here, the request is to include a possibility for wind energy for this location in the PSSV.

From the minutes (page 27) of the council meeting (**Appendix 10** to the questions) when a vote had to be taken on the Municipal Executive's proposal to adopt the zoning plan, the response of the alderman to a question from a municipal councillor as to why the residents had no say in the location and choice of the turbines:

"that the location of the turbines was already established in the PSSV".

Best regards,

Jan-Marcel van de Riet



VAN DE RIET
advocaten

Van de Riet advocatenkantoor B.V.

Laan van Chartroise 168, 3552 EZ Utrecht

Tel: [REDACTED]

Fax: + [REDACTED]

KvK nr. 80171508

Web: www.rietvast.nl

Disclaimer

Iedere aansprakelijkheid is beperkt tot het bedrag dat in het desbetreffende geval uit hoofde van onze beroepsaansprakelijkheidsverzekering wordt uitbetaald.

Any liability shall be limited to the amount which is paid out under our professional liability policy in the matter concerned.

De informatie verzonden met dit e-mailbericht (en bijlagen) is uitsluitend bestemd voor de geadresseerde(n) en zij die van de geadresseerde(n) toestemming kregen dit bericht te lezen. Gebruik door anderen dan geadresseerde(n) is verboden. De informatie in dit e-mailbericht (en bijlagen) kan vertrouwelijk van aard zijn en kan binnen het bereik vallen van een geheimhoudingsplicht en een verschoningsrecht.

Any information transmitted by means of this email (and any of its attachments) is intended exclusively for the addressee or addressees and for those authorized by the addressee or addressees to read this message. Any use by a party other than the addressee or addressees is prohibited. The information contained in this email (or any of its attachments) may be confidential in nature and fall under a pledge of secrecy and the attorney-client privilege.