Statement by the Government of the Netherlands

concerning communication ACCC/C/2020/181

A. Introduction

1. On 17 August 2016, R.G.J. Dercksen and others ('the communicants') submitted a communication to the Compliance Committee ('the Committee') under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Convention'). The Committee determined its preliminary admissibility on 23 November 2020 and forwarded the communication to the Government of the Netherlands ('the Government') on 4 December 2020.

2. The issue before the Committee is whether the province of Utrecht has complied with the Convention in connection with public participation in decision-making on wind farms located in the province of Utrecht.

3. The Government is of the opinion that the Convention has been correctly implemented in connection with public participation in decision-making on wind farms. In order to demonstrate this, the Government will make observations concerning the incorporation of the relevant provisions of the Convention into domestic law and the application of those provisions in connection with public participation in decision-making on wind farms. They are preceded by observations on the admissibility of the communication and a request for deferment.

B. Admissibility and request for deferment

4. 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.

5. The communicants allege that, in the Netherlands, no opportunity exists to challenge plans/programmes in respect of wind power and wind farms and that, in cases where the opportunity does exist to challenge decisions on specific wind farm projects before a court of law, the results are negligible because the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*; 'the Administrative Jurisdiction Division') has consistently held that the decision-making process for such decisions is in accordance with the Convention.

6. The Government does not agree with the communicants' contention that challenging a decision on a specific wind farm project before the Administrative Jurisdiction Division is ineffective because the results have been negligible. In its judgment of 27 May 2015 (ECLI:NL:RVS:2015:1621), the Administrative Jurisdiction Division quashed a decision on the wind farm 'Den Tol' in Netterden on the grounds that it breached article 6, paragraph 3 of Council

Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.[1] In its judgment of 19 December 2018 (ECLI:NL:RVS:2018:4180), the Administrative Jurisdiction Division quashed a decision to approve a municipal land-use plan for a windfarm in Delfzijl on the grounds that for a number of houses the norms for moving shadow and noise as laid down in the Environmental Management (General Rules for Establishments) Decree (*Activiteitenbesluit*) and the pertinent Order were not met. This shows that an assessment by the Administrative Jurisdiction Division 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 application to the Administrative Jurisdiction Division for judicial review to be an effective and sufficient remedy.

7. Moreover, the communicants 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 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]

8. In view of the availability of domestic remedies, the Government 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).

9. As the Committee is well aware, on 9 November 2015 NLVOW submitted a similar communication under the Convention to which the Government responded on 11 August 2016 (case ACCC/C/2015/133). A hearing took place on 6 November 2018 and the case is still pending before the Committee.

10. The issue before the Committee in case ACCC/C/2015/133 is whether the Convention has been complied with at national level in connection with access to information on, public participation in decision-making on, and access to justice in matters concerning wind turbines in the Netherlands.

11. The process of establishing whether public participation in decision-making on matters concerning wind turbines at national level is in accordance with the Convention is related to the process of establishing whether public participation in decision-making on matters concerning wind turbines at provincial level is in accordance with the Convention.

12. Therefore, the Government requests the Committee to defer its consideration of the decision-making in the current communication until such time as the Committee has reviewed the related issue in case ACCC/C/2015/133.

13. In case the Committee comes to a different conclusion and proceeds with the consideration of the current communication, the Government presents a short summary and description of the

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

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

scope of the issues raised by the communicants, before making observations on the merits of these issues.

C. Summary and scope of the issues raised

14. The communicants allege non-compliance with the Convention in connection with wind farms with respect to the following provisions.

15. According to the communicants, decision-making by the Utrecht provincial government regarding plans for wind power and administrative consent for wind farms does not provide for early public participation, when all options are open and effective public participation can take place (article 6(4)). They state that public participation only takes place when substantive decisions have already been taken.

16. According to the communicants, the public was not involved in the pledge made by the province of Utrecht to install 50 MW of wind power capacity as set out in the Administrative Agreement on the National Development of Wind Energy (*Bestuursovereenkomst Landelijke Ontwikkeling Windenergie*; BLOW). Nor, they allege, was the public consulted on the Wind Energy Action Plan 2002-2010 (*Plan van Aanpak Windenergie 2002-2010*) or the Utrecht Wind Plan 2002 (*Windplan Utrecht 2002*). According to the communicants, the provincial government did consult municipalities, promoters, landowners, property developers and civil society organisations that advocate wind power. However, organisations that voice the concerns of residents and organisations that are concerned with conservation and protection of the countryside were allegedly not heard.

17. According to the communicants, consultation of the public did take place in respect of the Regional Plan for Utrecht 2005-2015, but did not result in any significant modifications since all substantive choices and decisions had already been made. The communicants state that, by the time the public was able to participate, all options were no longer open and effective participation could no longer be guaranteed (article 7).

D. Implementing and making decisions under the Convention: the Dutch system

D.1 Introduction

18. As was set out in respect of case ACCC/C/2015/133, the Convention has been implemented in the Netherlands by means of the Aarhus Convention Implementation Act (*Wet Uitvoering van het Verdrag van Aarhus*).[3] This Act led to amendments of existing Dutch laws, such as the Environmental Management Act (*Wet milieubeheer*)[4] and the Act regulating public access to government information (the Government Information (Public Access) Act (*Wet openbaarheid van bestuur*)).[5] The Government Information (Public Access) Act is essentially concerned with

[3] Bulletin of Acts and Decrees 2004, 519.
[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.

the granting of access to information, both by enabling citizens to ask the government for information, environmental and otherwise, and by active disclosure of information.

19. In addition, the General Administrative Law Act (*Algemene wet bestuursrecht*)[6] is relevant. The General Administrative Law Act provides general rules on governmental activities in administrative affairs, on the preparation of decisions, and on the possibilities for applying to the administrative law courts for judicial review. The scope of both the Government Information (Public Access) Act and the General Administrative Law Act is broader than merely environmental issues. However, both Acts are highly relevant to the implementation of the Convention in the Netherlands. The laws applicable to NLVOW's communication mostly concern the General Administrative Law Act. For this reason, the sections of the General Administrative Law Act that are relevant to the implementation of the Convention are considered below. Additional laws relevant to this case are discussed in Section E of this statement.

20. In addition to the legislation set out in Sections D and E, there is other legislation that is relevant to the implementation of the Convention, but not to this case. This legislation is not covered by this statement, but can be found in the Dutch implementation reports.

D.2 Public participation

Provisions concerning public participation

21. The General Administrative Law Act contains general provisions on administrative decision-making procedures that apply to environmental decision-making. One of the procedures for decision-making is the uniform public preparatory procedure (*uniforme openbare voorbereidingsprocedure*), which is set out in part 3.4 of the General Administrative Law Act (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 part of the General Administrative Law Act 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.[7]

22. If different or supplementary requirements apply under these specific environmental laws, this is indicated in these laws. One example is the fact that specific environmental laws provide for 'everyone' (the public concerned) to present their views on a (draft) decision. This differs from the general rule in the General Administrative Law Act under which only 'persons concerned' can present their views.

23. The main steps to be taken under the uniform public preparatory procedure are presented below.

[6] Appendix 3: English translation of part 3.4 and other sections of the General Administrative Law Act.
[7] As indicated in communication ACCC/2014/104, part 3.4 of the General Administrative Law Act complies with the requirements of article 6 of the Convention.

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

24. The competent authority makes the draft decision available for inspection together with the relevant documents which are necessary to assess the draft (section 3:11 of the General Administrative Law Act).

25. Before these documents are made available for inspection, the competent authority publishes a notice of the draft decision in one or more daily or weekly newspapers, local papers that are delivered to homes free of charge, or in another suitable manner (section 3:12 (1) of the General Administrative Law Act).

26. Section 3:12 of the General Administrative Law Act 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 central government, the notice will have to be published in the Government Gazette (section 3:12 (2) of the General Administrative Law Act).

27. In most cases, the draft decision and related information is not only physically made available for inspection, but also online. Environmental projects being handled by 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 central government is available on the website www.bureau-energieprojecten.nl. The organisation responsible for this website, the Energy Projects Desk (*Bureau Energieprojecten*), is part of the Ministry of Economic Affairs and Climate Policy. It supports public authorities, initiators of wind farm projects and people living in the vicinity of wind farms that are involved in the – sometimes complicated – decision-making procedures on large energy projects. The Energy Projects Desk provides access to relevant information on each project and receives the public's views on the projects. For every project, a description is provided of its substance, the phases of the procedure and its current status, and access is provided to the documents for each phase of the project. All studies and reports that are relevant to 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 the underlying studies.

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

28. The procedure for public participation that allows persons concerned to present views (in writing or orally) is provided for in sections 3:15 to 3:17 of the General Administrative Law Act. Most relevant (environmental) laws extend this right to present views to include everyone (see, for example, section 3.12 of the Environmental Permitting (General Provisions) Act, *Wet*

algemene bepalingen omgevingsrecht). Members of the public can present their views during a period of six weeks from the day that the draft decision is made available for inspection (section 3:16 of the General Administrative Law Act), unless a longer period is specified by law.

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

29. The competent authority must add any new relevant documents and information to the documents made available for inspection (section 3:14 (1) of the General Administrative Law Act).

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

30. Part 3.7 of the General Administrative Law Act lays down the requirements as regards stating reasons for a decision. Section 3:46 of the General Administrative Law Act requires that a decision must 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 of the General Administrative Law Act requires that these reasons are made public together with the decision.

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

31. Sections 3:43 and 3:44 of the General Administrative Law Act contain provisions on communicating a decision in writing to the persons who stated their views on it during its preparation. The decision is communicated when the decision is notified to the applicant, or as soon as possible thereafter (section 3:43 of the General Administrative Law Act). Pursuant to section 3:44 of the General Administrative Law Act, a copy of the decision is sent to those persons who expressed views on the draft decision.

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

32. Most environmental laws refer to the preparatory procedure of the General Administrative Law Act for the preparation of plans and programmes. If reference is made to part 3.4 of the General Administrative Law Act, the points above are applicable. This means that a draft plan will be made available for inspection allowing everyone to present views (section 3:11 of the General Administrative Law Act in conjunction with section 3.8 of the Spatial Planning Act (*Wet ruimtelijke ordening*)[8] and section 7.11 of the Environmental Management Act). The draft plan is made available for inspection together with the relevant documents which are necessary to assess the draft, as required by article 7.

[8] Appendix 4: English translation of relevant parts of the Spatial Planning Act.

33. Public participation concerning policies relating to the environment is not required by law but is nevertheless solicited on a regular basis, since only if all parties concerned are properly consulted can policies enjoying broad support be developed. Central government uses a website (www.internetconsultatie.nl/veelgesteldevragen) to consult the public on papers concerning policies relating to the environment.

E. The communicants' allegations and the Government's response

34. Although the communicants state in their introduction and requests to the Committee that decision-making with regard to wind farms by the Utrecht provincial government is not in accordance with articles 6 and 7 of the Convention, part 6 of the communication focuses solely on plans, programmes and policies within the meaning of article 7. Therefore, the Government has interpreted the communication as being limited to the question of public participation concerning plans, programmes and policies within the meaning of article 7 of the Convention.

E.1 Decision-making at provincial level

Administrative Agreement on the National Development of Wind Energy (BLOW), wind energy in the province of Utrecht, Wind Energy Action Plan 2002-2010 and Utrecht Wind Plan 2002

35. It should be noted that the BLOW, the Wind Energy Action Plan 2002-2010 and the Utrecht Wind Plan 2002 predate the Convention's entry into force with respect to the Netherlands. These documents date from 2001, 2002 and 2002 respectively. The Convention was ratified by the Netherlands on 29 November 2004 and entered into force on 29 March 2005. The plans do not therefore fall within the Convention's scope and obligations. For the record, a brief explanation of how they came about is given below, since they provide the foundations for later plans.

36. The BLOW was concluded in 2001. It is an agreement between central government, the provinces and the Association of Netherlands Municipalities (VNG). Its objective is to install 1500 megawatts (MW) of onshore wind energy capacity by 2010. Under the agreement, the provincial governments were responsible for selecting locations within their respective provinces and meeting an obligation to install a defined amount of power capacity (in MW) within the provincial boundaries.

37. The BLOW requires provinces to draw up an Action Plan setting out how they intend to achieve their target. The target for the province of Utrecht is 50 MW. Utrecht's provincial executive adopted an Action Plan of this kind in July 2002. The Action Plan states that the province of Utrecht wishes to perform a steering and coordinating role in the achievement of the BLOW target and the erection of wind turbines. The province's role in this regard is both to provide scope for small-scale, initiatives (bottom-up approach) and to foster a limited number of large-scale wind farms (top-down approach). In so doing the province wishes to actively support municipalities and follow the necessary planning procedures.

38. A location study was carried out for the larger-scale initiatives, resulting in the adoption of the Utrecht Wind Plan by the provincial executive in July 2002. An environmental impact assessment (EIA) was drawn up for the preferred locations, linked to the preparatory procedure for the new regional plan.[9]

39. The Utrecht Wind Plan location study was performed in close consultation with the municipalities, market parties and interested organisations, including civil society organisations. The result of the study was discussed during workshops held at regional level with municipalities, interest groups, landowners and property developers. The Utrecht Wind Plan was used as a building block for the new regional plan for the province of Utrecht.[10]

40. With regard to involving people living in the neighbourhood, a communication section was included in the Utrecht Wind Plan. It acknowledges the need for good and timely communication with municipalities and the public to generate support and avoid proceedings that would delay the process. Communication was particularly important because the Utrecht Wind Plan 2002 was anchored in the regional plan.

41. In view of the specific character of the wind power project – the intention was to include decisions as concrete policy decisions in the regional plan and certain municipalities were very directly affected – special information sessions were held in the municipalities concerned.[11] The parties concerned received regular updates in an information bulletin and press releases were regularly issued.

E.2 Public participation at provincial level

Utrecht Regional Plan 2005-2015

42. In 2001 an initial discussion paper entitled 'Towards a new regional plan' was published. It formed the basis for a dialogue with municipalities, subnational authorities, civil society organisations and the province's residents. The procedure for entering into the dialogue was described in a letter (*Statenbrief*).[12] A brief summary of the letter is given below.

43. The provincial executive produced a leaflet and broadcast advertisements in order to enter into a dialogue with the public.[13] The information gleaned by means of the dialogue was included in the paper 'Spatial planning choices in outline'. This paper was adopted by the provincial council

[9] From the document *Stand van zaken Windenergie in de provincie Utrecht* (Status report on wind energy in the province of Utrecht), as discussed in the provincial committee meetings of 2 and 5 June 2002 (committee number 2003WM33/2003REG44). These provincial committees prepare decision-making by the provincial council.
[10] The Utrecht Wind Plan 2002 is available in Dutch as a PDF document.
[11] Paragraph 46 explains what is meant by concrete policy decisions.
[12] A *Statenbrief* is a letter from the provincial executive to the provincial council. The purpose of such a letter is to inform the provincial council about a particular subject. The subject of this letter is: 'Adoption of the paper *Ruimtelijke keuzes op hoofdlijnen* (Spatial planning choices in outline) (new regional plan) [PS2002REG13]'. The letter also refers to the paper *Balans van de Dialoog* (The dialogue: an overview).
[13] This leaflet was called: *Leven en werken centraal – Opstap naar een verantwoord streekplan* (Focus on living and working - Towards a well-balanced regional plan).

on 17 July 2002. It contains the spatial planning policy of the province of Utrecht and thus forms the basis for the regional plan.

44. Residents of the province of Utrecht were able to give their views on the regional plan by means of an interactive procedure comprising four public debates and four targeted initiatives on a specially created regional plan website. This interactive phase was positively received by the target groups and the entire procedure was summarised in a booklet, 'The dialogue: an overview'.[14]

45. In February 2003, the provincial executive and the provincial council's spatial planning and environment committee held exploratory discussions on the first draft of the draft regional plan.[15] Consultations were again held with subnational authorities, civil society organisations and provincial advisory bodies on the basis of the first draft.

46. An environmental impact assessment for large-scale wind locations was undertaken which provided for extensive information to the public as well as possibilities for discussion. The large-scale wind locations were set out in concrete policy decisions in this draft regional plan.[16] A concrete policy decision means a decision that has been comprehensively considered, specifying in concrete terms both the location and the envisaged activity, and open to judicial review under the General Administrative Law Act. The final consideration of the decision was therefore at provincial level. Once they have been adopted, concrete policy decisions are definitive for the purposes of the municipal land-use plan. When it draws up a land-use plan, a municipality must abide by the concrete policy decisions contained in the regional plan. In the land-use plan procedure, it is no longer possible to present views or submit objections concerning large-scale locations for wind energy. This was ruled out by section 24 of the Spatial Planning Act as it applied until 30 June 2008.[17]

47. Thereafter, in accordance with the Spatial Planning Act as applicable at the time (section 4a (3)), the draft regional plan and the environmental impact assessment for large-scale wind locations were available for inspection for four weeks from 20 January 2004 to 16 February 2004 inclusive. When plans and decisions are made available for inspection, anyone can present their views on them.

48. The making available for inspection of the draft regional plan and the environmental impact assessment resulted in a Memorandum of Reply. The Memorandum stated that, in order to fulfil

[14] The dialogue: an overview, draft. PS2002REG13b. Development of a new regional plan for the province of Utrecht, 2005-2015. Impressions of meetings, held with subnational authorities, civil society organisations and the residents of the province of Utrecht.
[15] The provincial council's spatial planning and environment committee is a group of political representatives who prepare decision-making by the provincial council on a particular issue.
[16] Concrete policy decisions were, under the Spatial Planning Act as applicable until 30 June 2008, parts of plans in respect of which the considered decision, the area or the location, and the intended project or spatial intervention was sufficiently concrete to be deemed a decision open to judicial review under the General Administrative Law Act. Concrete policy decisions were open to objection and judicial review (www.wieringa-advocaten.nl).
[17] Section 24 of the Spatial Planning Act [Repealed as of 1 July 2008]:
Section 23 (1) (b) and section 27 (1) and (2) do not apply in so far as a draft municipal land-use plan is based on a concrete policy decision.

section 4a (5) of the Spatial Planning Act as applicable at the time,[18] exchanges of views took place concerning the draft regional plan.

49. A separate Memorandum of Reply was drawn up for the part about wind energy.[19] Everyone who submitted objections after the draft regional plan and the environmental impact assessment were made available for inspection was invited to participate in the exchange of views. Residents of the province of Utrecht who had submitted no objections were informed about this phase by means of publications in the press. Around 250 entities and residents availed themselves of the opportunity to exchange views.

50. In January 2004, five information sessions were held concerning the environmental impact assessment for large-scale wind energy locations (13 January in Cothen, 15 January in Bunschoten-Spakenburg, 19 January in Breukelen, 20 January in Woerden and 27 January in Vinkeveen). In addition, four walk-in sessions were held on the draft regional plan (27 January in Leersum, 29 January in Amersfoort, 3 February in Utrecht and 5 February in Woerden). At these walk-in sessions, questions could also be asked about the locations for wind energy.

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[18] Section 4a of the Spatial Planning Act [Repealed as of 1 July 2008]:

1. The provincial council may adopt a regional plan for one or more parts of or the whole province outlining the future development of the area included in the plan and revise a regional plan that has been adopted. If part of such a plan is a concrete policy decision, this decision must be taken into account in the elaboration or deviation referred to in subsection 10 or in the adoption of municipal or regional plans as referred to in chapters IV or IVA of this Act. When adopting a plan the provincial council indicates the extent to which the proposed policy is aligned with or results in changes to provincial environmental policy, provincial water management policy or provincial traffic and transport policy and the extent to which and within what timeframe it intends to revise the applicable provincial environmental policy plan, the applicable provincial water management plan or the applicable provincial traffic and transport policy. A regional plan serves as a basis for instructions as referred to in section 37 (5).
2. The provincial executive is responsible for preparation. In this regard it hears the provincial planning committee.
3. Part 3.4 of the General Administrative Law Act applies to the preparation of the regional plan, on the understanding that:
   a. documents are also made available for inspection at the clerk's office of the municipalities to whose municipal districts the plan relates;
   b. section 3:12 of that Act is also applied by the municipal executive of each municipality to whose municipal district the plan relates;
   c. any person may present their views.
4. The provincial council adopts the regional plan within four months after the period mentioned in subsection 3 has elapsed. It may defer its decision once for up to eight weeks. In so far as the plan is to be amended upon its adoption compared with the draft and the amended adoption constitutes a concrete policy decision, Our Minister is given the opportunity beforehand to submit views thereon.
5. Subsection 3 (c) does not apply in so far as the draft of a regional plan is based on a concrete policy decision included in a key planning decision.
6. Unless section 4b (1) can be applied, the decision to adopt the regional plan is announced within two weeks after the date of the decision by making it available to all for inspection together with the adopted regional plan at the provincial offices and at the clerk's office of the municipalities to whose municipal districts it applies. Section 3:11 (1), (2) and (3) and section 3:12 (1) and (3) (a) of the General Administrative Law Act and subsection 3 (b) apply *mutatis mutandis*.
7. Decisions adopting a regional plan must be notified to Our Minister immediately after the date of the decision by sending a copy. If the regional plan includes a concrete policy decision, the regional plan must be sent together with the copy of the decision.
8. The regional plan determines the extent to which the provincial executive must elaborate the plan in accordance with rules indicated in the plan and may deviate from the plan within limits determined in the plan. This elaboration or deviation may not entail a concrete policy decision.
9. Rules may be laid down by order in council with regard to the preparation, design and structure of regional plans.

[19] Memorandum of Reply part 2, entitled 'Objections submitted to the large-scale wind locations for wind energy and the environmental impact assessment drawn up for them'. The Memorandum of Reply was adopted by the provincial council on 13 June 2004.

51. The Memorandum of Reply addresses all the objections submitted and gives a response to each one. It deals in turn with objections by theme (the use of and need for wind energy, the use of and need for the BLOW and the process whereby it was signed), objections by subject area (landscape, the moving shadow cast and reduction in property value) and objections by location.

52. It emerged from these objections that there were problems linked to certain locations. Those locations (e.g. Harmelen) were therefore scrapped for the time being. It also emerged from the objections that there was insufficient support for including the wind energy locations as concrete policy decisions in the regional plan. It was therefore decided, by means of an amendment when adopting the final regional plan, to include the wind energy locations in the regional plan not as concrete policy decisions but as indicative specifications. The provincial council's preference was a bottom-up approach to establishing the locations with the approval of the municipal council.

53. There are therefore no grounds for the communicants' complaint that the objections submitted did not lead to changes to the regional plan.

Provincial Spatial Policy Strategy 2013-2028

54. The Provincial Spatial Policy Strategy is the successor to the provincial regional plan. Some 290 views were presented in response to the draft version. Seven hearings were held at which respondents were able to explain their views.[20] A response to these views was provided by Memorandum of Reply.[21]

55. As indicated in paragraph 52, the provincial council decided not to take a top-down approach in the regional plan and instead to include wind energy locations in the plan as indicative specifications. The provincial council's preference is a bottom-up approach to establishing the locations with the approval of the municipal council. This is one of the main reasons why the Provincial Spatial Policy Strategy contains fewer wind energy locations.

56. It followed from the decision concerning the Provincial Spatial Policy Strategy that if a wind energy location had been assessed in spatial planning terms and was included in the Provincial Spatial Policy Strategy and if a request was made under the Electricity Act (*Elektriciteitswet*) to draw up a provincial land-use plan (*inpassingsplan*) for such a wind energy location, the province could not object to such a location without good reason.

57. By way of an example of what it considers careful decision-making, the province cites the case of a location for wind energy in Vianen that was included in the draft, but not the final version, of the Provincial Spatial Policy Strategy. This example is mentioned here, because the present communication also appears to be directed specifically at a location in Vianen. In the period preceding the drafting of the Provincial Spatial Policy Strategy, the municipality had stated its willingness to cooperate with an initiative for wind energy near the A2 motorway. Ultimately this

[20] Provincial Spatial Planning Strategy 2013-2028, Province of Utrecht (2016 Review). Decision of the provincial council, adopted on 19 January 2017.
[21] https://www.provincie-utrecht.nl/sites/default/files/2020-03/08_nota_van_beantwoording_prs2013-2028_en_prv_2013.pdf.

location was not included in the draft Policy Strategy, in spite of a positive spatial planning assessment in the environmental impact assessment.

58. The reason for its non-inclusion in the final Provincial Spatial Policy Strategy was that this would result in a change compared with the draft version, in which this location was not clearly included as a location favoured by the municipality.

59. The provincial executive and provincial council are aware that specific wind energy locations can attract considerable public opposition. Since support for this location had not been assessed, they considered it necessary to exclude this possible location from the final adopted Provincial Spatial Policy Strategy.[22] Upon the adoption of the Provincial Spatial Policy Strategy, it was decided to arrange and investigate the new search location by means of a partial revision of this strategy, as explained in greater detail below.

60. It can be concluded that there was indeed an extensive public participation procedure for the Provincial Spatial Policy Strategy. It was conducted on several levels and the residents of the province of Utrecht had a number of opportunities in both formal and informal settings to give their opinions on, among other issues, wind energy locations. During the informal and formal procedures, the communicants had the opportunity to express their opinions on the plans. These views were taken into account and led to adjustments.

First and second partial revision of Provincial Spatial Policy Strategy 2013-2028 (review)

61. Two partial revisions of the Provincial Spatial Policy Strategy were made in 2014. The purpose of the first partial revision was to fully comply with the central government Spatial Planning (General Rules) Decree (*Besluit Algemene Regels Ruimtelijke Ordening*) which entered into force on 1 October 2012 and to incorporate some changes to boundaries. The second partial revision related to sustainable energy. The second partial revision included an addition to the strategic environmental assessment due to the additional wind energy location near Vianen. Since the second partial revision did not include any new spatial planning developments, a second addition to the strategic environmental assessment was not necessary.

62. The immediate reason for the second partial revision was the wish of the municipality of Vianen, expressed on 11 May 2012 in a view on the draft Provincial Spatial Policy Strategy, to have a new wind energy search location added to the final Provincial Spatial Policy Strategy.[23] The partial revision of the Provincial Spatial Policy Strategy stems from that. On 19 June 2012, the municipal council decided to cooperate with an initiative to this end and to alter the municipal land-use plan accordingly.[24] The potential wind energy location in Vianen – added as new wind energy search location at the request of the municipality of Vianen – was converted into a

[22] This case is discussed in two parts of this document. It is mentioned here, to illustrate the careful decision-making process leading to the location's exclusion from the final version, and again in the discussion of the partial revision, since this case prompted the partial revision.
[23] Appendix 5: Views presented by the municipality of Vianen (in Dutch).
[24] Internal decision document no. 80F24DDA concerning the adoption of the Memorandum of Reply for the partial revision of the Provincial Spatial Policy Strategy.

definitive wind energy location. This change was ultimately included in the partial revision of the Provincial Spatial Policy Strategy.

63. In June 2015, the provincial executive adopted a discussion memorandum for the start of the review of the Provincial Spatial Policy Strategy. The provincial executive and the provincial council discussed the content of the review and the review process on the basis of that memorandum. In November 2015 the provincial council adopted a Framework Memorandum. On 24 May 2016, the provincial executive adopted the draft Policy Strategy (2016 Review).

64. In accordance with the statutory requirements, this draft was available for inspection from 31 May to 11 July 2016 inclusive. Anyone could present their views during this six-week period, either on paper, online or orally. A total of 158 views were presented. The substance of these views was summarised in a draft Memorandum of Reply adopted by the provincial executive on 27 September 2016, to which a provisional response from the provincial authorities was attached. The provincial council held hearings on 24 and 26 October 2016 at which respondents could discuss their views in person. Twenty-six respondents availed themselves of this opportunity. The hearings gave rise to a number of additions to the draft Memorandum of Reply.

65. The views on the wind energy location concerned, among other things, the landscape, flora and fauna, and the interests of the province.[25] One respondent presented the view that the wind energy policy formulated in the draft Policy Strategy was not in compliance with the Convention. They argued that insufficient environmental information, as defined in section 19.1a of the Environmental Management Act, had been provided together with the draft. The Memorandum of Reply which addressed the views presented indicated that central government policy was in compliance with the Convention.

66. It can be concluded that provision was made for participation by residents in the procedures by means of which one wind energy location (Utrecht) was scrapped and another added (Vianen) and residents of the province of Utrecht availed themselves of this opportunity. It was therefore not a done deal between the province and the municipalities.

E.3 Other relevant information

Interpellation debate on wind energy

67. On 29 September 2014 an interpellation debate on wind energy was held by the provincial council of Utrecht.[26] During that debate, the relevant member of the provincial executive at the time gave an undertaking to examine how the provisions of the Convention had been implemented by the province of Utrecht.

[25] The Memorandum of Reply states that seven views were presented against the wind turbines at the location near Vianen (Autenasekade). The views were included in the Memorandum of Reply in anonymised form.
[26] An interpellation debate is a debate initiated by a member of the provincial council on a subject that is not on the agenda and about which he or she wishes to put questions to the King's Commissioner or another member of the provincial executive (section 151 (2) of the Provinces Act (*Provinciewet*).

Letter from the provincial executive to the provincial council on the implementation of the Convention

68. This undertaking was fulfilled and reported on by means of a letter that was sent to the provincial council on 6 January 2015. The letter was sent for information purposes, not for decision-making.

69. It explains that the Convention focuses on three points:

    1) providing for access to environmental information held by the government;

    2) providing for public participation in decision-making on environmental matters; and

    3) providing for access to justice in environmental matters, for example to obtain access to environmental information.

70. A brief summary is included here of the second point only, since it addresses the central issue of the communication.

'*With a view to achieving the proposed national target of 6000 MW onshore wind power capacity by 2020, the province has pledged to generate 65.5 MW of wind power. The spatial planning frameworks for this endeavour comprise the Provincial Spatial Policy Strategy 2013-2028 and the Provincial Spatial Ordinance 2013.*

These frameworks are limited to the facilitation in spatial planning terms of initiatives whose implementation depends on private sector involvement. Several wind energy locations that offer space for large-scale wind turbine installations are designated in the Provincial Spatial Policy Strategy and the Provincial Spatial Ordinance. These locations were identified after consultation with the municipalities. In urban areas (within the red contours), it is up to municipalities whether they wish to allow for wind turbines in their spatial plans. A strategic environmental assessment was drawn up for the purpose of the Provincial Spatial Policy Strategy.

The purpose of an environmental impact assessment is to take proper account of environmental interests when making decisions on activities that may have a significant adverse impact on the environment. Section 3.2 relates to sustainable energy. Section 3.2.4 relates specifically to wind energy locations. Section 3.3 sets out the conclusions and recommendations. The strategic environmental assessment was also supplemented at the time of the first partial revision of the Provincial Spatial Policy Strategy and the Provincial Spatial Ordinance whereby Vianen was added as a wind energy location. In accordance with the provisions of the General Administrative Law Act and the Spatial Planning Act, the draft of the (revision of the) Provincial Spatial Policy Strategy and the Provincial Spatial Ordinance and the strategic environmental assessment were available for inspection for six weeks. They were accessible to all online and on paper at the provincial offices and at all municipal offices in our province. Anyone could present views or make observations during this period. The provincial council took this contribution into account in its decision-making.

The municipality must adopt or amend a land-use plan for implementation purposes in accordance with the procedures laid down to this end in the General Administrative Law Act and the Spatial Planning Act. An integrated environmental permit for building a structure (formerly a building permit) is needed for the erection of a wind turbine. If an integrated environmental permit for the construction and operation of an

*establishment (formerly an environmental permit) is also needed, it is incorporated into the same integrated environmental permit. Only offshore wind energy projects and onshore wind farms (three wind turbines or more) for which an environmental impact assessment was drawn up still fall into this category. Under the Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*), the municipality is the authority competent to grant or refuse to grant such a licence. The procedures whereby building permits and environmental permits are granted both provide for public participation and comply with the requirements laid down in the Convention.*

The foregoing is confirmed by the external expert's conclusion. Conclusion: the provision made for public participation complies with the requirements laid down in the Convention.

Court judgments concerning public participation in accordance with the Convention

71. Court cases have been brought concerning wind energy locations included in the Provincial Spatial Policy Strategy, in some of which the Convention was discussed. A number of examples specifically concerning the wind farm in Vianen on Autenasekade are given below:[27]

72. Judgment of the Administrative Jurisdiction Division of 27 May 2015 (201409190/1/R6):

'It has been established that the draft plan was available for inspection for six weeks from 18 June 2014. It included an environmental impact assessment for which there was no prescribed format. The announcement that the draft plan was being made available for inspection was published in the Government Gazette and in a free local newspaper. The draft plan and the documents relating to it could be consulted at the town hall and online. It is therefore clear that the statutory requirements on giving notification of the availability of documents for inspection were satisfied, so that everyone had the opportunity to respond to the draft plan by presenting views orally or in writing. Contrary to what [appellant in 4] and others argue, there are no grounds to conclude that the council did not take account in its decision-making of the responses submitted to the plan as contained in the views presented. The Memorandum of Reply to the views addressed all the views presented and this resulted in the draft plan being amended on a number of points. Finally, there are no grounds to conclude that there was a failure to provide information relating to the plan. The council explained that the draft plan and the documents relating to it were made available for inspection. [appellant in 4] and others did not further substantiate their argument that information relating to the environmental effects was not provided. This argument is therefore dismissed. The submission fails.'

73. Judgment by the Council of State of 14 December 2016 (201604363/1/A1):

'Contrary to what [appellant] argues and as the district court rightly held, the foregoing is not incompatible with the right to proper and effective legal protection, as laid down inter alia *in articles 6 and 7 of the Aarhus Convention. In this regard account is taken of the fact that, in the context of the municipal land-use plan procedure, in which provision is made for public participation, [appellant] brought a legal action concerning the (environmental) aspects to which she referred and that she believes have an important bearing on the question of whether an acceptable living environment exists. In its judgment of 27 May 2015, ECLI:NL:RVS:2015:1702, the Administrative Jurisdiction Division of the Council of State held that the council could reasonably take the position that the plan would not lead to unacceptable problems because of noise nuisance or a moving shadow. In this judgment, the Administrative Jurisdiction Division declared the application for judicial review of Vianen municipal council's decision of 30 September 2014 adopting the*

[27] NB: this concerns a judgment on the Autenasekade wind farm. The case was brought by interested parties against the municipality, not against the province, because the contested decision was made by the municipality.

land-use plan unfounded. In this regard the Administrative Jurisdiction Division held, inter alia*, that the council rightly took the position that the wind turbines provided for in article 4.2 of the plan rules complied with the Environmental Management (General Rules for Establishments) Decree (*Activiteitenbesluit*).'*

F. Conclusion

74. On the basis of the above considerations, the Government concludes that: (a) the application of paragraph 21 of Decision I/7 to this communication provides a legal basis for the Committee not to proceed with the consideration of the communication (in whole or in part); (b) the Committee should defer the consideration of this communication until it has reviewed the related issue in case ACCC/C/2015/133; and (c) the Convention has been complied with in connection with public participation in decision-making on wind turbines located in the province of Utrecht.