

Response of the Government of the Netherlands to the draft advice by the Aarhus Convention Compliance Committee to the Netherlands concerning the implementation of paragraph 3 (a) of decision VII/8m

Introduction

1. On 22 April 2022, the Government of the Netherlands ('the Government') requested guidance on the implementation of the recommendation set out in paragraph 3 (a) of decision VII/8m. The recommendation in paragraph 3 (a) of decision VII/8m concerns the non-compliance found in paragraph 88 of the Aarhus Convention Compliance Committee's ('the Committee') findings on communication ACCC/C/2014/104 (*Netherlands*), endorsed by the Meeting of the Parties through paragraph 1 of decision VII/8m. The Government posed several different questions regarding article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention' or 'the Convention') in its letter of 22 April 2022.
2. On 24 August 2022, the Government received the Committee's "Draft advice by the Aarhus Convention Compliance Committee to the Netherlands concerning the implementation of paragraph 3 (a) of decision VII/8m" ('draft advice'), including an Annex to the draft advice.
3. The Government and the communicant were invited to give their views on the draft advice. The Government will give its views below, following the structure of the draft advice and the order of questions as provided for by the Committee in its draft advice. By email note of 28 September 2022, the Committee informed all national focal points and stakeholders to the Convention on the draft advice and offered them the opportunity to comment on the Committee's draft advice. The Government wishes to express its gratitude to the Committee of offering other parties to the Convention the possibility to give their views on the draft advice.
4. The Government would like to use this opportunity to make clear that it is fully committed to implement the Aarhus Convention and to fully comply with the obligations resulting from the Convention. The comments the Government makes on the provided draft advice should be read in this light.

Relationship between article 6 (1) in conjunction with Annex I, paragraph 22, and article 6 (10) of the Convention

5. The Committee reiterates in its draft advice that article 6 (10) of the Aarhus Convention refers to a reconsideration or update of the permit conditions. In paragraph 20 of the draft advice, the Committee sets out that a reconsideration or update for an activity may occur in at least six different situations.
6. However, if the Government interprets these situations as set out in paragraph 20 of the Committee's draft advice correctly, article 6 (10) of the Convention only applies in three situations of the six as set out in the Committee's draft advice. Namely, (1) situation b, final paragraph,¹ (2) situation d, and (3) situation e.
7. The Government wishes to request the Committee, in its final advice, to take into account the following comments and questions on clarification, and would welcome the Committee to elaborate on the situations as set out in paragraph 20 of the draft advice.

¹ An extension or proposed change of an existing activity which in itself does not meet the criteria/thresholds and which on the basis of article 6 (1) (b) of the Convention is assessed as *not* having a potential significant effect on the environment.

8. As a start, the Government is of the opinion that the considered change as set out in paragraph 20(a), 20(b), second paragraph,² 20(c) and 20(f) of the draft advice is already covered by article 6 (1) of the Convention read in conjunction with paragraphs 20 and 22 of Annex I to the Convention, instead of on the basis of article 6 (10) of the Convention.
9. Regarding paragraphs 20(a), 20(b) and 20(c) of the draft advice, it is not clear to the Government why the Committee deems it relevant that the existing activity meets the criteria/thresholds listed in Annex I of the Convention. According to the Government, it would be sufficient to determine whether the proposed change or extension in itself meets the criteria/thresholds listed in Annex I of the Convention.
10. Following paragraph 20(a) of the draft advice, this would mean that, regardless of the size of the existing project activities, article 6 (1) (a) of the Convention is applicable since the size of the change or extension will in itself meet the criteria/thresholds as listed in Annex I of the Convention.
11. According to the Government, it would appear that there is no difference between paragraphs 20(b) en 20(c) of the draft advice. In both situations, the tests as described in paragraph 20(b) of the draft advice apply to these situations (however, please note point 16 of the Government's response on paragraph 20(b) of the draft advice below). The reasoning as set out in paragraph 20(c) of the draft advice does not seem to follow from the wording of paragraph 22 of Annex I to the Convention. According to that provision, article 6 (1) (a) of the Convention is applicable *only* if the change or extension itself meets the criteria/thresholds, regardless of the size of the project as a whole.
12. Even if the situation in paragraph 20(c) of the draft advice would trigger article 6 (1) (a) of the Convention – which it would not, in the view of the Government –, this interpretation raises the question whether or not public participation in such a case should regard the whole activity or only the change or extension. The Government is of the opinion that, taking into account the principle of legal certainty, providing public participation should and could only be allowed for the proposed extension or change, because the existing activity is permitted on the basis of an irrevocable permit on the basis of Dutch law.
13. The Committee's view as set out in paragraph 20(c) of the draft advice also seems to differ from the approach of the European Court of Justice (ECJ) in Environmental Impact Assessment ('EIA') cases. In the *Doel*-case, the ECJ emphasized that (only) the environmental effects of the proposed change or extension are relevant when determining if point 24 of Annex I, or point 13(a) of Annex II, of the EIA-Directive applies, and not the environmental effects of the project *as a whole* (after the change).³ Paragraph 22 of Annex I, first sentence, to the Convention is almost identical to the wording of point 24 of Annex I of the EIA-Directive. The European Commission seems to take the same approach in its notice on proposed changes and extensions.⁴ The Government is aware that both the *Doel*-case of the ECJ and the *Borssele Nuclear Power Plant*-case are cases in which no criteria/thresholds apply, which would mean that this case fits category 20(d) and not category 20(c). But the reasoning of the ECJ is clear: only the size of the proposed change or extension itself matters. Therefore, in the view of the Government, in both paragraphs 20(b) and 20(c) of the draft advice, in accordance with

² An extension or proposed change of an existing activity which in itself does not meet the criteria/thresholds and which on the basis of article 6 (1) (b) of the Convention is assessed as having a potential significant effect on the environment.

³ Case C-411/17, ECLI:EU:C:2019:622. In paragraph 77 the ECJ considers that "it must be examined whether measures such as those at issue in the main proceedings, along with the work to which those measures are inextricably linked, may fall within the scope of point 24 of Annex I to the EIA Directive".

⁴ Commission notice regarding application of the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) to changes and extension of projects - Annex I.24 and Annex II.13(a), including main concepts and principles related to these (2021/C 486/01), paragraph 3.3.1. Available online: [C_2021486EN.01000101.xml \(europa.eu\)](https://eur-lex.europa.eu/eli/notice/2021/486/01/1/1).

paragraph 22 of Annex I to the Convention, final sentence, article 6 (1) (b) of the Convention would apply and not article 6 (1) (a) of the Convention.

14. The Government is conscious of the fact that a project may not be deliberately cut up so as to avoid public participation. However, not every case where an activity in the course of time exceeds the criteria/thresholds set, qualifies as such a practice.
15. On the third paragraph of paragraph 20(b) of the draft advice, the Committee states that "it must then proceed to apply the tests under article 6 (10) to decide whether the proposed change or extension is nevertheless "capable of significantly changing the basic parameters of the activity" or "will address significant environmental aspects of the activity". The Government wonders whether this is only the case if the proposed change or extension is also an update or reconsideration of the operating conditions or whether *any* change or extension (by definition) is also an update or reconsideration of the operating conditions? According to the Government's reading, not *any* (or every) change or extension is also an update or reconsideration of the operating conditions, as one can also extend or change a licensed activity whereas the extension or change is still within the applicable and current permit conditions. The comments as provided here also apply to paragraph 20(d) of the draft advice.
16. On paragraph 20(f) of the draft advice, the Government would like to request the Committee to clarify whether situations can be described that exist under domestic law in which an EIA screening needs to be made of the entire project (after a change), whereas the size of the change or extension would in itself not trigger an EIA screening. Such an obligation does not follow from the EIA-Directive. An EIA screening for changes or extensions is obliged on the basis of the Directive if the change or extension in itself may have significant adverse effects on the environment (category 13(a) of Annex II), see also point 14 above. However, even if such a circumstance under domestic law occurs, the Government questions the basis of what article 6 (1) (b) of the Convention would apply. As the Government pointed out above, paragraph 22 of Annex I to the Convention only refers to the size of the change or extension, and paragraph 20 of Annex I to the Convention requires the Government to provide public participation in accordance with national legislation in case of an environmental impact assessment procedure (and not in the case of an EIA screening). The fact that paragraph 20 of Annex I to the Convention concerns an EIA and not an EIA screening also follows from the Implementation Guide of the Aarhus Convention,⁵ in which it is stated that

Paragraph 20 of annex I includes any activity not otherwise listed which requires public participation under an EIA procedure in accordance with national legislation. In its findings on communication ACCC/C/2008/35 (Georgia), the Compliance Committee observed that the determination of whether an activity falls within the ambit of paragraph 20 of annex I depends on three elements, namely: (a) public participation; (b) an EIA procedure in the context of which public participation takes place; and (c) domestic legislation providing for an EIA procedure. It further noted that even if paragraph 20 of annex I to the Convention refers to the taking place of an EIA, the domestic legislator may provide for a process that includes all basic elements for an EIA, without naming the process by the term "EIA". Such a de facto EIA process should also fall within the ambit of annex I, paragraph 20. It is critical, however, to define the extent to which the de facto EIA process qualifies as an EIA process, even if it is not termed as such. Thus, according to the Committee it is not the name but particular features of the given procedure that decide whether the procedure should be considered as an EIA procedure. One such characteristic feature is public participation.

17. Furthermore, it follows from the Implementation Guide that paragraph 22 of Annex I to the Convention, final sentence, not only resembles the screening as set out in the EIA-Directive, but is also modelled on the basis thereof: '[T]his approach is modelled on the EIA Directive and effectively means that the changes or extensions will be subject to screening'.⁶ Additionally, in

⁵ UNECE, The Aarhus Convention: An Implementation Guide (second edition 2014), available online: https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf, page 240.

⁶ *ibid.*

the Implementation Guide, a distinction is made between the EIA procedure and the EIA screening on other occasions as well. In contrast, paragraph 20 of Annex I to the Convention only concerns the EIA procedure itself.

18. Lastly, the Government wishes to respond to the communicant's remark on paragraph 15 of the draft advice. Contrary to what the communicant claims in the response to the draft advice on article 6, paragraph 10 of the Convention, it clearly follows from the wording of Annex I, under 1, of the Aarhus Convention that the threshold of 1 kW only applies to nuclear research installations and not to nuclear power plants.

"Changing basic parameters" v. "will address significant environmental aspects"

19. The Government welcomes the Committee's comments on "will address significant environmental aspects of the activity", "capable of significantly changing basic parameters", and the difference between the two. In paragraph 32 of the draft advice, the Committee states that the basic parameters of the activity are usually set out in the permit itself, and that these parameters include the measures required to address significant environmental aspects of that activity. Additionally, the Committee asserts that there will also likely be an overlap between "basic parameters" and its "significant environmental aspects". An example could be the emission limits set in the permit.
20. However, the explanation provided by the Committee is not yet crystal clear to the Government. For example, could the Committee specify what the exact difference is between "capable of changing basic parameters" and "addressing significant environmental aspects"? In the Government's view, the basic parameters are the conditions as included in the permit, including the necessary measures for addressing significant environmental aspects. Could the Committee provide an example of the latter, being the necessary measures for addressing significant environmental aspects?

Conclusion

21. The Government would once more like to thank the Committee for answering the questions posed through the drafting of this draft advice, and trusts that the Committee will address any remaining questions and need for clarification it has in its final draft advice.