

Compliance Committee to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters (Aarhus Convention)

**First progress review of the implementation of the Committee's  
findings and recommendations on communication  
ACCC/C/2014/104 (Netherlands)**

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## **I. Introduction**

1. On 4 October 2018, the Committee adopted its findings and recommendations on communication ACCC/C/2014/104 concerning the compliance of the Netherlands (see ECE/MP.PP/C.1/2019/3).
2. In accordance with paragraph 36(b) of the annex to decision I/7 of the Meeting of the Parties, the Party concerned agreed that the Committee might make its recommendations to it directly, in order to address compliance matters without delay pending the seventh session of the Meeting of the Parties.

## **II. Summary of follow-up**

3. On 27 August 2019, the secretariat wrote to the Party concerned to invite it to provide a first progress report by 1 October 2019 on the progress it had by that date made to implement the Committee's findings and recommendations.
4. On 1 October 2019, the Party concerned submitted its first progress report on time.
5. On 30 October 2019, the communicant of communication ACCC/C/2014/104 provided its comments on the first progress report of the Party concerned.
6. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 26 February 2020. The Committee thereafter requested the secretariat to forward the first progress review to the Party concerned and the communicant of communication ACCC/C/2014/104.

## **III. Consideration and evaluation by the Committee**

7. In order to fulfil paragraph 89 of the Committee's findings and recommendations on communication ACCC/C/2014/104, the Party concerned would need to demonstrate to the Committee that it has taken the necessary legislative, regulatory and administrative measures to ensure that, 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 paragraphs 2 to 9 of article 6 are applied.
8. With regard to paragraph 89 of the Committee's findings, in its first progress report the Party concerned reports that after receiving the Committee's findings, it undertook a study to determine whether measures, legal or otherwise, should and could be taken to improve public participation in future decisions on the duration of nuclear activities (operation and design lifetime).<sup>1</sup> It reports that particular emphasis was placed on decisions that are taken by covenant, through legislation or licensing.

### *Covenants*

9. The Party concerned explains that decision-making where decisions are taken by covenants is regulated by the 2003 Instructions for Covenants and is based on the General Administrative Law Act (GALA).<sup>2</sup> It asserts that the 2003 Instructions together with section 3:1(2) of the GALA provide proper legislative and administrative measures to ensure public participation in covenants about nuclear activities and their duration. It reports that in the context of its advisory role under section 3 of the Nuclear Energy Act, the Authority for Nuclear Safety and Radiation Protection will pay particular attention to appropriate public participation in any future "directional agreements" (such as covenants) on the duration of nuclear activities.<sup>3</sup>

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<sup>1</sup> Party's first progress report, 1 October 2019, para. 5.

<sup>2</sup> Party's first progress report, 1 October 2019, paras. 9-10.

<sup>3</sup> Party's first progress report, 1 October 2019, paras. 12-13.

## *Legislation*

10. With respect to legislation, in its first progress report the Party concerned states that since November 2017 online consultation is compulsory for all legislative and regulatory proposals initiated by the Government, unless they concern purely technical amendments or the implementation of European Union legislation.<sup>4</sup> A nonbinding Roadmap for Legislation sets out procedures, requirements and models for civil servants involved in the legislative process.<sup>5</sup> The Party concerned claims that if the amendment of the Nuclear Energy Act, which was relevant in 2010 for the Borssele nuclear power plant, had taken place today, the online consultation process would have been part of the legislative procedure.<sup>6</sup>

## *Licences*

11. In its first progress report the Party concerned reports that, in response to the Committee's recommendation in its findings on communication ACCC/C/2014/104, and in order to ensure that in the future its uniform public preparatory procedure as set out in section 3:4 of the GALA is always followed for licenses relating to a review or amendment of the duration of nuclear activities, it has initiated a legislative amendment of section 17 of the Nuclear Energy Act.<sup>7</sup>

12. Specifically, the Party concerned states that the proposed legislative amendment will mean that the application of the "regular procedure" set out in section 17(4) of the Nuclear Energy Act, under which the uniform public preparatory procedure and public participation do not apply, would be excluded from all license amendments that relate to the duration (operation or design lifetime) of a nuclear facility. This will mean that for such licence amendments, the uniform public preparatory procedure will have to be followed at all times. The Party concerned submits that this amendment will fulfil the Committee's recommendation in paragraph 89 of the Committee's findings on communication ACCC/C/2014/104.<sup>8</sup>

13. The Party concerned acknowledges that the uniform public preparatory procedure in section 3:4 the GALA was followed in the 18 March 2013 amendment of the licence for the Borssele nuclear power plant (NPP), even though it was not mandatory at the time to do so since, in the opinion of the competent authority, the environmental impact of the licence amendment was not expected to be greater than or to differ from that permitted under the existing licence.<sup>9</sup>

14. Section 17(4) of the Nuclear Energy Act currently provides:

"In derogation from paragraph 1, the parts of the General Administrative Law Act, the Environmental Permitting (General Provisions) Act and the Environmental Management Act cited therein shall not apply to preparatory work for decisions on an application for amendment to a licence pursuant to Section 15 (b) or (c) that does not give rise to different or greater adverse effects for the environment than is tolerated under the existing licence, for which there is no obligation to conduct an environmental impact study as provided for in Chapter 7 of the Environmental Permitting (General Provisions) Act and which will not result in a different facility than that for which a licence was granted."<sup>10</sup>

15. The Party concerned reports that work on the proposed amendment has already commenced, but due to its legislative process, which takes at least 1.5 years, the amendment is not expected to enter into force before 2021.<sup>11</sup> The Party concerned states however that, in

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<sup>4</sup> Party's first progress report, 1 October 2019, paras. 14 and 16.

<sup>5</sup> Party's first progress report, 1 October 2019, paras. 14 and 16, and annex C.

<sup>6</sup> Party's first progress report, 1 October 2019, para. 16.

<sup>7</sup> Party's first progress report, 1 October 2019, paras. 21-22.

<sup>8</sup> Party's first progress report, 1 October 2019, paras. 19 and 21-22.

<sup>9</sup> Party's first progress report, 1 October 2019, para. 20.

<sup>10</sup> Party's response to communication, annex 2, pp. 1-2.

<sup>11</sup> Party's first progress report, 1 October 2019, para. 23.

anticipation of the amendment's entry into force, the Authority for Nuclear Safety and Radiation Protection, which is the competent licensing authority, will proceed in accordance with the proposed amendment in its licensing practice in the meantime.<sup>12</sup> The Party concerned submits that in the interim this is a sufficient guarantee that the Committee's recommendation in paragraph 89 of its findings on communication ACCC/C/2014/104 are met.<sup>13</sup>

16. In the view of the communicant of communication ACCC/C/2014/104, the proposed amendment of section 17(4) of the Nuclear Energy Act will not address the breach of the Convention identified by the Committee in its findings.<sup>14</sup> In particular, the communicant claims that the public participation on the 18 March 2013 amendment of the licence for the Borssele NPP only concerned aging of the NPP, and most of the reports regarding the future safety of the plant were not disclosed during the public participation procedure, but were only made available to Greenpeace during the appeal before the administrative court (Raad van State).<sup>15</sup> The communicant claims that this failing has to date not been repaired, the information is still not available and no public participation with respect to the environmental impact has been organized.<sup>16</sup>

17. The Committee welcomes the efforts of the Party concerned to ensure that in the future the uniform public preparatory procedure will apply to all licenses relating to the review or amendment of the duration of nuclear activities.

18. The Committee also welcomes the proposed amendment of section 17(4) of the Nuclear Energy Act. The Committee considers that in doing so, the Party concerned removes the presumption in current section 17(4) that reconsiderations or updates to the duration of a licence for a nuclear activity should only be subject to public participation if the reconsideration or update will be subject to environmental impact assessment, will result in physical changes to the facility, or will have different or greater adverse effects on the environment than under the existing licence. As the Committee held in its findings on communication ACCC/C/2014/104, public participation meeting the requirements of article 6 of the Convention may be "appropriate", and thus required by article 6(10) of the Convention, even where no environmental impact assessment will be carried out or where there will be no physical changes.<sup>17</sup>

19. However, while the proposed amendment of section 17(4) of the Nuclear Energy Act is a positive step, the Committee considers that it is not sufficient to address the recommendation in paragraph 89 of the findings on communication ACCC/C/2014/104.

20. The Committee points out that, as acknowledged by the Party concerned, the uniform public preparatory procedure set out in section 3:4 of the GALA was applied in the 18 March 2013 amendment of the licence for the Borssele NPP, even though this was not at the time required by law.<sup>18</sup> Despite the application of the uniform public preparatory procedure, the Committee found that the Party concerned had failed to comply with article 6(4), in conjunction of article 6(10), of the Convention with respect to the 18 March 2013 licence amendment. In particular, the Committee considered that:

(a) The public did not have the opportunity to participate at an early stage, when all options were open and efficient public participation could take place;<sup>19</sup> and

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<sup>12</sup> Party's first progress report, 1 October 2019, para. 24.

<sup>13</sup> Party's first progress report, 1 October 2019, para. 24.

<sup>14</sup> Comments on the Party's first progress report by the communicant of communication ACCC/C/2014/104, 30 October 2019, paras. 9-12.

<sup>15</sup> Comments on the Party's first progress report by the communicant of communication ACCC/C/2014/104, 30 October 2019, para. 10.

<sup>16</sup> Comments on the Party's first progress report by the communicant of communication ACCC/C/2014/104, 30 October 2019, para. 10.

<sup>17</sup> ECE/MP.PP/C.1/2019/3, para. 71.

<sup>18</sup> Party's first progress report, 1 October 2019, para. 20.

<sup>19</sup> ECE/MP.PP/C.1/2019/3, para. 82.

(b) The public concerned should have been provided, as a minimum, with access to the information listed in article 6(6)(a)-(f) of the Convention.<sup>20</sup>

21. Accordingly, in addition to the proposed amendment to section 17(4) of the Nuclear Energy Act, in order to fulfil paragraph 89 of the Committee's findings on communication ACCC/C/2014/104 the Party concerned will need to take the necessary legislative, regulatory and administrative measures to ensure that, 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 paragraphs 2 to 9 of article 6 are to be applied in full, including that:

(a) The public is given the opportunity to participate at an early stage, when all options are open and efficient public participation can take place; and

(b) The competent public authority is required to give the public concerned access to all information relevant to the decision-making that is available at the time of the public participation procedure and that the relevant information shall include at least the information listed in article 6(6)(a)-(f) of the Convention.

22. In the light of the above, the Committee considers that the Party concerned has not yet taken the necessary measures to meet the recommendation in paragraph 89 of the Committee's findings on communication ACCC/2014/104. While a positive step, the proposed amendment to section 17(4) of the Nuclear Energy Act will not be sufficient to fulfil the recommendation in that paragraph.

#### **IV. Conclusions**

23. The Committee considers that the Party concerned has not yet taken the necessary measures to meet the recommendation in paragraph 89 of the Committee's findings on communication ACCC/2014/104. While a positive step, the proposed amendment to section 17(4) of the Nuclear Energy Act will not be sufficient to fulfil the recommendation in that paragraph.

24. The Committee invites the Party concerned together with its second progress report due on 1 October 2020 to provide evidence that it has taken the necessary legislative, regulatory and administrative measures to ensure that, 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 paragraphs 2 to 9 of article 6 are to be applied in full, including that:

(a) The public is given the opportunity to participate at an early stage, when all options are open and efficient public participation can take place; and

(b) The competent public authority is required to give the public concerned access to all information relevant to the decision-making that is available at the time of the public participation procedure and that the relevant information shall include at least the information listed in article 6(6)(a)-(f) of the Convention.

25. The Committee reminds the Party concerned that all measures necessary to implement the recommendation in paragraph 89 of the Committee's findings on communication ACCC/C/2014/104 must be completed by, and reported upon, by no later than 1 October 2020, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met that recommendation.

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<sup>20</sup> ECE/MP.PP/C.1/2019/3, para. 85.