

Dutch National Contact Point (NCP)
OECD Guidelines for Multinational Enterprises

Initial Assessment

Notification Stichting Hou Friesland Mooi vs. Nuon Energy N.V. and/or Nuon Wind Development B.V.

19 June 2018

Notification to the Dutch National Contact Point from Stichting Hou Friesland Mooi concerning an alleged violation of the OECD Guidelines for Multinational Enterprises by Nuon Energy N.V. and/or Nuon Wind Development B.V., submitted on 12 December 2017

EXECUTIVE SUMMARY

On 12 December 2017 Stichting Hou Friesland Mooi (HFM; ‘the notifier’) notified the Dutch National Contact Point (NCP) of an alleged violation of the OECD Guidelines for Multinational Enterprises by Nuon Energy N.V. and/or Nuon Wind Development B.V. (Nuon).

As part of its initial assessment, the Dutch NCP held separate, confidential meetings with the notifier and the business involved.

The Dutch NCP concludes that this notification merits further examination, based on the following considerations:

- The notifier has a legitimate interest in this case.
- Nuon Energy N.V. and/or Nuon Wind Development B.V. is part of the Swedish multinational company Vattenfall, a multinational enterprise within the meaning of the Guidelines.
- The points raised by HFM relate to material and substantiated issues.
- In this specific instance there is a relationship between the activities of Nuon and the issues in question.
- Consideration of this specific instance could contribute to achieving the Guidelines’ objectives and enhancing their effectiveness.

In this initial assessment the NCP expressly refrains from commenting on whether Nuon failed to observe the OECD Guidelines. The facts have not been examined and the evidence provided by the notifier has not been verified.

In conformity with the Dutch NCP procedure,¹ in this initial assessment the NCP explains its decision to offer its good offices to the parties to help them reach a solution through dialogue. The NCP believes that a dialogue in the context of this notification can contribute to achieving the Guidelines’ objectives and enhancing their effectiveness in so far as it can clarify the responsibility of the company involved in the project in question, a project in which municipal and provincial authorities also play a major role.

¹ <https://www.oecdguidelines.nl/notifications/documents/publication/2016/12/31/dutch-specific-instance-procedure>

The parties were given a two-week period to respond to the NCP's initial assessment, which was subsequently published on the NCP website: www.oesorichtlijnen.nl (in Dutch).

SUMMARY OF THE NOTIFICATION

On 12 December 2017 HFM notified the NCP of an alleged violation of the OECD Guidelines for Multinational Enterprises ('the Guidelines') by Nuon.

The notification specifically concerns alleged non-compliance with the chapters of the Guidelines on General Policies (Chapter II), Human Rights (Chapter IV) and Environment (Chapter VI).

According to HFM, Nuon has violated the guidelines that encourage enterprises to engage in dialogue with relevant stakeholders, to carry out human rights due diligence (right to health), to provide information regarding the potential environmental, health, and safety impacts of their activities, and to engage in adequate and timely communication and consultation with the communities directly affected. As a private enterprise, Nuon bears a responsibility alongside that borne by the relevant public authorities.

In this initial assessment the NCP refrains from commenting on the accuracy of the notifier's statements.

The notification concerns plans to expand an existing wind farm ('Hiddum-Houw') to create a new, larger wind farm ('Nij Hiddum-Houw'). Two parties initiated the project: Nuon and a group of local enterprises. Together with these two parties, the Province of Fryslân established an environmental advisory committee (OAR). By December 2017 an environmental impact assessment (MER), a draft imposed land-use plan and two draft environmental permits had been deposited for inspection and commentary.

Key points:

The notifier states that Nuon has violated the following provisions of the Guidelines:

1. General Policies (Chapter II, article 14)

Nuon did not comply with the requirement set out in article 14 that enterprises should 'engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision-making for projects or other activities that may significantly impact local communities'. Although Nuon participated in the environmental advisory committee (OAR) and in two information events arranged by the provincial authorities, it took no independent action, as far as the notifier is aware, to comply with article 14 of the Guidelines and did not engage in direct contact with the local community. The OAR is a closed forum that does not represent the local community, and its documents and discussions are confidential. The Province's introductory memorandum of 26 October 2016 states that the initiating parties and the Province will draw up a 'communication and participation plan'. This was not done and Nuon is responsible in part for this omission. Nuon has thus violated the code of conduct of the Netherlands Wind Energy Association (NWEA), '*Acceptatie & Participatie Windenergie op Land*' (Acceptance of and participation in onshore wind energy projects), which states that project initiators should, in consultation with the competent authority, draw up a participation plan in advance of the spatial planning process.

2. Human rights (Chapter IV, articles 1, 2 and 5)

Nuon should respect human rights (article 1) and avoid and address adverse human rights impacts (article 2). Under article 5, Nuon should 'carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts'.

The right to health is the primary human right at issue with respect to the Nij Hiddum-Houw project. It is reasonable to expect that Nuon is, or should have been, aware of recently published research on the negative effects of wind turbine noise on the health of local residents. Nuon should have carried out its own due diligence with regard to Nij Hiddum-Houw's impact on the human rights of local residents, particularly with regard to the right to health. Nuon can be held accountable for failing to object when the environmental impact assessment (MER) disregarded the health effects of Nij Hiddum-Houw, referring only to an outdated study by the National Institute for Public Health and the Environment (*Rijksinstituut voor Volksgezondheid en Milieu; RIVM*), which stated that there was no evidence of any health effects. Nuon cannot evade its responsibility under the Guidelines by referring to the MER.

3. Environment (Chapter VI, articles 1, 2, 3 and 4)

The notifier states that Nuon did not comply with articles 1, 2, 3 or 4 of Chapter IV (Environment) of the Guidelines.

The notifier states that, as far as it knows, Nuon established no environmental management system for Nij Hiddum-Houw. The notifier in any event never received any information in this connection, nor any response to specific questions in its letters about this matter. Nuon further failed to comply with article 2a of the Guidelines, which states that enterprises should provide the public with all necessary information 'on the potential environment, health and safety impacts of the activities of the enterprise' (article 2a). The mere fact that an MER was drawn up does not mean that Nuon complied with article 2a, particularly given the assessment's significant omissions. Nuon appears to have accepted the MER's serious shortcomings, including its total disregard for health effects, and in any case failed to make its own assessment as required by article 3. Under article 4, where human health and safety are concerned Nuon should not have failed to take measures or conduct its own assessment, even given a lack of full scientific certainty.

The notifier requests that Nuon:

1. now engage in a proper dialogue with the local community (the residents of the six villages) and listen to their concerns;
2. itself conduct or commission research into potential health effects associated with the wind farm as currently envisaged;
3. conclude and formalise clear agreements (e.g. on the position of residents and solutions and actions) covering any future situation in which local residents do in fact suffer damage to their health.

In this initial assessment the NCP refrains from commenting on the accuracy of the notifier's statements.

SUMMARY OF NUON'S INITIAL RESPONSE

Nuon is aware that Hou Friesland Mooi opposes the planned expansion of the current wind turbine farm Nij Hiddum-Houw. That is its right, and Nuon views its complaint against the company in that light. HFM's notification essentially concerns the extent to which the competent authority and initiating parties, including Nuon, engaged with the local community during the planning process. The Province of Fryslân, in its role as competent authority, followed the statutory procedure. Various judgments by the Council of State (for example judgment nos. 201608423/1/R6 and 201703826/1/R6) show that the nation's highest court takes the view that this procedure already provides sufficient opportunity for stakeholders to exert their influence.

Since Nuon is always willing to go the extra mile, it has, in accordance with its general project management guidelines and the statutory frameworks, extensively and meaningfully engaged with the

local community on the development of this project (as also referred to in General Policies, Chapter II of the OECD Guidelines under A, point 14):

- Hou Friesland Mooi participated in the environmental advisory committee (OAR), which for Nuon is a crucial instrument for engaging in dialogue with the local community. Nuon involves the local community in all its projects. In the case of Nij Hiddum-Houw, Nuon jointly funds (50/50 with the Province) the committee's chair, secretary and meeting room hire, as well as the support provided to the body by a representative of the Netherlands Association of People Living in the Direct Vicinity of Wind Turbines (Nederlandse Vereniging Omwonenden Windturbines; NLVOW). Hou Friesland Mooi was a member of the OAR.
- After nine months, Hou Friesland Mooi left the OAR of its own volition, a development about which Nuon expressed its regret. However, since a clear majority of local residents and direct stakeholders stayed in the OAR, Nuon continued its dialogue with the OAR with a view to concluding additional agreements (over and above the statutory obligations) in regard to this wind farm.
- The option of direct contact with Hou Friesland Mooi has always remained open, but this cannot result in the organisation having a veto in the participation process. This would undermine the OAR.
- Hou Friesland Mooi and its supporters can also continue to take part in the various public information meetings that are held at regular intervals, and can share their views concerning the project via regular channels as part of the spatial planning procedure. The organisation has in fact used these opportunities by attending every information meeting that has been arranged.

As with any project, in developing Nij Hiddum-Houw Nuon has always taken account of public health in the local community:

- Nuon complies with all statutory frameworks and, as part of this process, uses independent research (due diligence as referred to in Chapter IV, point 5 of the OECD Guidelines) to draw up strict requirements and measures concerning and minimising possible impacts caused by the wind farm;
- Nuon knows of no health effects, nor has it received any reports to this effect, involving any of its existing wind farms, some of which have been in operation for more than twenty years.
- Via the OAR Nuon makes agreements with the local community which go beyond its statutory obligations and which, in addition to Nuon's utmost precautionary efforts to prevent any impact, can also result in new mitigating measures, including in the operational phase, should the local community encounter any negative effects (in Nuon's opinion this goes above and beyond even the guidelines set out in Chapter VI of the OECD Guidelines).
- As part of these agreements Nuon will work, together with the competent authority, to ensure that the proper body or bodies (e.g. the Municipal Health Service (GGD) or local GPs) monitor the health of the local community and any health effects caused by the wind farm.

In summary, Nuon is of the opinion that it operates with the utmost care in accordance with the OECD Guidelines and that there are, therefore, no grounds whatsoever for declaring the complaint admissible.

In this initial assessment the NCP refrains from commenting on the accuracy of Nuon's response.

INITIAL ASSESSMENT

In accordance with the OECD Guidelines and the Dutch NCP's specific instance procedure, the NCP concludes that the notification merits further examination in light of the following considerations:

Is the Dutch NCP the right entity to assess the alleged violation?

The Dutch NCP is the right entity to assess the alleged violation of the OECD Guidelines by Nuon Energy N.V. and/or Nuon Wind Development B.V., located in Amsterdam. In principle a notification should be dealt with by the NCP of the country in which the alleged violation occurred. The alleged violation by Nuon Energy N.V. and/or Nuon Wind Development B.V. took place in the Netherlands, which means the notification may be examined by the Dutch NCP.

Is Nuon Energy N.V. and/or Nuon Wind Development B.V. a multinational enterprise on the basis of the Guidelines?

The fact that the alleged violation took place in the Netherlands does not, in the view of the NCP, negate the applicability of the Guidelines: Nuon Energy N.V. is a Dutch enterprise with approximately 4,200 employees and is part of the Swedish energy company Vattenfall, which carries out transnational activities in various countries. The notification concerns one of these activities, namely a wind farm development project in the Province of Fryslân in the Netherlands.

What is the identity of the notifying party and its interest in the case?

Stichting Hou Friesland Mooi is a foundation which has been working since 2012 to promote the interests of the local community as wind farms are established in Fryslân. The foundation maintains that it is not a conventional anti-wind power activist group but instead seeks to cooperate with the building of wind farms in the province provided the local community is involved in an appropriate manner. Its motto in this connection is 'A fair division of costs, benefits and influence'. The foundation participated in the 'Fryslân Foar De Wyn' project, in which Platform Duurzaam Fryslân (wind energy sector), the Friese Milieu Federatie (nature and environmental organisations) and Hou Friesland Mooi collaborated (supported by the Province of Fryslân) on a comprehensive plan aimed at achieving Fryslân's target of 530.5 MW of onshore wind power by 2020. The foundation arranges information meetings for the local community in the vicinity of the project, has a website and maintains an email mailing list of interested local residents.

Are the issues raised material and substantiated?

The issues raised by the notifiers are *prima facie* material and substantiated with documentation. The notifiers refer to relevant provisions in the Guidelines. The notification concerns alleged violations of the OECD Guidelines relating to General Policies (Chapter I), Human Rights (Chapter IV) and Environment (Chapter VI).

Is there a relationship, or can a relationship be established, between the company's activities and the issues raised in the specific instance?

Nuon invests and participates in various onshore wind farm projects in the Netherlands, including Nij Hiddum-Houw. These projects can or do impact on the environment as experienced by local residents. The notification concerns Nuon's responsibility to engage in dialogue with the local community, to provide information and to try to prevent or mitigate any unfavourable effects caused by the wind farm, in accordance with the abovementioned chapters of the Guidelines. In view of the above, the NCP takes the view that there is a relationship between Nuon's activities and the issues raised in the notification.

What is the relevance of applicable legislation and procedures, including court judgments?

As far as is known, there are no legal proceedings occurring in parallel that would prejudice this notification. In November 2017 HFM instituted interim injunction proceedings against the Province of Fryslân with respect to its depositing the plans for the Nij Hiddum-Houw project for inspection, arguing that to do so was premature and that there had been insufficient 'public participation'. The court did not find in HFM's favour.

The NCP would observe that although the subject of the interim injunction proceedings relates in part to the same subject as the notification, the injunction was aimed at the provincial authorities and not at Nuon. The notification concerns Nuon's responsibilities pursuant to the Guidelines.

Would consideration of the specific instance contribute to achieving the Guidelines' objectives and enhancing their effectiveness?

The OECD Guidelines clarify what the government of the Netherlands expects from enterprises in respect of international responsible business conduct. They offer practical advice for companies on how to deal with questions such as responsible supply chain management, human rights, the environment and the provision of information. The OECD Guidelines are therefore the starting point for the Dutch government policy on international responsible business conduct.

The NCP is conscious of the complexity of this subject, given the interwoven nature of the roles and responsibilities of the public authorities and the private enterprise involved in projects such as this. However, pursuing a dialogue in the context of this notification could for this very reason contribute to achieving the Guidelines' objectives and enhancing their effectiveness in so far as it could help clarify the company's individual responsibility in regard to similar projects, in which municipal and provincial authorities play a significant role, and more specifically in regard to the project in the present case.

CONCLUSION

The NCP takes the view that this notification merits further examination and, in accordance with the procedure of the Dutch NCP, offers its good offices to facilitate a dialogue between Stichting Hou Friesland Mooi and Nuon.

The goal of the dialogue is to help the parties reach agreement on the points raised in the notification, making use of the NCP's recommendations in light of the Guidelines.

All the parties involved accept the NCP's invitation to participate in a dialogue. In line with the NCP procedure, all parties will observe confidentiality in respect of the dialogue and further examination. The NCP will complete the procedure by issuing a final statement on the outcomes which will be published on the NCP's website.

The role of National Contact Points (NCPs) is to promote the application of the OECD Guidelines. The Dutch government has established an independent NCP which is responsible for its own procedures and decisions in accordance with the Procedural Guidance section of the Guidelines. The Dutch NCP consists of four independent members, supported by four advisory officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation bears political responsibility for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on www.oecdguidelines.nl.

Further information

If you have a question on the application of the OECD Guidelines or wish to submit a notification:

see www.oecdguidelines.nl
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