Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 October 2017[1]

Case C-664/15

Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation
v
Bezirkshauptmannschaft Gmünd

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Environment — Aarhus Convention — Access to justice — Standing of non-governmental organisations for the protection of the environment — Rights of such organisations to challenge the decision of competent authorities before a court on appeal — Status of such organisations as a party in administrative proceedings — Loss of status as a party to the administrative proceedings where such an organisation fails to submit objections in good time during those proceedings)

1. By this request for a preliminary ruling the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) asks for guidance on the standing of an environmental organisation in seeking access to justice based on the Aarhus Convention ('the Aarhus Convention').[2] The questions arise in the context of an application for a permit to abstract water from a river for the purposes of producing snow for a ski resort ('the permit procedure').[3] The environmental issues related to that particular procedure fall within the scope of Directive 2000/60/EC[4] ('the Water Framework Directive').

2. The delicate question of the standing of environmental organisations in environmental permit procedures has given rise to abundant case-law culminating in Case C-243/15 *Lesoochranárske zoskupenie VLK*.[5]

3. In the present case the Court will have to address the following issues. Does the Water Framework Directive read in conjunction with the Aarhus Convention confer standing on an environmental organisation to challenge administrative decisions in administrative or judicial procedures, in particular where a permit is requested to abstract water for snow production? Should the organisation concerned be accorded status as a party to the proceedings at the administrative stage or is it enough

1 Original language: English.

2 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed in Aarhus on 25 June 1998 and entered into force on 30 October 2001. All Member States are Contracting Parties to that convention. It was approved on behalf of the EU by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1). As from that date the European Union is also a Party to that convention.

3 The project at issue in the main proceedings is known as the 'Aichelberglift project'.

4 Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

5 See judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* ('*Brown Bears II*'), EU:C:2016:838, in particular paragraph 59.

that it has standing to bring an appeal against the permit granted by the competent authorities? Can national procedural rules preclude an environmental organisation from challenging such an administrative decision on appeal where it has not submitted its objections against the permit in 'good time' in the course of the administrative proceedings, as required by national law?

The Aarhus Convention

4. The objectives of the Aarhus Convention include affirming the need to protect, preserve and improve the state of the environment;[6] recognising that every person has the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations;[7] taking account of the importance of, inter alia, the role that non-governmental organisations can play in environmental protection;[8] and ensuring that effective judicial mechanisms be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.[9]

5. Article 1 provides that 'in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention'. It follows that the Aarhus Convention is potentially applicable wherever environmental legislation is at stake.

6. In accordance with Article 2(4), the term 'the public' 'means one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organisations or groups'. Pursuant to Article 2(5), 'non-governmental organisations promoting environmental protection and meeting the relevant requirements under national law shall be deemed to have an interest' in environmental decision-making and therefore fall within the scope of the term 'the public concerned' in that provision.

7. Article 6 is entitled 'Public participation in decisions on specific activities'. Article 6(1)(a) states that the provisions governing public participation must be applied in relation to decisions on whether to permit any of the proposed activities that are listed in Annex I.[10] Article 6(1)(b) states that those provisions must also be applied in accordance with national law to such decisions concerning activities that are not listed in Annex I which may have a significant effect on the environment. It is for the State concerned to determine whether a proposed activity falls within the scope of Article 6. Paragraphs 2 to 10 of Article 6 provide, inter alia, for the right of the public to an early participation in an environmental decision-making procedure and to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Article 9(2) provides:

'Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) having a sufficient interest; or, alternatively,

6 Fifth recital.

7 Seventh recital.

8 Thirteenth recital.

9 Eighteenth recital.

10 The listed activities include, for example, those relating to the energy sector, the production and processing of metals and the mineral industry. They comprise, on any basis, activities that are liable to have a 'significant' effect on the environment. It appears from the file before the Court that the Aichelberglift project does not fall within the scope of that Annex.

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

…'

9. Article 9(3) states:

'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

10. Article 9(4) adds:

'… without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'

EU law

The Habitats Directive

11. The aim of the Habitats Directive [11] is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora within EU territory. [12] Under the directive, a coherent European network of special areas of conservation ('SACs') is established to enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. [13] Within SACs, Member States must avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. Any plan or project which is not directly connected with or necessary to the management of a site but likely to have a significant effect thereon

11 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

12 Article 2(1).

13 Article 3(1).

must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The competent national authorities are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.[14]

The Water Framework Directive

12. The recitals to the Water Framework Directive include the following statements. Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.[15] As set out in the Treaties, EU environmental policy contributes to achieving the objectives of preserving, protecting and improving the quality of the environment and is based on the precautionary principle and on the principle that preventive action should be taken.[16] The success of the Water Framework Directive relies on close cooperation and coherent action at European Union, Member State and local level as well as on information, consultation and involvement of the public, including users.[17] The directive aims at maintaining and improving the aquatic environment in the European Union.[18] To ensure the participation of the general public including users of water in establishing and updating river basin management plans, it is necessary to provide proper information on planned measures and to report on progress with their implementation with a view to involving the general public before final decisions on the necessary measures are adopted.[19]

13. In accordance with Article 1, the purpose of the Water Framework Directive is to establish a framework for the protection of, inter alia, inland surface waters, which includes (a) preventing further deterioration and protecting and enhancing the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems; (b) promoting sustainable water use based on a long-term protection of available water resources; and (c) aiming at enhanced protection and improvement of the aquatic environment.

14. Under the definitions listed in Article 2, 'surface water' means inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it also includes territorial waters; and 'inland water' means all standing or flowing water on the surface of the land, and all groundwater on the landward side of the baseline from which the breadth of territorial waters is measured.[20] Pursuant to Article 3(1), Member States must identify the individual river basins lying within their national territory and assign them to individual river basin districts.

15. Article 4(1) (entitled 'Environmental objectives') lays down certain environmental objectives 'in making operational the programmes of measures specified in the river basin management plans'. In particular, 'Member States shall implement the necessary measures to prevent deterioration of the status of all bodies' of surface water. They 'shall protect, enhance and restore' such bodies of water.

16. Pursuant to Article 11(1), each Member State should ensure that for each river basin district (or for the part of an international river basin district within its territory) a programme of measures as defined in paragraphs 2 to 4 of that article is established. In particular, such measures should include 'controls over the abstraction of fresh surface water … including … a requirement of prior authorisation for abstraction'.[21] In accordance with Article 13(1), Member States must ensure that a river basin management plan is produced for each river basin district lying entirely within their

14 Article 6(1), (2) and (3) respectively.

15 Recital 1.

16 Recital 11.

17 Recital 14.

18 Recital 19.

19 Recital 46.

20 Article 2(1) and (3) respectively.

21 Article 11(3)(e).

territory. Under Article 14(1), Member States are to encourage the active involvement of all interested parties in the implementation of the Water Framework Directive, in particular in the production, review and updating of the river basin management plans. Member States must ensure that, for each river basin district, they publish and make available relevant documents for comments to the public, including users.

17. Point 1.1 of Annex V to the directive lists various quality elements which determine the classification of the ecological status of surface waters. Point 1.2 contains detailed normative definitions of ecological status classifications: ‘high’ or ‘maximum’, ‘good’ and ‘moderate’.

The EIA Directive

18. The EIA Directive[22] requires that before a permit is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their direct and indirect effects[23] on the environment (an ‘impact assessment’) — inter alia, their effects on fauna, flora and water.[24] The public has the right to participate in procedures involving such an impact assessment and may challenge the legality of their results, whether that assessment is separate or integrated into procedures for granting permits to projects.[25] Projects considered *a priori* to have significant effects on the environment are listed in Annex I to the EIA Directive. Such projects are subject to an obligatory impact assessment. Annex II lists projects which shall be subject to a ‘determination’ by a Member State, based on a case-by-case examination, thresholds or criteria set by that Member State, as to whether they should be subject to an impact assessment.[26] The EIA Directive does not require an impact assessment for projects not listed in either of the annexes.

Austrian law

The Allgemeines Verwaltungsverfahrensgesetz

19. Paragraphs 41 and 42 of the Allgemeines Verwaltungsverfahrensgesetz (the General law on administrative procedure, ‘the AVG’) state:

‘41(1) The calling of a hearing shall be personally notified to known stakeholders. If other persons may also be possible stakeholders, notice of the hearing shall be given, in addition, on the official notice board of the municipality, by means of an announcement in the newspaper designated for official notices by the authority or by means of an announcement in the electronic official journal of the authority.

(2) ... The notification (notice) of the calling of the hearing shall contain the information prescribed for writs of summons, including information on the possible consequences under Paragraph 42. ...

22 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) (‘the EIA Directive’).

23 Article 2(1).

24 Article 3.

25 Articles 6, 9 and 11 respectively.

26 Article 4. It appears from the file before the Court that the Aichelberglift project does not fall within Annex I to the EIA Directive.

42(1) If notice of a hearing has been given pursuant to the second sentence of Paragraph 41(1) and, where applicable, in a special form provided for in the administrative rules, the consequence shall be that a person loses their status as a party if they do not submit objections with the authority during business hours no later than the day before the beginning of the hearing or during the hearing. If no provision is made in the applicable administrative rules regarding the form in which notice is given, the legal consequence described in the first sentence shall occur if notice of the hearing has been given pursuant to the second sentence of Paragraph 41(1) in due form.

…'

The Wasserrechtsgesetz

20. In order to transpose the Water Framework Directive and the prohibition on deterioration laid down in Article 4(1) thereof, the Wasserrechtsgesetz-Novelle 2003 (2003 Law amending the Wasserrechtsgesetz (the Law relating to water, 'the WRG 1959')) revised several provisions of the WRG 1959 and inserted certain new provisions. The substantive provisions governing the procedure for issuing of permits under the legislation governing water-related matters are contained in particular in Paragraphs 12(2), 15(1), 21(3), 32 and 38 of the WRG 1959. In the administrative procedure to obtain a permit to abstract water under the national legislation governing water-related matters, the standing of persons as parties to that procedure is determined in accordance with Paragraph 102(1)(a) and (b) of the WRG 1959.[27] Environmental organisations which do not have any subjective public rights do not enjoy status as a party to the proceedings. In accordance with Paragraph 102(3) of the WRG 1959, only parties to the proceedings are permitted to submit objections in the course of the proceedings. Paragraph 145b(3) indicates that the WRG 1959 is intended to transpose the provisions of the Water Framework Directive.

The Bundes-Verfassungsgesetz

21. Article 132(1) of the Bundes-Verfassungsgesetz (Federal Constitutional Law) provides that an appeal against a decision of an administrative authority may be introduced by a person who alleges an infringement of his rights. The referring court explains that only natural or legal persons who enjoyed or were accorded status as a party in a preceding administrative procedure can claim such an infringement of rights by bringing an appeal before a court.

Facts, procedure and questions referred

22. Aichelberglift Karlstein GmbH ('Aichelberglift') was granted a permit to abstract water from a nearby river (the Einsiedelbach) for a snow-making facility at a ski resort in Austria. Aichelberglift's request was initially examined under a procedure based upon Article 6(3) of the Habitats Directive. The competent national authority decided that given the project's low impact on the environment there were no reasons to refuse the request ('*nihil obstat*').[28]

27 See the further explanation of those rules, as derived from the material placed before the Court, in points 78, 110 and 119 below.

28 The Austrian Government explained at the hearing that that decision was not contested and accordingly became definitive.

23. Subsequently Aichelberglift's request for a permit was examined in a separate administrative procedure pursuant to the WRG 1959.[29] Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation ('Protect'), an environmental organisation, made a request to be admitted as a party to those proceedings on the basis of Article 6(3) of the Habitats Directive and Article 9(3) of the Aarhus Convention.

24. In the course of that procedure, a hearing was held by the Bezirkshauptmannschaft Gmünd (the Gmünd district authority) in accordance with Paragraphs 41 and 42 of the AVG. Protect submitted objections to the project, which were rejected on the basis that it had not claimed infringement of any rights under the WRG 1959 and could not therefore be a party to the proceedings under national rules. On 4 November 2013 the Bezirkshauptmannschaft Gmünd granted Aichelberglift's application for a permit.

25. Protect challenged that decision unsuccessfully before the Landesverwaltungsgericht Niederösterreich (Lower Austria Regional Administrative Court), which took the view that Protect did not enjoy status as a party to the administrative proceedings because it had failed to submit its objections to the application in good time, that is either at the latest on the day preceding the hearing or during the course of that hearing.[30] Protect's status as a party had therefore been lost pursuant to Paragraph 42 of the AVG.

26. Protect brought proceedings contesting that ruling before the referring court. Protect argued in essence that pursuant to Articles 2(4) and (5) and 9(3) of the Aarhus Convention, it had status as a party to administrative proceedings relating to the WRG 1959 and that it had a legal interest in ensuring that provisions of EU law relating to the environment were respected.

27. Against that background the referring court asks:

'(1) Does Article 4 of [the Water Framework Directive] or [that directive] as a whole confer on an environmental organisation, in a procedure which is not subject to an environmental impact assessment under [the EIA Directive], rights for the protection of which it has access to administrative or judicial procedures under Article 9(3) of the [Aarhus Convention]?

If Question 1 is answered in the affirmative:

(2) Is it necessary under the provisions of the Aarhus Convention to be able to assert those rights at the stage of the procedure before the administrative authority or is the possibility of being granted judicial protection against the decision of the administrative authority sufficient?

(3) Is it permissible for national procedural law (Paragraph 42 of the AVG) to require the environmental organisation — like other parties — to submit its objections not only in an appeal to the administrative court, but in good time at the stage of the procedure before the administrative authorities, failing which it loses its status as a party and is also no longer able to bring an appeal at the administrative court?'

29 The explanations given by the Austrian Government during the hearing seem to indicate that each project has to be examined in several administrative procedures, each ending with an administrative decision. Those proceedings are conducted, in particular, on the basis of the legislation on the protection of nature and the WRG 1959.

30 As I understand it, under Paragraph 42(1) of the AVG there are two different deadlines for a party to the procedure to submit objections.

28. The same questions arose in Case C-663/15 *Umweltverband WWF Österreich* which was the subject of a request to this Court for a preliminary ruling by the same referring court. By decision of the President of the Court of 20 January 2016, that case and the present one were joined for the purposes of the written and oral procedure and the judgment. Umweltverband WWF Österreich, Protect, Ötztaler Wasserkraft GmbH (the other party in Case C-663/15), the Republic of Austria, the Kingdom of Netherlands and the European Commission submitted written observations in relation to both cases. At the joint hearing on 15 March 2017, all of those parties made oral submissions.

29. By judgment of 27 April 2017, the referring court quashed the decision of the Landesverwaltungsgericht Tirol (Tyrol Regional Administrative Court) of 8 January 2015 in Case C-663/15 *Umweltverband WWF Österreich*. By order of 30 May 2017, the referring court declared that the proceedings by the WWF in that case had become devoid of purpose and that there was no longer any need to adjudicate. By order of 28 June 2017, the referring court decided to withdraw the request for preliminary ruling in Case C-663/15. That order was notified to the Court on 10 July 2017. Cases C-663/15 and C-664/15 were disjoined by order of the President of the Second Chamber dated 11 July 2017 and Case C-663/15 was duly removed from the Court's register by order dated 14 July 2017.

30. It is, frankly, regrettable that the Court was not informed earlier that Case C-663/15 was to be withdrawn. Time and effort were spent working in detail on that case between 27 April and 10 July 2017 that could more usefully have been invested in processing other 'live' cases. Just as the spirit of cooperation which underpins the procedure for preliminary rulings under Article 267 TFEU requires this Court to deal efficiently and expeditiously with cases referred to it, that same spirit of cooperation means that it is incumbent upon a referring court to keep this Court informed of any material change in circumstances that may affect whether a reference for a preliminary ruling is maintained before the Court.

Preliminary remarks

31. The referring court states that the project concerned by the main proceedings involves the abstraction of water from a local river. My understanding is therefore that it involves abstraction of fresh surface water within the meaning of Article 11(3)(e) of the Water Framework Directive. It follows that the project is subject to obtaining a prior permit in accordance with national measures transposing that provision and to the prohibition on deterioration of the status of the surface waters set out in Article 4(1)(a)(i) of that directive.

32. Next, it is not in dispute that Protect fulfils the conditions to belong to 'the public concerned' within the meaning of Article 2(5) of the Aarhus Convention and that it also falls within the broader concept of 'public' for the purposes of Article 6 thereof.

Is the Court competent to answer the questions referred?

33. In its written observations the Commission submitted that the Court has jurisdiction to answer the questions referred. I agree and shall address the issue only briefly.

34. The Aarhus Convention is a mixed agreement, concluded by the EU on the basis of a competence it shares with the Member States. The provisions of that convention form an integral part of the EU legal order. [31] The Court has already confirmed that it had jurisdiction to interpret different provisions of the Aarhus Convention [32] and has given, in that regard, a significant number of judgments in the context of references for a preliminary ruling and infringement proceedings. [33]

35. More particularly, in *Brown Bears I* the Court held, in the context of Article 12(1) of the Habitats Directive, that the field of law concerned was '*in large measure covered by EU law*' and that it therefore had jurisdiction to interpret Article 9(3) of the Aarhus Convention. [34]

36. In the present case, Protect claims to derive its rights to participate in the procedure concerning a request for a permit to abstract water and to seek judicial review from Article 4 of the Water Framework Directive read in conjunction with Article 9 of the Aarhus Convention. The abstraction of surface and ground water is subject to permit procedures in the Member States (Article 11(3)(e) of the directive); granting such a permit is subject to compliance inter alia with the prohibition on deterioration of the status of the bodies of water (Article 4(1)); derogations from that prohibition may be granted only under the strict conditions specified by Article 4(7) of that directive.

37. It follows by straightforward application of the rules laid down in *Brown Bears I* that the Court has jurisdiction to provide an interpretation of Article 9(3) of the Aarhus Convention in conjunction with Article 4 of the Water Framework Directive.

Which are the relevant provisions of the Aarhus Convention?

38. The logic underlying the system of the Aarhus Convention is that the intensity of public involvement and the scope of the public's rights in administrative procedures are proportionate to the likely environmental effect of the projects in question.

39. Thus, projects likely to have a significant effect on the environment are subject to Article 6(1) [35] and consequently to Article 9(2) of the Aarhus Convention. By virtue of those two provisions, environmental organisations enjoy rights of participation in administrative procedures involving such projects and a subsequent right to judicial review of any decision taken.

40. Where a project is not likely to have a significant environmental impact, Article 6 and consequently Article 9(2) do not apply. Such procedures are subject only to Article 9(3), which applies 'in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 [of Article 9]'. For members of the public, Article 9(3) is thus a fall-back provision which may be relied on to obtain access to justice when Article 9(1) and (2) cannot be invoked. [36]

31 See *Brown Bears II*, paragraph 45.

32 See judgment of 8 March 2011, *Lesoochranárske zoskupenie* ('*Brown Bears I*'), C-240/09, EU:C:2011:125, paragraph 30, in which the Court refers, inter alia, to principles developed in judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraphs 4 to 6, and of 30 September 1987, *Demirel*, 12/86, EU:C:1987:400, paragraph 7.

33 See, inter alia, judgments of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8; of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221; of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* ('*Trianel*'), C-115/09, EU:C:2011:289; and of 13 February 2014, *Commission* v *United Kingdom*, C-530/11, EU:C:2014:67.

34 See paragraphs 34 to 43 of the judgment. By way of further background, see also the analysis of the then existing case-law in my Opinion in that case (EU:C:2010:436), points 43 to 57.

35 Article 6(1)(a) refers to projects listed in Annex I (projects which are considered a priori to have significant effects on the environment), whilst Article 6(1)(b) refers to projects which 'may have a significant effect on the environment'.

36 Article 9(1) of the Aarhus Convention concerns procedures for access to information relating to the environment. It is not relevant to the present reference.

41. Article 9(3) provides for the public to have 'access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. That therefore includes access to a procedure to challenge the legality of a decision (an act of a public authority) adopted following an administrative procedure that the applicant considers may contravene Article 4 of the Water Framework Directive. Whether the procedure by which that act of a public authority is challenged is itself administrative or is judicial will depend on national law — the present proceedings indicate that in Austria, in respect of decisions under the WRG 1959, it is the latter.

42. Unlike Article 6, Article 9(3) does not provide for a right of participation in the administrative procedure leading up to the decision. Unlike Article 9(2), it does not expressly deal with *locus standi* for environmental organisations. To my mind, a plausible explanation for the latter is that the draftsman of the Aarhus Convention, having carefully explained (in Article 9(2)) that, for the purposes of judicial review, environmental organisations meeting the requirements of Article 2(5) were to be *deemed* to satisfy the procedural requirement of 'having a sufficient interest' or 'maintaining the impairment of a right' (whichever was the criterion for *locus standi* for the Contracting Party concerned), felt that he had already given sufficient guidance on that particular point.

43. The referring court identifies Article 9(3) of the Aarhus Convention as the provision relevant to the present case. To that effect, it states expressly that the EIA Directive does not require an impact assessment for projects to abstract water to produce snow and that Aichelberglift's request for a permit therefore fell to be examined solely on the basis of national provisions related to water (that is, the WRG 1959). During the hearing, both the Netherlands Government and Protect suggested that, at least to some extent, Article 9(2) should have been deemed to apply in the main proceedings.

44. It appears from the file before the Court that the Aichelberglift project does not fall within the scope of Annex I to the Aarhus Convention [37] or that of Annex I to the EIA Directive [38] and thus was not subject to a mandatory impact assessment under that directive. The referring court confirms that analysis in its order for reference. Article 6(1)(a) of the Aarhus Convention is therefore not applicable.

45. As regards Article 6(1)(b), the Contracting Parties are required to determine whether a given project '*may have* significant effects on the environment' (emphasis added). [39] In this respect 'a mere likelihood of significant effect triggers [that] obligation'. [40] The size, location and characteristics of the potential impact of the project on the environment are the relevant factors to be taken into account. [41]

46. The material before the Court is not sufficient to establish whether the Aichelberglift project falls within the scope of Article 6(1)(b) of the Aarhus Convention. In particular, it is not clear from the order for reference whether the project in the main proceedings was, or should have been, examined to determine — in accordance with Article 4(2) of the EIA Directive or Article 6(1)(b) of the Aarhus Convention — whether it required to be made subject to an impact assessment [42] and whether Protect

37 Projects considered a priori to have a significant effect on the environment listed in that annex that relate to water include: thermal and nuclear power stations, waste-water treatment plants, inland waterways and ports for inland-waterway traffic, groundwater abstraction or artificial groundwater recharge schemes involving an annual volume of at least 10 million cubic metres of water, works for the transfer of water resources between river basins and dams and other installations designed for the holding back or permanent storage of at least 10 million cubic metres of water.

38 Annex I to the EIA Directive includes similar projects relating to water to those covered by Annex I to the Aarhus Convention.

39 Article 4(2) of the EIA Directive provides for a similar obligation with regard to projects that fall within the scope of Annex II to that directive.

40 See *The Aarhus Convention: An Implementation Guide* ('the Aarhus Implementation Guide'), Second Edition, 2014, p. 132 (only available in Chinese English, French and Russian). The Court has held that the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention (judgment of 16 April 2015, *Gruber*, C-570/13, EU:C:2015:231, paragraph 35).

41 See the Aarhus Implementation Guide, p. 133. See also, by analogy, Annex III to the EIA Directive, which lists relevant criteria for making such a determination.

42 Such an assessment triggers the application of Articles 6 and 9(2) of the Aarhus Convention: see *Brown Bears II*, paragraphs 56 and 57. The order for reference indicates merely that Aichelberglift's request for a permit was examined initially under a procedure based upon Article 6(3) of the Habitats Directive: see point 22 above.

was (or was not) able to challenge the results of that determination.[43] It is also unclear whether and to what extent the project is situated in a SAC within the meaning of Article 3(1) of the Habitats Directive and whether the significance of the effects of the project on water was (or was not) examined in the impact assessment conducted on the basis of Article 6(3) of that directive. Finally, the precise relationship between that assessment and the permit procedure in the main proceedings is not entirely clear, whilst the fact that they are (possibly) interconnected may be relevant for the applicability of Article 9(2) of the Aarhus Convention.[44]

47. It is for the referring court to proceed with the necessary fact-finding in order to establish whether the Aichelberglift project falls within the scope of Article 6(1)(b) of the Aarhus Convention. If it does, Article 9(2) would indeed then apply. In that event, the answers to the referring court's questions are already to be found in the abundant case-law concerning Article 9(2) of the Aarhus Convention,[45] as developed in particular in the context of Article 11 of the EIA Directive, which mirrors most of the provisions of Article 9(2).

48. In what follows, I shall proceed on the assumption that Article 6 and thus also Article 9(2) of the Aarhus Convention do *not* apply; and that the procedure giving rise to the request for a preliminary ruling, in which Protect claims that the grant of the permit to Aichelberglift to abstract water to produce snow breaches Article 4 of the Water Framework Directive, is to be examined exclusively from the perspective of Article 9(3) of the Aarhus Convention.

The first question

49. By its first question, the referring court seeks to ascertain in essence whether an environmental organisation may rely on Article 4 of the Water Framework Directive or that directive as a whole in conjunction with Article 9(3) of the Aarhus Convention to challenge, before an administrative authority or a court, the legality of acts or omissions of the competent authority in an administrative procedure which is not subject to the EIA Directive, such as that in the main proceedings.

50. This question is formulated in broad terms. The administrative procedure in the present case was conducted by the competent authority in accordance with the WRG 1959, which is intended to transpose the Water Framework Directive. The act contested in the main proceedings is a permit granted on the basis of the WRG 1959. The referring court explains that such permit is subject to appeal to a Landesverwaltungsgericht (regional administrative court).

51. The central question that has to be addressed when examining that question is therefore that of the *locus standi* of environmental organisations to challenge such a permit before a court or tribunal in connection with Article 4 of the Water Framework Directive. I shall first examine the meaning of Article 4 of that directive before analysing the question of standing of environmental organisations to challenge the legality of such permits.

43 If an environmental organisation is precluded from bringing proceedings against such an assessment, the assessment is not binding on that organisation and the latter may contest its results in an action brought against either that assessment, *or against any subsequent decisions* granting a permit to the project concerned. See, by analogy, judgment of 16 April 2015, *Gruber*, C-570/13, EU:C:2015:231, paragraphs 44 and 51. In such a situation the effects of Article 9(2) of the Aarhus Convention may thus extend beyond the procedure in which its application is initially triggered, despite the fact that the assessment carried out in the course of that procedure concluded that there were no significant effects on the environment within the meaning of Article 6(1)(b).

44 That is because that prior assessment *was* subject to the application of Articles 6 and 9(2) of Aarhus Convention. See *Brown Bears II*, paragraphs 56 and 57.

45 Most recently in *Brown Bears II*.

The meaning of Article 4 of the Water Framework Directive

52. The Austrian Government submits that Article 4 of the Water Framework Directive has no direct effect as it does not designate any addressees, while the Dutch Government and Protect argue that recognised environmental organisations should be allowed to rely upon that provision.

53. The Water Framework Directive refers to water as a heritage which must be protected, defended and treated as such (recital 1). The directive establishes a framework for preventing deterioration, enhancing protection and improving the aquatic environment in the European Union (recital 19 and Article 1). It contributes to forwarding the environmental objectives of the Treaty (recital 11).

54. Article 4 of the Water Framework Directive, which lays down the general environmental objective sought by the directive, occupies a central position in the overall system of water protection established by that directive.

55. Notwithstanding that the Water Framework Directive is a framework directive, the Court held in its landmark judgment in *Bund für Umwelt und Naturschutz Deutschland* that 'Article 4(1)(a) of that directive does not simply set out, in programmatic terms, mere management-planning objectives, but has binding effects'.[46] The wording of Article 4(1)(a)(i), which provides that 'Member States *shall* implement the necessary measures to prevent deterioration of the status of all bodies of surface water' involves an obligation on the Member States to act to that effect.[47] That obligation must be respected in particular when approving individual projects under the legal regime governing water protection, notably by refusing authorisation for projects which could result in deterioration of the status of the body of water concerned unless the view is taken that those projects are covered by the derogation laid down in Article 4(7).[48]

56. The Court has interpreted the concept of 'deterioration of the status' of a body of surface water in Article 4(1)(a)(i) of the Water Framework Directive broadly. Thus, there is deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V to the directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole.[49]

57. According to established case-law, wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.[50]

58. The prohibition of deterioration is, in my view, strict, unconditional and sufficiently precise to confer on it direct effect.[51]

46 See judgment of 1 July 2015, C-461/13, EU:C:2015:433, paragraph 43.

47 See, to that effect, judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 31 (emphasis added).

48 See judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 50.

49 See judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 70.

50 See judgment of 19 January 1982, *Becker*, 8/81, EU:C:1982:7, paragraph 25.

51 The Court held in the context of Article 2(1) of the EIA Directive that the fact that the Member State has some degree of discretion does not preclude such direct effect. See judgment of 24 October 1996, *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 59.

59. In the context of environmental directives, the Court has held in a number of cases that sufficiently precise provisions concerning the protection of the common natural heritage are directly effective despite the fact that they do not expressly confer rights on individuals.[52] Most recently, the Court has recognised the direct effect of Article 6(3) of the Habitats Directive,[53] which imposes the obligation to carry out an impact assessment before granting a permit for a project likely to have a significant effect on a protected site. The Court has also held that whenever non-compliance with the measures required by a directive might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights.[54]

60. In those cases, including *Brown Bears II*, the Court has held that it would be incompatible with the binding effect which Article 288 TFEU ascribes to a directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by recognised environmental organisations. Where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an obligation would be weakened if individuals were prevented from relying on it before their national courts. Its effectiveness would be similarly undermined if national courts were prevented from taking it into consideration as an element of EU law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive.[55]

61. The possibility of invoking Article 4 of the Water Framework Directive stems from the action (contrary to EU law) which is to be prohibited. Environmental organisations may therefore, in my view, rely on Article 4 in so far as the avenues of legal redress are available to them in national law.[56]

Does an environmental organisation have standing to invoke Article 4 of the Water Framework Directive?

62. The Austrian Government submits that, except for the limited provision of Article 14, the Water Framework Directive does not provide for participation or the right to judicial review. That is in contrast to certain other environmental directives,[57] some of which were amended explicitly in order to implement the rights provided for in Article 9 of the Aarhus Convention.[58] It adds that Article 9(3) of that convention, which is the provision Protect relies on to justify its standing, has no direct effect.

52 See in the context of Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), read in conjunction with Articles 1(2) and 4(2) thereof, the judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraphs 64 to 66. See, in the context of Article 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), the judgment of 7 March 1996, *Associazione Italiana per il WWF and Others*, C-118/94, EU:C:1996:86, paragraph 19.

53 See *Brown Bears II*, paragraph 44.

54 See judgment of 17 October 1991, *Commission* v *Germany*, C-58/89, EU:C:1991:391, paragraph 14. See also in the same vein, judgments of 30 May 1991, *Commission* v *Germany*, C-59/89, EU:C:1991:225, paragraph 19; of 30 May 1991, *Commission* v *Germany*, C-361/88, EU:C:1991:224, paragraph 16; of 12 December 1996, *Commission* v *Germany*, C-298/95, EU:C:1996:501, paragraph 16; of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 66; of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, paragraph 37; and of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraphs 55 and 56.

55 See *Brown Bears II*, paragraph 44.

56 Advocate General Kokott reached the same conclusion in her Opinion in *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:60, point 141.

57 See Article 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17) and Article 11 of the EIA Directive.

58 See Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337 and 96/61/EC [of 24 September 1996 concerning integrated pollution prevention and control] (OJ 2003 L 156, p. 17).

General remarks on the interpretation of Article 9(3) of the Aarhus Convention

63. Article 9(3) provides that each Party is to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public (which includes environmental organisations by virtue of Article 2(4)), have access to administrative or judicial procedures to challenge acts or omissions of private persons or public authorities which contravene provisions of its national law relating to the environment. It thus lays down the right, inter alia, to challenge acts of administrative authorities adopted in administrative proceedings.

64. It is common ground that no EU law provisions expressly adopted to implement Article 9(3) of the Aarhus Convention apply in the present context. In particular, the Water Framework Directive sets out a legislative framework without specifying the detailed procedural rules necessary for its implementation. Article 4 does not as such give environmental organisations the right to trigger an administrative or judicial review. The only relevant provision appears to be Article 14(1) ('Public information and consultation'), which provides that Member States shall '*encourage* the active involvement of all interested parties in the implementation of [that] directive'.[59] It seems to me that that provision is too abstract to be relied upon directly as a source of procedural rights.

65. The Court has held that Article 9(3) of the Aarhus Convention is not directly effective.[60] Environmental organisations cannot thus rely directly on that provision to claim *locus standi* to challenge acts of national authorities, such as the permit granted to Aichelberglift.

66. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights derived from EU law, in this case the Water Framework Directive read in conjunction with the Aarhus Convention, since the Member States are responsible for ensuring that those rights are *effectively* protected in each case.[61]

67. The procedural autonomy of the Member States is not absolute. It must be exercised in keeping with the aims and the objectives of the Aarhus Convention and of the Water Framework Directive.

68. I pause to recall that following the entry into force of the Treaty of Lisbon on 1 December 2009, the principle of 'a high level of protection and improvement of the quality of the environment' set out in Article 3(3) TEU has become a guiding objective of EU law. The same principle is also enshrined in Article 37 of the Charter of Fundamental Rights of the European Union[62] which — again, following the entry into force of the Treaty of Lisbon — forms part of EU primary law and is to be regarded as an interpretative tool of secondary law.[63]

59 Emphasis added. Based on the explanation of the referring court, I understand that the remainder of Article 14 providing for the right to be informed and to make comments is not relevant to the present case.

60 See *Brown Bears I*, paragraph 45; and judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 59.

61 See, to that effect, *Brown Bears I*, paragraph 47; in a different context, see also judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 46.

62 OJ 2010 C 83, p. 389 ('the Charter'). That provision sets out an obligation to ensure that 'a high level of environmental protection and the improvement of the quality of the environment' is integrated into the policies of the EU.

63 See Opinion of Advocate General Jääskinen in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2014:2324, point 6. As I have recently indicated in my Opinion in Case C-557/15, *Commission* v *Malta*, EU:C:2017:613 (judgment pending), I am fully in agreement with Advocate General Jääskinen in highlighting this important development.

69. It follows from the Water Framework Directive that Member States bear the responsibility for implementing the environmental objectives of that directive, as set out in particular in Articles 1 and 4, and that the success of that directive relies in particular on information, consultation and *involvement of the public* (recital 14).[64] Moreover, in accordance with Article 14(1) Member States *shall* encourage the active involvement of all interested parties in the implementation of the Water Framework Directive.

70. These provisions indicate the manner in which Article 9(3) of the Aarhus Convention must be interpreted. The involvement of the public in the early stages of an administrative procedure in accordance with Article 14(1) of the Water Framework Directive would be, to a large extent, meaningless if it were not possible for at least some members of the public to obtain *locus standi* later in the process, in particular in order to challenge the compliance of decisions adopted in that procedure with that directive.

Criteria that the Member States may lay down in accordance with Article 9(3) of the Aarhus Convention

71. Admittedly, in the context of the Aarhus Convention the Member States enjoy a great deal of flexibility. In particular, the right to administrative or judicial remedy in Article 9(3) of the Aarhus Convention may be granted only to those members of the public who 'meet the criteria, if any, laid down in its national law'.

72. However, while laying down procedural rules to implement Article 9(3) of the Aarhus Convention, the Member States have to bear in mind that that convention aims at ensuring that '… effective judicial mechanisms [are] accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced' (18th recital).

73. The phrase 'where they meet the criteria, if any, laid down in its national law' cannot serve 'as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment'; that phrase 'indicates a self-restraint on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception'; and 'any such criteria should be consistent with the objectives of the Convention regarding ensuring access to justice'.[65] The most natural reading of that phrase is therefore, I think, that it is a *renvoi* to the alternative procedural requirements of 'having a sufficient interest' or 'maintaining the impairment of a right' in Article 9(2).

74. In my Opinion in *Djurgården-Lilla Värtans Miljöskyddsförening*,[66] I analysed what conditions Member States may lay down on the basis of Article 1(2) of Directive 85/337 (now replaced by the EIA Directive), which refers to 'any requirements under national law'.[67] What I wrote is transposable to the present context. Environmental organisations promoting environmental protection and meeting objectively justified, transparent and non-discriminatory requirements facilitating access to justice under national law must be, in my view, entitled to rely on Article 9(3) of the Aarhus Convention.

64 Other objectives of that directive were discussed in points 53 and 54 above.

65 See the Aarhus Convention Implementation Guide, p. 198.

66 C-263/08, EU:C:2009:421, in particular, points 73 and 74.

67 I suggested there that essentially these may be two types of conditions. First, there may be conditions relating to national requirements as to the registration, constitution or recognition of associations, the purpose of which is to obtain a legal declaration of the *existence* of such bodies under national law. Second, there may be conditions relating to such organisations' *activities* and how these are linked to the legitimate protection of environmental interests. Conditions which are framed in such ambiguous or inadequate terms that they give rise to uncertainty or to discriminatory outcomes are not acceptable. Any restriction whose effect is to *hinder* rather than to *facilitate* access to administrative and judicial procedures for environmental organisations must, even more evidently, be rejected.

75. It follows that national law cannot exclude in a generalised manner the rights of all environmental organisations flowing from Article 9(3) under the guise of introducing in their national law 'criteria' for exercising those rights.[68] In *Trianel*,[69] I suggested that, like a Ferrari with its doors locked shut, a system of protection is of little practical help if it is totally inaccessible for certain categories of action.

76. Such an interpretation of the notion of 'criteria, if any' would indeed have perverse consequences. A procedural system that virtually excluded the right of any environmental organisation to challenge administrative acts adopted on the basis of national provisions implementing the Water Framework Directive would be liable to seriously undermine the *effet utile* of the prohibition set out in Article 4[70] and, more generally, gravely jeopardise attaining the objective of a high level of environmental protection enshrined in Article 37 of the Charter.

The role of environmental organisations

77. The natural environment belongs to us all and its protection is our collective responsibility. The Court has recognised that the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such.[71] Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing.[72]

78. Both the referring court in its order for reference and the Austrian Government during the hearing explained that in Austrian law a claimant has standing in administrative or judicial procedures only in so far as he holds subjective substantive rights that he claims were infringed. Environmental organisations cannot, by their very nature, meet the condition of having substantive rights. That makes it virtually impossible for such an organisation to challenge an administrative decision before an administrative authority or a court, no matter how diligently they act or how pertinent the observations that they wish to lodge.

79. As I understand it, not even individual right-holders could bring an action claiming an infringement of a provision intended to protect the environment as such or one protecting the public interest, such as the prohibition of deterioration laid down in Article 4 of the Water Framework Directive. It follows that unless the substantive rights of individuals happen to coincide with the public interest and unless those individuals decide to bring an action to enforce those rights before a competent authority or a court, no one can act to protect the environment.[73]

68 See, by analogy, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 53. The Court there held that the expression 'in accordance with the conditions … laid down by national legislation' contained in a directive providing for employees to enjoy paid leave must be construed as meaning that, 'although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right … subject to any preconditions whatsoever'.

69 See my Opinion in *Trianel*, C-115/09, EU:C:2010:773, point 77.

70 See, by analogy, the reasoning of the Court in cases in which the Court has examined exclusion of *locus standi* for neighbours of the project site (judgment of 16 April 2015, *Gruber*, C-570/13, EU:C:2015:231) and for recognised environmental organisations having fewer than 2 000 members (judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631). In that latter case, it is noteworthy that only two environmental organisations in Sweden at the material time had that many members, so that the *effect* of the rule was to bar virtually all such organisations from access to the court.

71 See judgment of 12 May 2011, *Trianel*, C-115/09, EU:C:2011:289, paragraph 46.

72 On this issue, see Stone, D., *Should trees have standing*?, Oxford University Press, Oxford, 2010.

73 As I understand the Austrian Government's submissions, even if an environmental organisation bought a piece of land next to the project site, it would be limited to arguing that there had been an infringement of the provisions, if any, that related to the protection of its substantive rights as landowner.

80. As I explained in my Opinion in *Djurgården-Lilla Värtans Miljöskyddsförening*,[74] environmental organisations give expression to the collective and public interest, which no one else would otherwise be able to defend. They bring together the claims of many individuals in a single action, act as a filter and contribute their specialised knowledge, thereby putting the courts in a better position to decide the case. Thus, in the long run they make environmental procedures work better. In so doing, environmental organisations play a crucial role in protecting our shared environmental heritage.

81. The authors of the Aarhus Convention did not opt to introduce an *actio popularis* in environmental matters. They chose instead to strengthen the role of environmental organisations. In so doing, they steered a middle course between the maximalist approach (*actio popularis*) and the minimalist approach (a right of individual action available only to parties having a direct interest at stake).[75] That was, in my view, a sensible and pragmatic compromise.

82. The Court has recognised that members of the public and associations are required to play an active role in defending the environment.[76] The 7th, 13th and 17th recitals of the Aarhus Convention emphasise the importance of environmental organisations. As Advocate General Kokott rightly observed in her Opinion in *Brown Bears II*,[77] Article 2(5) of the Aarhus Convention makes provision for recognising the interests of organisations promoting environmental protection and meeting any requirements under national law. The European Court of Human Rights has likewise underlined the role played by non-governmental organisations, finding that in public matters they may be characterised as social 'watchdogs'.[78]

83. In general terms, I consider that the decision-maker in administrative or judicial proceedings should have more rather than less information on the environmental implications of a proposed project. That argues in favour of granting *locus standi* to environmental organisations meeting relevant criteria concerning their existence and activities laid down in national law.[79] Given their role in environmental matters, such organisations are particularly well placed to tender relevant information.

84. As I see it, Articles 2(5) and 9(3) of the Aarhus Convention provide a blueprint for understanding how to approach the role of environmental organisations as agents for the environment. Where EU environmental directives lay down binding obligations on the Member States, environmental organisations meeting the criteria set out in Article 2(5) of the Aarhus Convention should in principle be able to get before a court to claim that there has been an infringement of those obligations in accordance with Article 9(3) thereof.

85. Individuals concerned by a project that has environmental effects naturally have *locus standi* to defend their property or other interests from potential damage that a project may cause. If environmental organisations are denied standing to ask a court to verify whether an administrative decision complies with obligations binding upon the Member State, such as those flowing from Article 4 of the Water Framework Directive, the environment — that is, the public interest — will be inadequately represented and defended. That would lead to the absurd result that private property and the interests of individuals would be better protected against possible errors of the administration than the public interest. The intention of the EU legislature cannot have been to create such a discrepancy.

74 C-263/08, EU:C:2009:421, points 59 to 65.

75 The Aarhus Convention Implementation Guide states that 'the Convention is intended to allow a great deal of flexibility in defining which environmental organisations have access to justice. … The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment' (see p. 198).

76 See judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 40.

77 See Opinion of Advocate General Kokott in *Brown Bears II*, EU:C:2016:491, point 48.

78 See the judgment of the Court of Human Rights of 28 November 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (CE:ECHR:2013:1128JUD003953407), paragraph 34.

79 See point 74 above.

The effect of Article 47 of the Charter

86. Article 4 of the Water Framework Directive must moreover be interpreted in the light of Article 47 of the Charter.[80]

87. That provision of primary EU law reaffirms the principle of effective judicial protection. It requires that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that provision.[81]

88. Article 51(1) states that the Charter can be relied on against Member States only when they are implementing EU law.[82] Where a Member State lays down procedural rules that limit the ability of an environmental organisation to bring an action in the public interest alleging a breach of Article 4 of the Water Framework Directive, it implements obligations stemming from EU law for the purposes of Article 51(1) of the Charter.[83] Moreover, the relevance of Article 47 of the Charter is not limited to cases where a substantial provision of EU law is coupled with a provision of a procedural nature conferring a right to effective judicial protection.[84]

89. A procedural rule which, in principle and in practice, makes it extremely difficult for an environmental organisation to play the role prescribed by Article 9(3) of the Aarhus Convention and challenge the legality of an administrative decision that it considers to have been taken in breach of Article 4 of the Water Framework Directive, necessarily falls foul of the fundamental right of EU law to an effective judicial remedy.[85]

90. That a Member State has opted in its national legal order for rights-based *locus standi*, rather than interest-based *locus standi* does not suffice to render lawful such a general exclusion. The wording of Article 9 of the Aarhus Convention read as a whole shows that the authors of that convention were fully aware of the differences in *locus standi* rules between the Parties. They carefully crafted the arrangements in Article 9 governing the standing of environmental organisations so that access to the courts does *not* depend on the choice made by a particular Contracting Party.

Concluding remarks

91. Recognising the standing of environmental organisations in accordance with Article 9(3) of the Aarhus Convention in these circumstances does not mean granting that provision direct effect by the back door. It is, rather, the logical consequence of the need to safeguard the *effet utile* of Article 4 of the Water Framework Directive, seen from the viewpoint of the fundamental right to an effective judicial remedy.

80 See, to that effect, judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraphs 30 to 37, as well as my Opinion in that Case, EU:C:2013:747, points 44 to 46.

81 See judgments of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraph 45; of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95; and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73.

82 See, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 17. See also judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 49.

83 See, by analogy, *Brown Bears II*, paragraph 52; and judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 33.

84 See *a contrario* judgment of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraphs 59 to 60; see also judgments of 23 October 2014, *Olainfarm*, C-104/13, EU:C:2014:2316, paragraphs 34 to 40; and of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraphs 34 to 41.

85 See judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 72 and 73.

92. The Court has been prepared on many occasions to endorse a broad, teleological reading of EU environmental legislation.[86] The approach I put forward does no more than consolidate what the Court has already ruled in *Brown Bears II*.

93. Finally, the information before the Court suggests that there is no conflict between the reading I propose and Article 132(1) of the Bundes-Verfassungsgesetz (which forms part of Chapter VII, entitled 'Constitutional and Administrative Guarantees'). As explained by the referring court, in the light of that provision only a natural or legal person who alleges a violation of his or her rights by a decision of an administrative authority and who was a party in the preceding administrative procedure can claim an infringement of those rights by bringing before an administrative tribunal an appeal against that administrative decision. As I understand matters, those requirements do not appear to pose an obstacle for recognising the *locus standi* of environmental organisations to challenge the legality of administrative decisions in accordance with Article 9(3) of the Aarhus Convention.

94. The answer to the first question should therefore be that Article 4 of the Water Framework Directive, read in conjunction with Article 9(3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which prevent an environmental organisation duly constituted and operating in accordance with the requirements of national law from having access to administrative or judicial procedures within the meaning of Article 9(3) of the Aarhus Convention to challenge acts of the competent authority adopted in an administrative procedure conducted on the basis of provisions of national law implementing that directive.

95. Since I have answered the referring court's first question in the affirmative, it is necessary also to consider the second and third questions.

The second question

96. By its second question, the referring court seeks in essence to ascertain whether the Aarhus Convention requires that an environmental organisation be able to allege a breach of Article 4 of the Water Framework Directive during proceedings before an administrative authority or whether it is sufficient that such an organisation has the possibility of challenging the decision of the administrative authority adopted at the end of that procedure before a court or tribunal.

97. It follows from the answer that I have proposed to the first question that an environmental organisation must be allowed to rely upon Article 4 of the Water Framework Directive read in conjunction with Article 9(3) of the Aarhus Convention in order to challenge a decision of the administrative authority adopted at the end of an administrative procedure conducted on the basis of provisions of national law implementing the Water Framework Directive.

98. The question remains whether the Aarhus Convention also requires that an environmental organisation be allowed to invoke Article 4 of the Water Framework Directive *during* such administrative procedure. In other words, must it be granted the right to participate in such a procedure? I will address this question in two stages: first, in general terms and second, taking into account the particular context of Austrian law.

86 See the case-law cited in this Opinion. See also, inter alia, judgment of 22 September 1988, *Land de Sarre and Others*, 187/87, EU:C:1988:439, paragraphs 14 to 20. That case concerned the interpretation of Article 37 of the Euratom Treaty, which dealt with whether a plan for the disposal of any kind of radioactive waste 'is likely to involve radioactive contamination of the water, soil or airspace of another Member State'. Faced with the need to choose between a restrictive literal interpretation of that provision and a broader, more teleological reading, both the Court and the Advocate General (Sir Gordon Slynn, see his Opinion in that Case, EU:C:1988:291) opted for the latter.

Right of participation: general observations

99. Article 9(3) of the Aarhus Convention provides for the right to administrative or judicial review of 'acts … by … public authorities'. These would include administrative decisions adopted at the end of administrative procedures. Unlike Article 6 of that convention, Article 9(3) does not provide for rights of *participation* in administrative procedures. Those rights fall to be analysed in the light of Article 6. However, for the reasons I have set out earlier, [87] I am proceeding on the assumption that Articles 6 and 9(2) of the Aarhus Convention do not apply in the present case.

100. The fact that an environmental organisation has a right to contest an administrative decision does not imply in itself the right to participate in the procedure leading to the adoption of that decision. The Court has held that participation in an environmental decision-making procedure is separate to, and has a different purpose from, judicial review. [88]

101. Unlike some other environmental directives, [89] the Water Framework Directive does not expressly provide for public participation. Nor does it require, as the Habitats Directive does, that a project be agreed only 'if appropriate, after having obtained the opinion of the general public'.

102. However, Article 14(1) of the Water Framework Directive, entitled 'Public information and consultation', does provide that Member States shall '*encourage* the active involvement of all interested parties in the implementation of [that] directive' [90] and recital 14 states that the success of that directive relies in particular on information, consultation and *involvement of the public*. The procedure for granting a permit on the basis of the WRG 1959 is to be seen as implementation of that directive. [91]

103. It seems to me that if the 'involvement' of the public organised by a Member State in accordance with Article 14(1) of the Water Framework Directive is not accompanied by procedural rights enabling the members of the public to express their views and requiring the competent authority to take those views into account, that would not respect the aim of that provision. Such a form of 'involvement' of the public would not deserve to be described as 'consultation'. It would be more akin to a 'statement of intentions' made by the competent authority to the public.

104. The Court has already explained that status as a party to the administrative procedure enables an environmental organisation to participate more actively in the decision-making process by setting out in greater detail and in a more apposite manner its arguments relating to the risk that the planned project may have adverse effects on the environment. The competent authorities are required to take those arguments into account before the project concerned is authorised. Without such participation, arguments supporting protection of the environment may never be either put forward or taken into account, so that the fundamental objective of the procedure set out in Article 14(1) of the Water Framework Directive, namely ensuring a high level of environmental protection, might not be achieved. [92]

87 See point 48 above.

88 See judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631, paragraph 38.

89 See, for example, Article 6(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26); Article 13 of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56); Article 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17); Article 11 of the EIA Directive; and Article 23 of Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (OJ 2012 L 197, p. 1).

90 Emphasis added.

91 See, by analogy, judgments of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 32, and of 4 May 2016, *Commission* v *Austria*, C-346/14, EU:C:2016:322, paragraph 53.

92 See *Brown Bears II*, paragraphs 69 and 70.

105. Furthermore, the aim of the administrative procedure in environmental matters, including those related to water, is to reach a decision that reconciles the interest of the applicant in obtaining a permit with the surrounding environmental constraints. An efficient procedure is one in which the environmental organisation can be involved at an early stage in order to put forward relevant environmental considerations. That makes for a balanced procedure and may reduce the likelihood of subsequent litigation. The Court has always been aware of the need to promote procedural economy in different kinds of procedures. [93]

106. It follows that granting environmental organisations status as a party in administrative procedures in order to rely on directly applicable provisions of EU environmental law, such as Article 4 of the Water Framework Directive, [94] contributes to maintaining and improving the aquatic environment in the EU and, more generally, to attaining the objectives of EU environmental law. [95]

107. In the absence of EU rules governing the matter, it is for the referring court, in accordance with the principle of consistent interpretation, to interpret the national procedural law to the greatest extent possible in the light of those objectives in order to ensure their effective implementation. [96]

Right of participation in the context of Austrian law

108. The referring court explains that under Article 132(1) of the Bundes-Verfassungsgesetz, only a natural or legal person who had status as a party in a preceding administrative procedure may bring an appeal before a court or administrative tribunal (*in casu*, the Verwaltungsgericht of a given *Land*) against the decision adopted at the end of such procedure. Status as a party in the administrative procedure and the right to bring an appeal are therefore directly interconnected. The absence or loss of status as a party in the procedure before the administrative authority thus results in loss of the right to challenge the decision of that administrative authority on appeal.

109. As a matter of principle, such a requirement of prior participation in an administrative procedure does not seem to undermine rights guaranteed by the Aarhus Convention or the Water Framework Directive. The right to effective judicial review under Article 47 of the Charter and the principle of effectiveness do not preclude such a requirement being a condition for bringing legal proceedings if the rules governing that remedy do not disproportionately impair the effectiveness of judicial protection. [97]

110. However, as I understand the position in Austrian law, it is virtually impossible for an environmental organisation to obtain status as a party in such an administrative procedure in order to promote the mandatory objectives of EU environmental law set out in Article 4 of the Water Framework Directive. [98]

111. If the position under national law is indeed as described above — which is a matter solely for the referring court — to refuse an environmental organisation status as a party in an administrative procedure would be tantamount to negating the right to an effective judicial remedy which such organisation derives from Article 9(3) of the Aarhus Convention in connection with Article 4 of the

93 See, for example, in the context of state aid, judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 51; in the context of fixing allowances in greenhouse gas emission trading scheme, judgment of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraph 86; in the context of preliminary ruling proceedings, judgment of 20 October 2011, *Interedil*, C-396/09, EU:C:2011:671, paragraph 20; and in the context of proceedings concerning competition, judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 35.

94 See points 55 to 58 above.

95 See, by analogy, Opinion of Advocate General Kokott in *Brown Bears II*, EU:C:2016:491, point 51.

96 See *Brown Bears I*, paragraph 50.

97 See, by analogy, Opinion of Advocate General Kokott in *Puškár*, C-73/16, EU:C:2017:253, point 70.

98 See point 78 above.

Water Framework Directive. It follows from the answer that I have proposed to the first question that, where that right of participation is necessary to promote the mandatory objectives of EU environmental law set out in Article 4 of the Water Framework Directive, it is not permissible to deprive an environmental organisation of that right.

112. The answer to the second question should therefore be that:

– A national court is required to interpret its national procedural law relating to status as a party in an administrative procedure for granting a permit conducted on the basis of national legislation implementing the Water Framework Directive, such as that in the main proceedings, to the greatest extent possible in a way that is consistent with the objectives laid down by the Water Framework Directive (in particular, Articles 4 and 14(1) thereof) so as to enable environmental organisations to rely on those provisions during administrative proceedings before the national authority.

– Where the right of an environmental organisation, duly constituted and operating in accordance with the requirements of national law, to challenge acts adopted in an administrative procedure by the competent national authorities on the basis of Article 4 of the Water Framework Directive before an administrative authority or a court is conditional upon prior participation in such a procedure, that article, read in conjunction with Article 9(3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which prevent such an organisation from obtaining status as a party in such a procedure.

The third question

113. By its third question, the referring court essentially seeks to ascertain whether national procedural rules, such as Paragraph 42 of the AVG, may require environmental organisations to submit objections in good time at the stage of the permit procedure, failing which they lose status as a party to that procedure, together with the right to challenge before the competent court or tribunal the acts of the competent authorities subsequently adopted in that procedure. [99]

114. I confess that I find the question as phrased curious. Logically, one might think that Paragraph 42 of the AVG can be applied only to someone who *is* already a party. However, the referring court explains that under Austrian procedural law (Paragraph 102(1) of the WRG 1959) environmental organisations such as Protect *cannot* obtain status as a party to such procedure. [100] One might therefore suppose that Paragraph 42 of the AVG either cannot be applied to Protect or that, if it were to be applied, that would have no effect on the outcome of the main proceedings. In such circumstances the third question would appear to be hypothetical. [101]

99 I recall that Paragraph 42 of the AVG defines in good time as being either at the latest on the day preceding the hearing held in the course of an administrative procedure or during the hearing itself; see point 19 above.

100 See point 78 above.

101 The second question referred already deals with the situation where an environmental organisation *cannot* obtain status as a party to an administrative procedure.

115. Nonetheless, it may be inferred from the explanations of the referring court that Protect's request to become a party was rejected together with its objections to the project on the basis of Paragraph 42 of the AVG on the ground that Protect had failed to submit objections related to water (based on the WRG 1959) in good time during the administrative procedure.[102] That would suggest that Protect *could* have obtained status as a party, had it submitted such objections in time.

116. The hearing did not resolve this conundrum.

117. In what follows, I shall assume that Protect *could* have secured status as a party to the administrative proceedings by submitting the required objections in good time.

118. The Austrian Government argues (presumably on the basis of its reading of national law) that Protect should have submitted objections without waiting to be admitted as a party.

119. From the material before the Court, it appears to me anything but obvious under Austrian legislation that an environmental organisation should be expected to understand that it can secure status as a party to the administrative procedure dealing with a request for a permit for abstraction of water for the production of snow by simply submitting objections in accordance with Paragraph 42 of the AVG. Rather, Paragraph 102(3) of the WRG 1959 appears to reserve the possibility of submitting such objections only to the parties whilst Paragraph 102(1) of the WRG 1959 prevents an environmental organisation which does not have any subjective public rights from obtaining status as a party.

120. I consider that to require an environmental organisation nevertheless to attempt to submit objections in such a situation (almost on a speculative basis) would be unfair and misleading. To apply Paragraph 42 of the AVG and inflict on Protect the loss of status as a party in such a situation would mean punishing it for not having done what the national law appears to preclude it from doing. Such a procedural rule would not, in my view, meet the criteria of fairness and equity set out in Article 9(4) of the Aarhus Convention. It strangely resembles the situation of the dying man in Kafka's *Before the law* who — having spent his whole life trying to walk through the gate which is now being closed — is told that it had been wide open for him the whole time.

121. It is for the national court to verify whether the national rules do indeed operate in that way. If so, then to refuse Protect status as a party in the administrative procedure and thus to bar it from access to a court or tribunal would be to negate Protect's right to an effective judicial remedy, which as an environmental organisation it derives from Article 4 of the Water Framework Directive read in conjunction with Article 9(3) of the Aarhus Convention.[103] It follows from the answer that I propose to the first question that, where that right is necessary to promote the mandatory objectives of EU environmental law set out in Article 4 of the Water Framework Directive, it is not permissible to deprive an environmental organisation of that right.

122. If, on the other hand, the referring court finds that an environmental organisation, such as Protect, could have been reasonably expected, based on fair and equitable procedural rules, to submit its objections in good time in the administrative proceedings, the procedural time limit imposed by Paragraph 42 of the AVG does not seem to undermine any rights guaranteed by the Aarhus Convention or the Water Framework Directive. As a matter of principle, a time limit laid down by national law for the parties to submit objections respects the essence of the right to an effective

102
From the explanations of the referring court it would appear that the Bezirkshauptmannschaft Gmünd (the Gmünd district authority) considered that Protect *did not enjoy* status as a party, while the Landesverwaltungsgericht Niederösterreich (Lower Austria Regional Administrative Court) took the view that Protect *had lost* that status pursuant to Paragraph 42 of the AVG. See points 24 and 25 above.

103
See judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 74, in which the Court found that Article 47 of the Charter implies that the right to effective judicial remedy cannot be undermined by a condition prior to bringing an appeal to the court or tribunal.

judicial remedy and does not seem to go beyond what is necessary in pursuit of the legitimate objectives of legal certainty, swiftness and economy of administrative proceedings. Thus, the Court has recognised that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it has found that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.[104] Indeed, Article 9(4) of the Aarhus Convention itself requires that the procedures be 'fair, equitable [and] timely'. In so far as it bars the possibility for a *party* to submit objections to a project after a specified time limit which the party has failed to respect, Paragraph 42 of the AVG appears to meet those criteria.[105]

123. The answer to the third question should therefore be that Article 4 of the Water Framework Directive, read in conjunction with Article 9(3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which inflict on an environmental organisation the loss of status as a party in an administrative procedure as a consequence of failure to submit objections in good time in that procedure, in so far as those rules fail to meet the criteria of fairness and equity referred to in Article 9(4) of the Aarhus Convention.

Conclusion

124. In the light of the foregoing, I suggest that the Court give the following answers to the questions referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria):

– Article 4 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, read in conjunction with Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national procedural rules which prevent an environmental organisation duly constituted and operating in accordance with the requirements of national law from having access to administrative or judicial procedures within the meaning of Article 9(3) of that convention to challenge acts of the competent authority adopted in an administrative procedure conducted on the basis of provisions of national law implementing that directive.

– A national court is required to interpret its national procedural law relating to status as a party in an administrative procedure for granting a permit conducted on the basis of national legislation implementing Directive 2000/60, such as that in the main proceedings, to the greatest extent possible in a way that is consistent with the objectives laid down by that directive (in particular, Articles 4 and 14(1) thereof) so as to enable environmental organisations to rely on those provisions during administrative proceedings before the national authority.

– Where the right of an environmental organisation, duly constituted and operating in accordance with the requirements of national law, to challenge acts adopted in an administrative procedure by the competent national authorities on the basis of Article 4 of Directive 2000/60 before an administrative authority or a court is conditional upon prior participation in such a procedure, that article, read in conjunction with Article 9(3) of the convention in question and Article 47 of the

104
See judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 41 and the case-law cited.
105
The Aarhus Convention Implementation Guide confirms this conclusion; see p. 202.

Charter of Fundamental Rights of the European Union, must be interpreted as precluding national procedural rules which prevent such an organisation from obtaining status as a party in such a procedure.

– Article 4 of Directive 2000/60, read in conjunction with Article 9(3) of the convention in question and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national procedural rules which inflict on an environmental organisation the loss of status as a party in an administrative procedure as a consequence of failure to submit objections in good time in that procedure, in so far as those rules fail to meet the criteria of fairness and equity referred to in Article 9(4) of that convention.