Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 2 July 2020[1]

Case C-826/18

LB,
Stichting Varkens in Nood,
Stichting Dierenrecht,
Stichting Leefbaar Buitengebied
v
College van burgemeester en wethouders van de gemeente Echt-Susteren,
joined parties:
Sebava BV

(Request for a preliminary ruling from the Rechtbank Limburg (District Court, Limburg, Netherlands))

(Reference for a preliminary ruling — Aarhus Convention — Article 6 — Participation rights — Public participation procedure — Article 2(4) and (5) — 'The public' and 'the public concerned' — Personal scope of application — Article 9(2) and (3) — Access to justice — Standing — Charter of Fundamental Rights of the European Union — Article 47 and Article 52(1) — Right to effective judicial protection — Directive 2011/92/EU — Articles 6 and 11 — Directive 2010/75/EU — Articles 24 and 25 — Condition of prior participation — Procedural autonomy)

I. Introduction

1. Under Netherlands law, everyone has the right to participate in a public participation procedure leading to the adoption of a decision concerning an environmental activity. However, access to a court to challenge any final administrative decision issued within that procedure is subject to two cumulative conditions. First, the person must be an interested party, with its interests directly affected by the decision in question. Second, that person must have participated during the public participation procedure by submitting its observations concerning the draft decision, unless that person may not reasonably be criticised for not having done so.

2. The result of national rules being drafted in this manner appears to be considerable dissonance in the personal scope of both procedural frameworks: a very open administrative stage and a much narrower judicial stage. That naturally opens up the issue: *what of those left out*? What of those members of the public who either are not directly affected or have not submitted any observations in the public participation procedure? Is access to a court, which is guaranteed under the Aarhus Convention[2] or under any provisions of EU law, completely excluded for those members of the public?

1 Original language: English.

2 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 (OJ 2005 L 124, p. 1; 'the Aarhus Convention' or 'the Convention').

II. Legal framework

A. The Aarhus Convention

3. The Aarhus Convention was signed in Aarhus on 25 June 1998 by the then European Community and subsequently approved by Council Decision 2005/370/EC.[3]

4. According to Article 6(1)(a) of the Aarhus Convention, the decision to permit environmental activities listed in Annex I shall be subject to the public participation procedure set out in Article 6(2) to (11). Article 9(2) of the Convention governs the right of access to justice to challenge decisions that have been subject to the public participation procedure set out in Article 6. For the purpose of defining their personal scope, Article 6 and Article 9(2) use the terms 'the public' and 'the public concerned'. These terms are defined in Article 2(4) and (5) of the Convention respectively.

B. EU law

5. Before the adoption of Council Decision 2005/370/EC, the then European Community adopted Directive 2003/35/EC.[4] The latter amended two existing directives in order properly to align Community rules with the Aarhus Convention, in particular with Article 6 and Article 9(2) and (4) thereof.[5] These directives have since been replaced by Directive 2010/75/EU[6] and Directive 2011/92/EU,[7] as amended by Directive 2014/52/EU ('Directive 2011/92').[8]

6. Article 6 and Article 9(2) of the Aarhus Convention are transposed by Articles 6 and 11 of Directive 2011/92, and Article 24 in combination with Annex IV and Article 25 of Directive 2010/75, respectively. The terms 'the public' and 'the public concerned', which also feature in those provisions, are defined in Article 1(2)(d) and (e) of Directive 2011/92 and Article 3(16) and (17) of Directive 2010/75, respectively.

C. Netherlands law

7. From the order for reference, as further clarified by the Netherlands Government at the oral hearing, I understand the relevant provisions of Netherlands law in the following way.

8. The contested activity in the main proceedings has been subject to the public preparatory procedure pursuant to Section 3.4 of the Algemene wet bestuursrecht (General Administrative Law Act; 'the Awb'). The latter constitutes a public participation procedure within the meaning of Article 6 of the Aarhus Convention.

3 See above, footnote 2.

4 Directive 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/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

5 Recitals 5 and 11 of Directive 2003/35.

6 Directive 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).

7 Directive 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).

8 Directive of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92 (OJ 2014 L 124, p. 1).

9. The public preparatory procedure within the meaning of the Awb entails that, in the event of an application for a permit, the competent authority must *first* take a draft decision regarding its position on the application in question. The draft decision must be made available to *everyone* by appropriate means, and according to Article 3.12(5) of the Wet algemene bepalingen omgevingsrecht (General Provisions of Environmental Law Act; 'the Wabo'), *everyone* can submit observations in regard to the draft decision.

10. I wish to point out that the Netherlands Government has expressly confirmed at the hearing that under the Wabo, *everyone* literally means any physical or legal person, without any limitations, spatial or otherwise. Thus, in principle, a Czech resident in the Czech Republic, a Dane resident in Denmark, or a Chinese resident in China all *have the right to participate* under Netherlands law during the public participation procedure for the requested activity in the main proceedings.

11. The Netherlands Government has further explained that by opening the public preparatory procedure to everyone, it sought to enhance the debates between the competent authority and the public as much as possible. That government equally wished to reduce the burden on the (local) administrative authorities from having to ascertain, in each individual case, those members of the public who might be concerned by the proposed activity in question and those who might not.

12. In addition, the Netherlands Government further considers that it follows in fact from Article 6(7) of the Aarhus Convention that the right to participate during the public participation procedure is open to *everyone* subject to Article 6 of the Aarhus Convention.

13. Next, after the public participation procedure, the administrative authority will issue a final decision concerning the requested activity. The possibility to challenge the procedural and substantive legality of such a decision before a court is subject to *two cumulative conditions* under Netherlands law. Those conditions considerably narrow down the field of applicants compared to the administrative phase leading to the adoption of that decision.

14. *First*, according to Article 8:1 of the Awb, the applicant must be an 'interested party' within the meaning of Article 1:2 thereof, meaning a person whose interests are directly affected by the decision. Associations promoting environmental protection are always regarded as 'interested parties' under Article 1:2(3) of the Awb.

15. I note that the term 'interested party' does not figure in Article 9(2) of the Aarhus Convention, which instead employs the term 'members of the public concerned having a sufficient interest or … maintaining the impairment of a right'. I understand from the order for reference that the term 'interested party' within the meaning of the Awb constitutes the transposition of this expression in Article 9(2) of the Aarhus Convention. Accordingly, a person who is not an 'interested party' within the meaning of Article 1:2 of the Awb, is not considered a member of 'the public concerned' within the meaning of Article 9(2) of the Aarhus Convention.

16. *Second*, the 'interested party' must have also participated in the public preparatory procedure in accordance with Article 6:13 of the Awb by submitting its views in relation to the activity in question, unless that party may not reasonably be criticised for not having done so.

17. According to the Netherlands Government, the purpose of this second requirement is to enhance the efficiency of administrative procedures, and thereby the efficiency of legal procedures. Participation in the public preparatory procedure enables one to identify the contentious points at an early stage of the decision-making process, thus improving the quality of that process. It makes it possible to avoid legal proceedings, or, if they do take place, should help to make them more efficient.

18. As regards the exception to this rule (where the party may not be reasonably criticised for not having participated), the Netherlands Government explained during the hearing that it applies if the lack of participation is justified. According to national case-law, this is the case, for instance, if the notification of the draft decision is flawed; if the issued decision is different from the notified draft decision and that difference has negative consequences for the 'interested party'; or if a person, due to a relocation, becomes an 'interested party' only after the expiry of the deadline to submit observations to the draft decision.

19. Finally, with regard to the connection between the two conditions for standing, the Netherlands Government clarified at the hearing that a party who has participated in the public preparatory procedure under the Wabo, but is not an interested party within the meaning of the Awb, will have no right to challenge the subsequent decision in court, even if that party participated by submitting comments at the preparatory phase.

III. Facts, national proceedings and the questions referred

20. In 2016, Sebava BV submitted an application to College van burgemeester en wethouders van de gemeente Echt-Susteren (Municipal Council of Echt-Susteren, Netherlands, 'the defendant'), for the construction of a new pen for 855 sows, the exchange of breeding sows for farrowing sows in the existing pens and the construction of a covered run for sows.

21. The application was submitted by the defendant for the uniform public preparatory procedure within the meaning of Section 3.4 of the Awb. The referring court confirms that that procedure is a public participation procedure within the meaning of Article 6 of the Aarhus Convention.

22. The defendant made available a copy of the application memorandum and other related documentation for inspection. Notice of this was given in the *Staatscourant* (Government Gazette). The application was also published in the *Gemeenteblad* (Municipal Gazette) of the defendant's municipality.

23. On 28 September 2017, the defendant issued the requested permit and gave notice of this in the *Staatscourant*.

24. The permit decision was challenged before the referring court, the Rechtbank Limburg (District Court, Limburg, Netherlands) by four applicants. The first applicant is a physical person and veterinarian by profession ('the first applicant'). She is also a board member, secretary and chairperson of various interest groups promoting animal welfare. The three other applicants are environmental associations ('the three applicant associations') (altogether 'the four applicants').

25. Before the referring court, the four applicants admit that they did not submit any objections to the defendant's draft decision. They argue, however, that they cannot reasonably be criticised for not having done so because the defendant gave an incorrect notification of the draft decision. On that basis, the four applicants request the referring court to annul the contested decision so as to enable them to still be able to submit their objections to the draft decision.

26. Regarding the action brought by the first applicant, the referring court considers that it should be declared inadmissible on the basis of Article 8:1 and Article 1:2 of the Awb. It considers that the first applicant is not an 'interested party' within the meaning of those provisions. The referring court finds that the first applicant has brought the action in a personal capacity, since she made known her capacity as a board member, secretary and chairperson of various interest groups only a considerable time after the appeal period had expired. In addition, she lives some distance away from the proposed pigpen and therefore does not experience any spatial or environmental consequences as a result thereof.

27. Regarding the action brought by the three applicant associations, the referring court considers that, as environmental associations, they are indeed interested parties under Article 1:2(1) of the Awb. However, they did not put forward any objections to the draft decision. It follows from Article 6:13 of the Awb that an interested party who may reasonably be criticised for not having expressed a view during the preparatory procedure cannot bring an action before the administrative court.

28. It is in this factual and legal context that the Rechtbank Limburg (District Court, Limburg) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must European law and, in particular, Article 9(2) of the Aarhus Convention be interpreted as precluding a total exclusion of the right of access to justice for the public (any person), in so far as the latter is not the public concerned (interested parties)?

If Question 1 is answered in the affirmative:

(2) Must European law and, in particular, Article 9(2) of the Aarhus Convention be interpreted as meaning that it follows therefrom that the public (any person) should, in the event of an alleged infringement of the procedural requirements and public-participation rights applicable to that public, as contained in Article 6 of that Convention, have access to justice?

Is it important in that regard that the public concerned (interested parties) should have access to justice in that respect and can also raise substantive complaints before the courts?

(3) Must European law and, in particular, Article 9(2) of the Aarhus Convention be interpreted as precluding a situation in which access to justice for the public concerned (interested parties) is made dependent on the exercise of public-participation rights within the meaning of Article 6 of that Convention?

If Question 3 is answered in the negative:

(4) Must European law and, in particular, Article 9(2) of the Aarhus Convention be interpreted as precluding a provision of national law which excludes access to justice in respect of a decision on the part of the public concerned (interested parties) if that public can reasonably be criticised for not having set out any views against (parts of) the draft decision?

If Question 4 is answered in the negative:

(5) Is it entirely up to the national court to provide an opinion, on the basis of the circumstances of the case, as to what should be understood by the term "who can reasonably be criticised" or is the court obliged to take certain European legal safeguards into account in that regard?

(6) To what extent are the answers to Questions 3, 4 and 5 different in relation to the public (any person), in so far as that is not the public concerned (interested parties)?'

29. Written observations have been submitted by the Danish Government, Ireland and the Netherlands and Swedish Governments, as well as the European Commission. The defendant has provided observations endorsing the observations submitted by the Netherlands Government. The four applicants in the main proceedings, the defendant, Ireland, the Netherlands Government, as well as the Commission participated in the oral hearing that took place on 30 January 2020.

IV. Assessment

30. This Opinion is structured as follows. I shall start by identifying the applicable provisions of the Aarhus Convention and of Directives 2010/75 and 2011/92 (A). I will then turn to the compatibility of the two conditions on standing in Netherlands law, namely the condition of being an 'interested party' (B), and the condition of submitting views in the public participation procedure (C), with those instruments.

A. The applicable law: Aarhus Convention, Directives 2010/75 and 2011/92

31. The referring court considers the provisions on public participation in Article 6 of the Aarhus Convention, Article 6 of Directive 2011/92 as well as Article 24 of Directive 2010/75 to be applicable in the main proceedings.

32. That appears indeed to be the case for both the Aarhus Convention and Directive 2010/75. According to Article 6(1)(a) of the Aarhus Convention, Article 6 applies with respect to decisions on whether to permit proposed activities listed in Annex I. Annex I, point 15(c) mentions installations for the intensive rearing of pigs with more than 750 places for sows. According to Article 10 of Directive 2010/75, the provisions on public participation in Article 24 of that directive applies to the activities set out in Annex I. Point 6(6)(c) of that annex mentions the intensive rearing of pigs with more than 750 places for sows.

33. By contrast, it is not immediately apparent that the activities in the main proceedings fall within the scope of the activities captured by Directive 2011/92. Annex I, point 17(c) and Annex II, point 1(c) to Directive 2011/92 makes that directive applicable to installations for the intensive rearing of pigs with more than 900 places for sows and water management projects for agriculture. That said, however, the decision on whether 'the construction of a new pen for 855 sows, the exchange of breeding sows for farrowing sows in the existing pens and the construction of a covered run for sows', also falls under that or any other provision of Directive 2011/92, is naturally one for the national court to make, having taken into account the detailed technical specification of that activity.

34. As the Court does not have the necessary facts before it to make a definitive assessment concerning the applicability of Directive 2011/92, I take as the starting point that, as stated by the referring court, that directive is also applicable in the main proceedings.

35. Next, the referring court expressly invokes only Article 9(2) of the Aarhus Convention in the six questions referred to this Court. However, in view of the order for reference, the mention of 'EU law' in the formulation of the questions should be understood as including a reference to Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75. In substance, both these provisions correspond to Article 9(2) of the Aarhus Convention.

36. Concerning the interpretation of those secondary law instruments, Articles 6 and 11 of Directive 2011/92 and Articles 24 and 25 of Directive 2010/75 must be interpreted in the light of the corresponding provisions of Article 6 and Article 9(2) of the Aarhus Convention. Since the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention, the wording and aim of that convention must be taken into account for the purpose of interpreting those directives. [9]

9 Judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 34).

37. Therefore, in one way or the other, EU secondary law in this area is tied to the Aarhus Convention. I thus find it most useful to assess the questions referred by the national court in the light of the relevant provisions of the Aarhus Convention, in particular its Article 6 and Article 9(2), and take note of the corresponding provisions of Articles 6 and 11 of Directive 2011/92 and Articles 24 and 25 of Directive 2010/75 only when those provisions deviate from the text of the Aarhus Convention. In principle, this may be the case in two situations.

38. First, Article 3(5) of the Aarhus Convention allows its Parties to introduce measures providing for more extensive rights than the ones set out in the Convention. Second, there could indeed be inconsistency between the Aarhus Convention and EU secondary rules with regard to a specific provision. In fact, the referring court considers that there is an inconsistency or contradiction between the scope of participation rights granted to 'the public' in the two directives, on the one hand, and the Aarhus Convention on the other hand.

B. The access to justice for 'the public'

39. By its first and second questions, which it is appropriate to examine together, the referring court asks whether Article 9(2) of the Aarhus Convention, as well as Article 11 of Directive 2011/92 or Article 25 of Directive 2010/75, preclude a total exclusion of the right of access to justice for 'the public', in so far as the latter is not 'the public concerned' within the meaning of those instruments.

40. These questions relate to the situation of the first applicant, the physical person, whom the referring court considers to be part of 'the public', but not 'the public concerned'. By contrast, the three applicant associations are regarded as 'interested parties' under Article 1:2(3) of the Awb.[10] As such, they have 'sufficient interest' under Article 9(2) of the Aarhus Convention and are not concerned by the first and second questions.

41. The first and second questions of the referring court are based on the assumption that Article 6 of the Aarhus Convention grants participation rights to 'the public' at large, *irrespective of* whether they also form part of 'the public concerned'. Thus, the referring court notes that Article 9(2) of the Aarhus Convention seems to apply only to 'the public concerned', which suggests that the first applicant has no standing under this provision. The referring court questions, however, whether such an interpretation can be retained in the light of the fact that Article 6 of the Convention grants several procedural rights, not just to 'the public concerned', but to 'the public' at large. In that respect, the referring court points to Article 6(3)(7) and (9) of the Convention.

42. In order to examine whether Article 9(2) of the Aarhus Convention precludes a total exclusion of the right of access to justice for 'the public' at large, it is necessary to first determine the personal scope of that provision (1). Since Article 9(2) constitutes the judicial enforcement mechanism of the participation rights granted in Article 6, it is then necessary to turn to the personal scope of the participation rights in Article 6.

1. The personal scope of Article 9(2) of the Aarhus Convention

43. The *wording* of Article 9(2) is rather clear: that provision grants a right of access to justice only for members of 'the public concerned', not 'the public' (at large).

10 See above, points 14 and 27 of this Opinion.

44. The Aarhus Convention specifically defines both notions. Under Article 2(4), 'the public' means essentially everyone. Pursuant to Article 2(5), 'the public concerned' is a subset of the public. It covers only 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.

45. Certainly, with regard to its *objective*, Article 9(2) of the Aarhus Convention seeks to ensure a wide access to justice within the scope of the Convention.[11] However, that objective can hardly be taken out of context in order to rewrite the clear wording of Article 9(2). The *system and logic* of Article 9(2), seen in the context of other provisions of the Aarhus Convention, give support to that proposition.

46. First, it was the choice of the authors of the Aarhus Convention not to introduce an *actio popularis* in environmental matters. As Advocate General Sharpston has already pointed out,[12] because an *actio popularis* approach was rejected during the negotiations of the Aarhus Convention, the authors of the Aarhus Convention decided to strengthen the role of non-governmental organisations (NGOs) promoting environmental protection who, according to Article 2(5) and Article 9(2), are always considered part of 'the public concerned' and considered to have a sufficient interest.[13] If Article 9(2) were now to be interpreted as suddenly granting standing to 'the public' at large, that logic and compromise would be disturbed.

47. Second, there is the difference between Article 9(2) and Article 9(3): it would appear that when the drafters of the Aarhus Convention wished to grant access to a court to 'the public' at large, and not just 'the public concerned', they were able to state so expressly. That is the example of the wording of Article 9(3), which grants rights to the members of 'the public' without further qualifications.

48. Third, however, Article 9(2) and Article 9(3) are two distinct provisions of the Convention. Article 9(2) makes a cross-reference to Article 6. Additionally, from the overall structure of Article 9 as a whole, it is clear that the judicial enforcement provision of Article 6 is Article 9(2), as much as Article 9(1) is for Article 4.

49. Moreover, Article 9(3) opens with the statement that 'in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall …'. That wording and the structural logic of Article 9 of the Aarhus Convention indicate that Article 9(3) *is not supposed to govern* the enforcement of participation rights under Article 6, but other rights granted by other provisions of the Convention (or under national law). Thus, contrary to the Danish Government and the Commission, I do not consider that Article 9(3) governs the right of access to justice with regard to participation rights granted in Article 6 of the Convention, nor decisions resulting from the procedure in Article 6.

50. If that were indeed the case, what purpose does Article 9(2) and any conditions or rules stated therein serve (or in Article 9(1), for that matter), if anything and everything covered in those provisions would be immediately overridden by the potentially all-encompassing Article 9(3)?

51. In sum, in and of itself, Article 9(2) does not grant any right of access to justice to 'the public', but only to 'the public concerned'. The same conclusion is also true for Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 both of which, on this matter, are worded almost identically to Article 9(2) of the Aarhus Convention.

11 See, for example, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 58).

12 Opinions of Advocate General Sharpston in *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU:C:2009:421, point 63), and in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:760, point 81).

13 See, to that effect, the *Aarhus Convention: An Implementation Guide*, Second Edition, 2014, ('the Implementation Guide'), p. 194 and the Aarhus Convention Compliance Committee ('the Compliance Committee'), Findings and recommendations of 16 June 2006, Belgium (ACCC/C/2005/11, paragraph 35).

52. There is, however, the matter of the connection between Article 9(2) and Article 6. In its text, Article 6 indeed occasionally refers to 'the public' and not just to 'the public concerned'. That is the issue to which I now turn.

2. The personal scope of Article 6 of the Aarhus Convention

53. Most of the provisions of Article 6, including its key provision of Article 6(2), grant participation rights only to 'the public concerned'. It is 'the public concerned' who shall be notified in the environmental decision-making procedure about the proposed activity under Article 6(2) and who shall then have access to examine all information relevant to the decision-making procedure under Article 6(6). Moreover, Article 6(5) states that it is again 'the public concerned' who should be identified by prospective applicants, before they apply for a permit, in order to enter into discussions with them and provide them with information regarding the objectives of their application.

54. However, as the referring court notes, Article 6(3)(7) and (9) uses the term 'the public', and not just 'the public concerned'.[14] This indeed raises the question whether Article 6 grants participation rights to 'the public' at large, irrespective of whether or not they form part of 'the public concerned', and in the affirmative, whether Article 9(2) then, in spite of the preliminary conclusion above, nonetheless requires the Parties to ensure (at least some) standing for 'the public' in order to enforce such rights.

(a) Article 6(3) and Article 6(9)

55. Article 6(3) imposes an obligation on public authorities to include reasonable time frames for the different phases in the public participation procedure in order for 'the public' to first be informed and then to prepare and participate effectively.

56. In my view, the reference to 'the public' in that provision is easily explained by the nature of that provision. It concerns a phase at which communication to the outside world is required, where it may neither be possible, nor reasonable, to insist on identifying 'the public concerned'. Hence the information is simply to be made public. This reading is further supported by the reference in Article 6(3) to Article 6(2), which concerns only 'the public concerned'.

57. Similar considerations apply in respect to Article 6(9). That provision obliges the authorities to inform 'the public' promptly, once a decision has been taken, and to make the decision accessible to 'the public'. In a way, that provision mirrors the provision of Article 6(3), but at the stage of output: while Article 6(3) requires a reasonably broad dissemination of the information about the public participation procedure before it has started, Article 6(9) requires the same with regard to its results once it has finished.

58. There is no reason to keep planning permits a secret. This is not only because of the overall requirement of transparency and openness of public administration. There might equally be, apart from 'the public concerned' who have participated in the decision-making procedure and are known to the public authorities when they issue the final decision, members of 'the public concerned' who *have not* participated in this procedure, but might still wish to challenge the decision resulting from that procedure.

59. Thus, both input and output openness, as well as practicability of the public participation procedure under Article 6, logically explains why Article 6(3) and (9) uses the notion of 'the public'.

14 For the sake of completeness, the referring court also mentions Article 6(8). That provision, however, simply requires the Parties to ensure that due account is taken of the outcome of the public participation when the decision is rendered. I thus fail to see how that provision would include any potential rights for 'the public'.

(b) The curious case of Article 6(7)

60. Article 6(7) provides that procedures for public participation shall allow 'the public' to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

61. It seems that, based on the wording of Article 6(7) the Netherlands Government considers, like the referring court, that 'the public' at large is granted participation rights in the public participation procedure. Indeed, on its wording, and in contrast to Article 6(3) and (9), paragraph 7 of that article concerns the public participation procedure itself. It relates neither to the preparatory stage, nor to the publication stage. In fact, it concerns the very exchange between the participants in the public procedure and the public authority on the proposed activity.

62. There appears to be two opposing ways to interpret Article 6(7) of the Aarhus Convention.

63. The *first interpretation* of Article 6(7) would be the one suggested by the Netherlands Government, at least as to its first step: 'the public' in Article 6(7) should mean everyone. Thus, every natural or legal person, without any limitation as to its interest or whether it is individually affected, is given *a right* to participate in the environmental decision-making procedure under Article 6 of the Aarhus Convention.

64. However, for the reasons set out in detail below,[15] the logical consequence of that proposition can hardly be the one as set out in Netherlands law, whereby everyone has the right to participate, but only the interested parties may be allowed to challenge the outcome of that participation before a court. Instead, the logical consequence of that interpretation of Article 6(7) would be the one proposed by the Commission, which is also mentioned in the Implementation Guide:[16] because Article 9(2) of the Convention is the means for enforcing *all rights* in Article 6, and because Article 9(2) applies only to 'the public concerned', it would then mean that any member of 'the public' who actually participates in a public participation procedure by submitting comments gains the status of a member of 'the public concerned'. In other words, according to this interpretation, Article 6(7) would open the door for 'concern by participation' for the purposes of Article 9(2).

65. The *second interpretation* would be to construe Article 6(7) of the Convention as meaning that, while everyone ('the public') have the possibility to address themselves to the public authority in order to make themselves and their interest in the decision-making process known, if interpreted in the overall context of Article 6 and the Aarhus Convention, Article 6(7) confers participation rights – those being rights which create corresponding obligations for the relevant authorities to take those observations into account in accordance with Article 6(8), and may be judicially enforceable under Article 9(2) – only in so far as those persons form part of 'the public concerned'.

66. For a number of reasons that I shall develop in the following three subsections, I cannot imagine the first interpretation, in whichever of its possible varieties, being a sensible one.

15 Points 81 to 85 of this Opinion.

16 The Implementation Guide, p. 153 and 195. Although the Implementation Guide has no binding force, it may be taken into consideration for the purpose of interpreting the Convention — see judgment of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 38).

(c) A 'global' right to participate?

67. First, there is the internal logic of Article 6. If Article 6(7) were to be interpreted as granting a right to participate to everyone, not just 'the public concerned', what would that mean for the other provisions of that article, that are in and of themselves limited to 'the public concerned'? How would their interaction operate? How, for instance, would 'the public' be likely to exercise their right to submit comments or observations on a draft decision according to Article 6(7), if they do not have a right to be informed about the draft decision in the first place, because that right is limited to 'the public concerned' under Article 6(2)? Likewise, on what basis should 'the public' submit comments on the proposed activity, considering the fact that they do not have the right to access all the information relevant to the draft decision, since Article 6(6) grants those rights only to 'the public concerned'?

68. Thus, in practical terms, Article 6 must form a coherent whole. That means either broadening the scope of 'the public concerned' in all the other provisions of Article 6, which goes against their clear wording, so as to effectively read 'the public', or, to interpretatively scale back Article 6(7) to mean that only 'the public concerned' have participation rights in the sense mentioned above at point 65, in order to fall in line with the rest of that article.

69. In my view, the coherent whole that ought to be Article 6 grants participation rights only to 'the public concerned', and not to 'the public', for both operational as well as principled reasons.

70. On the *operational* side, I have some difficulty imagining how the procedures and rights, conceived of and designed for a certain community that is reasonably likely to be affected by the proposed activity, would work with regard to any and everybody.

71. Starting with the effective communication of the information about the proposed activity under Article 6(3) and (2): if that communication is not intended to reach just the public that might reasonably be concerned, but rather – against its wording – the public in general, without any spatial, environmental, or interest-based limits, then should any and every proposed activity not be notified to the whole world? Must then the notice of every larger pig stall (in the Netherlands) be published in say the *Financial Times*, *The Economist*, or any other medium with truly global reach?

72. Thus, it is rather clear that the term 'the public' used in various provisions of Article 6 must be read within the reasonable confines of what the entire operation as a whole is intended to achieve: to give the public that is likely to be concerned a reasonable chance, at an early stage and in advance, to learn about decision-making on proposed activities and how they can participate.[17]

73. To that operability connects the *principled* issue: what interests, not to say rights, would a Czech, a Dane, or a Chinese,[18] each residing hundreds or even thousands of kilometers away from the proposed activity, have in the construction of a new pen for 855 sows in Echt-Susteren, in the southeast of the Netherlands?

74. Certainly, the Aarhus Convention recalls, in its preamble, the right of every person to live in an environment adequate for their health. There is equally, no doubt, no shortage of theories as to why environmental rights are special, collective rights, which must be allowed to be exercised in a special way. In addition, the Aarhus Convention itself pushes, in a number of general provisions in its Article 3, as well in further specific provisions, for as broad as possible public participation as well as access to justice in environmental matters.

17 See judgment of 7 November 2019, *Flausch and Others* (C-280/18, EU:C:2019:928, paragraph 32 and seq.), where the Court noted that the effectivity of the communication is to assessed with regard to 'the public concerned', and not to 'the public' at large. See Opinion of Advocate General Kokott in *Flausch and Others* (C-280/18, EU:C:2019:449, point 62).

18 To continue with the examples made above, in point 10, of persons who following the confirmation of the Netherlands Government would have *a right* to participate in the public participation procedure under Netherlands law.

75. However, with all those allowances made, in my, perhaps traditional and positivistic view, I still do not see what interests such Czechs, Danes, or Chinese would have in a case like the present one with regard to the actual environmental activity proposed in the main proceedings. Above all, however, I cannot infer any such enforceable rights from the provisions of the Aarhus Convention. From the overall logic, as well as context, the Aarhus Convention cannot be construed as giving *a right* to public participation in the environmental decision-making procedure under Article 6 *to everyone*.

76. Thus, the much more sensible interpretation of Article 6(7), considered on its own, is that that provision is supposed to follow the same logic as the rest of that article. In order to identify 'the public concerned' in a given public participation procedure, the public authorities should allow 'the public' at large to address themselves to the authorities and to explain their interest and position in the decision-making process. In that light, Article 6(7) allows 'the public' at large to submit its observations to the public authorities. That does not mean, however, that that public at large would have any rights with regard to effectively participating in that procedure, or the public authorities any correlating obligations. In order for 'the public' to have that right, they must form part of 'the public concerned'.

77. For the sake of completeness, it does not appear that the reports by the Compliance Committee, invoked by the referring court, suggest a different interpretation. It is true that the committee found that a Party to the Convention had failed to guarantee the full scope of the rights envisaged by Article 6(7) by limiting the right to submit comments to 'the public concerned'. However, that was also because those comments were required to be 'motivated proposals', meaning that they should contain reasoned argumentation, that obligation being perhaps indeed somewhat onerous for the (administrative) public participation procedure.[19] Equally, Article 6(8) of the Aarhus Convention obliges the public authorities to 'seriously consider all the comments received' for the purpose of its decision.[20] These findings do not, however, really deal with the scope of Article 6(7) in relation to 'the public' and the definition of that public in the overall context of Article 6 of the Aarhus Convention.

78. Finally, and on an indeed subsidiary note, the interpretation proposed here of the Aarhus Convention also ensures an interpretation which is aligned and consistent with Directives 2011/92 and 2010/75. I note that Directives 2011/92 and 2010/75 grant participation rights to 'the public', only *in so far* as they form part of 'the public concerned'. Thus, while the right to be informed of the draft decision is granted to 'the public' at large in the directives,[21] the right to submit observations, together with all other participation rights, are granted solely to 'the public concerned'.[22]

79. The approach and the logical distinctions made in the directives, which reflect essentially the interpretation by the EU legislature of Article 6(7) of the Aarhus Convention, appears consistent. While everyone ('the public') has the right to be informed of a draft decision, it is only 'the public concerned', that is, the public actually affected or likely to be affected or having an interest, who has the right to actively participate in the procedure.

19 The Compliance Committee, Findings and recommendations of 4 April 2008, Lithuania (ACCC/C/2006/16, paragraph 80).

20 The Compliance Committee, Findings and recommendations of 8 February 2011, Spain (ACCC/C/2008/24, paragraphs 99-100).

21 Article 6(2) of Directive 2011/92 and Article 24(1) of Directive 2010/75 in combination with Annex IV(1).

22 Regarding the right to submit observations, see Article 6(4) of Directive 2011/92 and Article 24(1) of Directive 2010/75 in combination with Annex IV(3) and IV(5). For all other participation rights, see Article 6(3) and (5) to (7) of Directive 2011/92 and Article 24(1) of Directive 2010/75 in combination with Annex IV(3).

80. Finally, even if the EU legislature in general, and some provisions of EU law in particular, are sometimes singled out as being at odds with certain provisions of the Aarhus Convention,[23] that is clearly not the case here. On the contrary, it would appear to me that the EU legislature rather rationally evaluated and transposed international law obligations, without going below the minimum requirements set out in Article 9(2) of the Aarhus Convention. Thus, contrary to the referring court, I do not think that there is an inconsistency or contradiction between the scope of the directives and the Aarhus Convention on this point.

(d) Participation rights under Article 6 as leges imperfectae*?*

81. It ought to be noted that the Netherlands rules in question are nonetheless somewhat more nuanced. On the one hand, the Netherlands Government states that 'the public' under that provision should mean everyone. Thus, as also evidenced by its national transposition of that obligation, *everyone has the right* to submit observations and to participate in the public participation procedure under Article 6. However, only 'interested parties', meaning 'the public concerned', have any access to a court.

82. Using that approach for the interpretation of the relevant provisions of the Aarhus Convention would mean that Article 6(7), or even Article 6 as a whole, would give everyone the right to participate in the environmental decision-making. But only those persons covered by Article 9(2) as 'the public concerned' would then have any access to justice. Moreover, effective participation under Article 6 would not matter for the scope of Article 9(2): 'the public' under Article 6(7) could never gain the status of 'the public concerned' under Article 9(2), even if that public participated fully in the environmental decision-making procedure.

83. I recall *that* Article 9(2) expressly governs the substantive and procedural legality of decisions subject to the participation procedure in Article 6, *that* Article 9(2) applies only to 'the public concerned', and *that* Article 9(3) does not govern the legality of decisions subject to the procedure in Article 6.[24] In other words, to consider that Article 6 grants participation rights to 'the public' at large would result in a situation where the Convention creates participation rights for 'the public', without a corresponding enforcement mechanism in Article 9 of the Convention for such rights.

84. As a consequence, there would be two classes of participants in the environmental decision-making procedure before an administrative authority under the Aarhus Convention. Those with enforceable rights and those with none. The latter category would have the right to submit and to engage. However, in practical terms, there would be no enforcement mechanism for those rights. Certainly, one cannot help but start from the assumption that all administrative authorities in all Member States behave in an impeccable way. Yet, assuming that one or more of them would occasionally fail to live up to that ideal, there would be absolutely nothing preventing such a less angelic administrative authority from throwing anything it receives from 'the public' that is not 'the public concerned' immediately into the rubbish bin.

23 See, for instance, the Compliance Committee, Findings and recommendations of 17 March 2017 ACCC/C/2008/32 (part II) concerning compliance by the European Union, where the Compliance Committee found that EU law does not provide adequate administrative or judicial review of non-legislative environmental acts under Article 263(4) TFUE.

24 See above, points 48 to 50 of this Opinion.

85. I find such a conception untenable and, to that extent, subscribe to the views of the Commission.[25] Under the Aarhus Convention, and above all under EU law in general,[26] or any legal system worth its name for that matter, *for there to be a right, there must a remedy*. If there is no way of enforcing the correlating obligation from another party, here the public authority, there is by definition no right. It can be considered a gift, a favour, or even charity, but hardly a right. Thus, if EU law, or, for that matter, an international convention to which the European Union is a party and which it embraces and enforces internally within the EU legal order, provides for a right, access to a court must also be available for enforcing that right, either through the instrument in question or, failing that, under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').[27]

(e) 'Procedural' legality only or 'concern by participation'?

86. Arguably, at least in theory, there could be some intermediate positions concerning the scope of the access to court in question.

87. First, what if 'the public' at large under Article 6(7) were considered to have access to court only to the extent that it participated in the environmental decision-making procedure? Could such persons thus safeguard the respect for their personal participation rights only to the extent that they made use of them, without being allowed to contest the resulting decision in its entirety? Alternatively, what if they were allowed to challenge only the *procedural*, but not the *substantive* legality of decisions resulting from the procedure in Article 6?

88. Such suggestions have even less foundation in the text and the structure of the Aarhus Convention. They would in effect amount to inserting, next to the categories of 'the public' and 'the public concerned', a third category of 'the semi-concerned public' (or 'the public procedurally concerned').

89. Moreover, I do not believe that such intermediate positions are in fact possible. In the first scenario, the judicial scope of review 'à la carte' would entirely depend on the personal choice made by the applicant at the administrative stage.[28] The second scenario builds upon an imaginary (and in practice hardly feasible) distinction between the procedural and substantive legality of decisions subject to the procedure in Article 6.[29] Above all, however, there is once again no such distinction present in Article 9(2) itself. In fact, Article 9(2) does not even require standing for a party invoking only a procedural defect, so long as it is established that the contested decision would not have been different without that defect.[30]

90. Second, if Article 6(7) were to be interpreted as meaning that everyone who actually participates in the public participation procedure becomes 'the public concerned', such a requirement would have to be applied by all the State Parties when defining what constitutes a sufficient interest or the impairment of a right under Article 9(2) for 'the public concerned' other than NGOs. In other words, the State Parties would be required to operate with a criterion of 'concern by participation' under Article 9(2).

25 See above, point 64 of this Opinion.

26 See, to that effect, judgments of 25 July 2002, *Unión de Pequeños Agricultores* v *Council* (C-50/00 P, EU:C:2002:462, paragraphs 38 and 39); of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 335); and of 18 March 2010, *Alassini and Others*, (C-317/08 to C-320/08, EU:C:2010:146, paragraph 61).

27 See, to that effect, judgments of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 45 to 47 and the case-law cited) and of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 57 and 58 and the case-law cited).

28 The judicial scope of review could also potentially run against the previous case-law of the Court on the matter in the judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraphs 75 to 82), where the Court stated that limiting the scope of judicial review to the pleas that were already raised at the administrative stage was incompatible with the broadest possible access to review by courts in environmental matters.

29 On the general difficulty of dividing and clearly differentiating between pleas in one action in environmental matters, see, by analogy, my Opinion in *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2017:781, points 74 to 91).

30 See, to that effect, judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraphs 49 to 51).

91. This, however, cannot be the case. Article 9(2) leaves significant discretion to the Parties in defining what constitutes a sufficient interest or the impairment of a right for 'the public concerned' other than NGOs.[31] Moreover, the concept of concern by participation would undermine the very basis of the conditions for standing in Article 9(2). If everyone were to be allowed to participate under Article 6(7), and in so doing, were to gain standing under Article 9(2) by virtue of mere participation, Article 9(2) would essentially apply to *everyone*, amounting to an *actio popularis*. But again, that was an outcome the drafters of the Aarhus Convention expressly rejected.[32]

(f) Interim Conclusion

92. While seeking to respect fully the spirit of and the efforts made by the Aarhus Convention to open up the decision-making process and access to justice in environmental matters, I simply cannot subscribe to the idea that, on the basis of the wording of Article 6(7), taken out of the context of Article 6 as a whole, public participation rights enshrined in Article 6 must be granted to everyone. That conclusion is not only based on the provision itself, but also, as demonstrated in the previous subsections of this Opinion, on the rather questionable consequences that such an expansion would have on the other provisions of the Aarhus Convention – in particular, the subsequent issue of access to court. The laudable objective of granting more access in environmental matters must not be detached from the overall logic of the instrument and its limits.

93. In the light of all the foregoing, I draw the conclusion that Article 6(7) of the Aarhus Convention must be interpreted as containing participation rights for 'the public', only in so far as they form part of 'the public concerned', and that Article 9(2) likewise applies only to 'the public concerned'. This latter provision therefore does not preclude an exclusion of the right of access to justice for 'the public' at large that is not considered to be, at the same time, 'the public concerned'.

3. More extensive rights granted under national law

94. What would that conclusion mean for the situation of the first applicant, if viewed *only* in the light of the Aarhus Convention and Directives 2010/75 and Directive 2011/92? The first applicant is a physical person, and veterinarian by profession. She states that because of her profession and the oath she took on being admitted to that profession, she is personally concerned by the well-being of animals. That does not amount, however, to any concern of interest under national law, which would give her the status of affected party.

95. Under the interpretation of the Aarhus Convention outlined above, the first applicant is a member of 'the public', but not 'the public concerned'. She has no right to participate in the environmental decision-making procedure under Article 6 of the Aarhus Convention. Furthermore, she, apparently, does not form part of 'the public concerned' under national law for the purposes of Article 9(2). Since she has no participation rights under Article 6, the State Party is not obliged to grant her any rights of access to court under Article 9(2). Article 9(3) is not intended to cover acts or omissions that are already subject to Article 9(2). Thus, there is no additional obligation under Article 9(3) either. Directives 2010/75 and 2011/92 change nothing as to those conclusions.

31 Judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 38).

32 See above, point 46 of this Opinion.

(a) A right of access for 'the public' granted by national law

96. Nevertheless, the present case does not really stop here. I recall that, according to Netherlands law, the right for 'the public' to participate in the decision-making process granted under that national law goes beyond the scope of Article 6(7) of the Convention as interpreted above. By virtue of Article 3.12(5) of the Wabo, the right to participate in the decision-making procedure applies to *everyone* without any distinction being made between 'the public concerned' and 'the public'. I thus understand that national law gives every natural and legal person the right to fully participate in the public participation procedure.[33]

97. That raises another layer of complexity. Do Article 9(2) of the Aarhus Convention, Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75, or in fact other provisions of EU law, oppose an exclusion of the right of access to justice for 'the public' with regard to the legality of decisions subject to the procedure in Article 6, in cases where such more extensive rights of public participation have expressly been granted to this group *under national law*?

98. Pursuant to Article 3(5) of the Aarhus Convention, the Parties may introduce more favourable provisions in national law than required by the Convention, such as more extensive public participation in the decision-making procedure under Article 6. The possibility of providing more rights under national law is equally reflected in a number of specific provisions of the Convention.

99. In view of the interpretation of Article 6 of the Aarhus Convention, suggested in the previous section, under which the Member States are obliged to guarantee full public participation only to 'the public concerned', but not to 'the public' at large, it would appear that the Netherlands has provided for more extensive rights of public participation than those required under the Convention. That Member State has done so, however, only with regard to the public participation under Article 6, but not with regard to any subsequent rights of access to justice under Article 9(2).

(b) More extensive rights and the scope of the Charter

100. How is such a situation to be assessed under EU law? In particular, do such 'more favourable' domestic provisions fall 'within the scope of EU law' for the purposes of the applicability of the Charter? Is it then imperative that access to a court pursuant to the first paragraph of Article 47 of the Charter is granted to the members of 'the public' at large, in order to provide them with a judicial remedy for the more extensive participation rights granted by national law, but within the scope of the legislative instrument of EU law?

101. A two-stage assessment is required to answer those questions. First, is a Member State that is going, on a specific point, beyond what is necessary and is carrying out action not expressly prescribed by EU law, acting within the scope of EU law and thus 'implementing EU law' within the meaning of Article 51(1) of the Charter? Second, is the first paragraph of Article 47 of the Charter then applicable, because 'rights and freedoms guaranteed by the law of the Union' are at stake?

33 As outlined above at points 9 and 10 of this Opinion.

102. First, to consider that the 'more favourable' national provisions at issue fall within the scope of the Charter pursuant to its Article 51(1) would be in line with the, indeed rather dominant, approach to that question. Although the specific national rules are not (strictly speaking) mandated by EU law, they will be within the scope of EU law if they are implementing more broadly and abstractly framed provisions of EU law. [34]

103. The same conclusions should arguably be reached, a fortiori, with regard to an instrument that clearly provides for the possibility of the Member States going beyond the strict minimum necessary, and in fact integrates the more extensive rights and participation provided into its overall framework, such as in Article 3(5) and Article 9(2) or (3) of the Aarhus Convention.

104. If that were indeed the case, then the logic outlined above [35] with regard to the rights guaranteed by the Aarhus Convention would also be applicable: where there is right given, even if not by EU law, but by the Member State within the scope of EU law and in line with an express mandate to do so, there must be a remedy for its infringement.

105. That would have to be, a fortiori, the case with regard to such a basic guarantee as the right to an effective remedy and access to a court under the first paragraph of Article 47 of the Charter. Indeed, that paragraph confers on individuals a right which they may rely on as such. [36] As the more recent case-law of the Court makes clear, Article 47 of the Charter does not merely represent some trims and decorations on top of the matter, but embodies the very core and the quintessence of any system governed by the rule of law. [37]

106. However, in the recent (Grand Chamber) judgment in *TSN and AKT*, the Court has found that a Member State is not implementing EU law for the purposes of Article 51(1) of the Charter when it adopts national provisions falling within the powers retained by the Member States by virtue of an EU law provision pursuant to which a directive shall not affect Members States' rights to apply more favourable provisions. [38]

107. From that judgment, it would appear that it is the micro-analysis of each individual provision that matters: 'Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter …' [39]

108. I cannot fully embrace the wording of *TSN and AKT* in so far as to say that, in contrast to the indeed established case-law of the Court, cases would be suddenly and somewhat abruptly sliding in and out of the scope of application of EU law and thus the Charter assessed at the level of every single provision of secondary law. [40] With the same logic, a number of past cases, in which there was no concrete provision of EU law governing the specific matter at issue, but which were still found to

34 Thus for example, already in the judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), the national rules concerning the imposition of tax surcharge in the subsequent tax period, as a penalty for false tax declarations made in the previous tax periods, were said to be the 'implementation of EU law', specifically the obligation of the Member States to provide for 'the correct collection of the tax and for the prevention of evasion'. See also, for example, judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 64 to 69) or of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 48).

35 See above, point 85 of this Opinion and the case-law cited.

36 See, for example, the recent judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 56 and the case-law cited).

37 See, for example, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 120 and 167 and the case-law cited).

38 Judgment of 19 November 2019 (C-609/17 and C-610/17, EU:C:2019:981, in particular, paragraphs 49 to 51).

39 Ibid, paragraph 53.

40 With all of that happening in a rather counterintuitive way: the more concrete and specific the discussion becomes on the substance, the more likelihood of the case suddenly falling 'outside of the scope' of EU law altogether, presumably with all the associated and structural abstract questions still remaining within that scope. In practical terms, this is likely to lead to all the discussion on merits being dislocated at the stage of jurisdiction, with lengthy and detailed assessment on merits then suddenly becoming a lack of jurisdiction/admissibility issue at the very end of the reasoning.

be within the scope of EU law and thus the applicability of the Charter, would suddenly fall outside the scope of application of the Charter.[41] That approach also differs from other more recent streams of case-law, where the Charter and its guarantees remained applicable, while it was acknowledged that no concrete provision of secondary law guaranteed any such specific right that would oppose the legislative solution enacted in national law.[42]

109. I can nonetheless embrace the functional logic of *TSN and AKT*. The Court arrived at the statement recalled in point 107 of this Opinion only after having considered the level of harmonisation in a given field, the nature of the EU competence, and most importantly, after enunciating the proviso that the 'more favourable measures' provided for in national law must not undermine the coherence of EU law action in the field at issue.[43]

110. To me, the ultimate question within such a context is not the question of the applicability of the Charter (and the scope of EU law), but rather the identification of *a specific right* that would be *provided by EU law* and which would then trigger the protection of the first paragraph of Article 47 of the Charter.

111. That is why, second, even if perhaps not strictly insisting on the fact that any and every element of participation for 'the public' falls entirely outside the scope of EU law, the fact remains that there is no right of participation guaranteed under EU law to 'the public' that could be enforced pursuant to the first paragraph of Article 47 of the Charter. Thus, EU law is indeed not opposed to an exclusion of the right of access to justice for members of 'the public' who do not fall within 'the public concerned'. However, that is not the reason for which the Charter or EU law would *not be applicable* to the case at hand, but rather it is because EU law does not provide any such right of participation to 'the public' in the first place. If there is *no right* given or freedom granted by EU law, there is no corresponding right of access to a court under the first paragraph of Article 47 of the Charter to enforce a non-existent right.

112. Indeed, I have already suggested that the key analysis in such cases is not necessarily the *scope* of the Charter, but rather the identification of *a right* flowing from a *specific provision* of EU law.[44] In the absence of any such specific right, even for a case which falls, on the more traditional, generous reading of the scope of EU law, within its scope, EU law will have very little or nothing to say on that matter, because that regulatory space is left, in an area of shared competence, to the Member States. In such a case, the Court does not suddenly lose jurisdiction, but rather concludes that EU law is not opposed to the national law at issue.

113. In sum, for all those reasons, my suggested answer on the compatibility of the exclusion of members of 'the public' who do not fall within 'the public concerned' from access to justice in a situation in which those members of the public have been given *participation rights under national law* would be the following.

114. First, the full participation rights under Article 6 of the Aarhus Convention are guaranteed only to 'the public concerned'. There is no such right guaranteed to 'the public' under that provision, nor, a fortiori, under any other provision of EU law, including Directives 2011/92 and 2010/75.

41 Within which abstract terms, such as 'proper collection of the VAT' or 'financial resources of the Union' were allowed to bring virtually any question concerning the enforcement of VAT or issues of fraud concerning financial resources of the Union within the scope of EU law. However, if that were indeed the proper logic (and the level of abstraction), then *TSN and AKT* was also firmly within the scope of EU law, because 'paid annual leave' is, at that level of abstraction, certainly provided for by both EU primary and secondary law. Further on the reach of such 'implementation logic' for the scope of the Charter, see my Opinion in *Ispas* (C-298/16, EU:C:2017:650, points 26 to 56).

42 See, for example, judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraphs 66 to 74).

43 Judgment of 19 November 2019 (C-609/17 and C-610/17, EU:C:2019:981, paragraphs 47 to 51).

44 See my Opinion in *El Hassani* (C-403/16, EU:C:2017:659, points 74 to 83), and, as far as the level of analysis of the right in question is concerned, my Opinion in Dzivev (C-310/16, EU:C:2018:623, points 70 to 80).

115. Second, even if such a situation were not to fall outside the scope of EU law and thus the applicability of the Charter, the fact remains that in such a situation, there is no right provided and guaranteed by EU law. Thus, the enforcement of rights provided under national law is a matter for national (fundamental rights) guarantees. EU law is not opposed to such an exclusion because it does not require the extension to 'the public' at large in the first place. It is for national law to protect nationally given rights in such situations.

116. A final remark is called for. Such an outcome is not only compatible with the logic of a composite legal order and multi-layered system of protection of fundamental rights that is the European Union, but also with the overall aims of the Aarhus Convention. Encouraging and promoting public participation in environmental matters can happen in different ways. One of those ways might perhaps also be a certain 'multi-speed' public participation system: in order to encourage participation, more than what is required by the Aarhus Convention is granted at one stage, but not necessarily at the subsequent stages.

117. To insist, in such a situation, on the rather absolutist 'all or nothing' approach, meaning that if something extra is given at one stage,[45] everything else must be given as well, would ultimately be counterproductive from the point of view of the objectives pursued by the Aarhus Convention. Indeed, no good deed goes unpunished. Sardonic statements aside, it is rather likely that, if such a choice of 'all or nothing' with regard to the facultative extra were postulated, the natural reaction of a number of State Parties would likely be to go for the 'nothing extra'. That is nonetheless hardly the outcome a sensible interpretation of the scope of (legally enforceable) obligations, under an instrument that is supposed to encourage public participation in environmental decision-making, should be striving to achieve.

(c) Conclusion

118. In the light of all the foregoing, I would suggest that Article 6 of the Aarhus Convention, as well as Article 6 of Directive 2011/92 and Article 24 of Directive 2010/75, are to be interpreted as granting full participation rights only to 'the public concerned' within the meaning of those instruments, but not to 'the public' at large.

119. Neither Article 9(2) of the Aarhus Convention, nor Article 11 of Directive 2011/92 or Article 25 of Directive 2010/75, nor for that matter Article 47 of the Charter, are opposed to the exclusion of members of 'the public' which do not fall within 'the public concerned', from access to court.

C. The condition of prior participation

120. By its third to sixth questions, which it is appropriate to examine together, the referring court enquires whether Article 9(2) of the Aarhus Convention, or Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75, preclude a condition in national law, such as the one set out in Article 6:13 of the Awb, that makes access to justice for 'the public concerned' dependent on the prior submission of observations in the public participation procedure, unless failure to do so is justified. In case the Court provides a negative answer to that question, the referring court further asks whether the same provisions preclude a rule in national law according to which a national court may declare an action by members of 'the public concerned' admissible only for those parts of the decision against which objections were already made during the preparatory phase. Finally, by its sixth question, the referring court asks whether these questions merit a different answer in relation to 'the public'.

45 While the reasons for which that extra is given at that specific stage, as outlined above in point 11 of this Opinion, make good regulatory sense.

121. For the reasons that I will set out in this section, it would appear to me that the condition of prior participation in the administrative procedure is indeed incompatible with the access to justice granted directly by Article 9(2) of the Aarhus Convention to 'the public concerned'. However, following the logic and approach suggested in the previous section, that is not the case for 'the public' at large.

1. Condition of prior participation for 'the public concerned'

122. The wording of Article 9(2) is, not surprisingly, rather silent on any condition of prior participation. Like the referring court and the Netherlands Government, I find that the question before the Court must be distinguished from the situation regulated by the third paragraph of Article 9(2) of the Convention. That provision relates to the exhaustion of *administrative review procedures* prior to recourse to judicial review procedures, where such a requirement exists under national law. But that provision clearly relates to an *administrative* review, typically a second instance administrative decision. It does not concern access to a court.[46]

123. Next, the Netherlands Government points to the fact that Article 9(2) requires the Parties under the Convention to ensure that members of the public concerned have access to justice 'within the framework of its national legislation'. From this reference to the framework of national legislation, the Netherlands Government argues that it is left to the discretion of the Member States to set out conditions on standing such as the one in the main proceedings.

124. I agree with that proposition in general, with one rather major caveat: it is naturally for the Member States to set detailed conditions on standing without, however, taking away what has already been provided by Article 9(2) itself.

125. In the absence of EU rules governing the matter, the Member States have procedural autonomy to lay down the detailed procedural rules governing the actions mentioned in Article 9(2).[47] However, when exercising their procedural autonomy, the discretion of the Member States is not only subject to (traditional) observance of the principles of equivalence and effectiveness. In the specific context of the Aarhus Convention, it is further limited by the objective of Article 9(2) to give 'the public concerned' wide access to justice within the scope of the Convention.[48]

126. The Commission considers that Article 9(2) precludes a condition of prior participation. It bases this interpretation on the objective of Article 9(2), as interpreted in *Commission* v *Germany*[49] and *Djurgården-Lilla Värtans Miljöskyddsförening* ('*Djurgården*').[50] By contrast, the Netherlands Government and Ireland draw the opposite conclusion from that case-law and invoke, to that effect, the judgment in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* ('*Protect Natur*').[51] It is thus necessary to start the discussion on that matter with a detailed analysis of that case-law.

46 In some instances, in particular when hybrid tribunals are concerned, a discussion can be had as to whether that instance of review is still 'administrative' or already 'judicial'. However, that is clearly not the issue at hand in the present case.

47 See judgments of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432, paragraph 35), and 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, paragraph 52).

48 Judgments of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 58), and of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 39).

49 Judgment of 15 October 2015 (C-137/14, EU:C:2015:683).

50 Judgment of 15 October 2009 (C-263/08, EU:C:2009:631).

51 Judgment of 20 December 2017 (C-664/15, EU:C:2017:987).

(a) Djurgården, Commission *v* Germany *and* Protect Natur

127. In *Djurgården*, development consent was sought for a project that may have significant effects on the environment. According to Swedish law, the proceedings in the public participation procedure were carried out by a specialised environmental court. In the light of this, the Högsta domstolen (Supreme Court, Sweden) asked the Court whether, under Article 11 of Directive 2011/92, the right to a review procedure could be considered to have already been exhausted in the proceedings leading to the decision, since these proceedings were conducted by a court, or whether 'the public concerned' still had a right to challenge that decision before a court.

128. The Court answered that the public concerned must be able to have access to a review procedure, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.[52] The Court put forward two reasons for that conclusion: First, the right of access to a review procedure within the meaning of Article 11 of Directive 2011/92 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, the participation in an environmental decision-making procedure under the conditions laid down in Directive 2011/92 is 'separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure'.[53]

129. *Commission* v *Germany* concerned, inter alia, a procedural rule in German law which restricted the pleas to be raised in support of legal proceedings against an administrative decision falling within the scope of Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 to objections that had *already* been raised during the administrative procedure.[54]

130. The Court found that this rule was contrary to Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75. The Court pointed out that those provisions lay down no restriction whatsoever on the pleas which may be relied on in support of a review under those provisions and recalled their objective of ensuring a broad access to justice in the area of environmental protection.[55] Turning to the national provisions in question, the Court noted that they laid down specific conditions restricting the review by the courts, which were not provided for in either Article 11 of Directive 2011/92 or Article 25 of Directive 2010/75.[56]

131. In response to an argument put forward by the German and Austrian Governments, the Court further added that such a restriction could not be justified by reference to the efficiency of administrative procedures. In essence, the German and Austrian Governments had argued that, pursuant to Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75, it falls within the procedural autonomy of the Member States to lay down the detailed procedural rules governing the actions mentioned in those provisions.[57]

132. The Court nonetheless rejected these arguments, stating that 'although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of [the administrative] procedure, … the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive

52 Judgment of 15 October 2009 (C-263/08, EU:C:2009:631, paragraph 39).

53 Ibid, paragraph 38.

54 Judgment of 15 October 2015 (C-137/14, EU:C:2015:683).

55 Ibid, paragraphs 76 and 77.

56 Ibid, paragraph 78.

57 Ibid, paragraphs 71 to 74.

and procedural legality of the contested decision in its entirety'.[58] The Court added that the national legislature may nonetheless lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.[59]

133. Finally, *Protect Natur*[60] concerned a rule in Austrian law which entailed a condition of prior participation. More specifically, the procedural rule in question imposed a time limit on environmental organisations, pursuant to which such organisations lost the status of party to the administrative procedure and therefore could not bring actions against the decision resulting from that procedure, if they had failed to submit objections within the time limits set out in the administrative procedure. However, it is to be noted that the case concerned the compatibility of that rule with Article 9(3) of the Aarhus Convention in relation to public procedures subject to Directive 2000/60/EC,[61] and not with Article 9(2) of the Aarhus Convention and public procedures subject to Article 6 of that convention.

134. The Court found that it falls within the procedural autonomy of the Member States to set out the national rule in question. The Court based this finding on the wording of Article 9(3), which expressly provides that the review procedures forming the subject of that provision may be subject to 'criteria' in national law. According to the Court, it follows from this that, in principle, Member States may, in the context of the discretion they have in that regard, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue such review procedures.[62] Therefore, the compatibility of such a rule depends on whether it complies with the right to an effective remedy in Article 47 of the Charter, which corresponds to the principle of effectiveness, and the conditions for restrictions to this right set out in Article 52(1) of the Charter.[63]

135. Like the Commission and the referring court, I do not consider that the finding of the Court in *Protect Natur* is applicable in the context of Article 9(2) of the Aarhus Convention. Article 9(3) differs from Article 9(2) in several aspects. Article 9(3) has a broader personal scope of application and covers a wider range of acts and decisions than Article 9(2). More importantly, Article 9(3) confers more flexibility on the Parties in relation to the conditions for standing, as it expressly allows the Parties to set out 'criteria' in national law. This latter point was indeed the basis of the Court's reasoning.

136. With regard to the other two judgments, *Djurgården* and *Commission* v *Germany*, I do not think that that case-law provides any concrete answer to the issue raised in the present case either. However, I am bound to acknowledge that the overall direction of that case-law is rather clear. I draw three conclusions from that case-law that are indeed relevant for the present case.

137. First, in the eyes of the Court, the administrative decision-making on environmental matters and its (potential) subsequent judicial review are two distinct procedures. Naturally, both procedures share the same subject matter, but they ought to be kept separate. Second, Article 9(2) grants an independent, freestanding right of access to court in environmental matters for the public concerned. The Court accepts some degree of connectivity to the public participation procedure, but not conditionality. Third, the national conditions that may reasonably be set in transposing Article 9(2), and thus setting the criteria for access to a court, cannot deprive the access itself of its content.

58 Ibid, paragraph 80.

59 Ibid, paragraph 81.

60 Judgment of 20 December 2017 (C-664/15, EU:C:2017:987).

61 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).

62 Judgment of 20 December 2017, *Protect Nature* (C-664/15, EU:C:2017:987, paragraph 86).

63 Ibid, paragraphs 87 and 90.

(b) The condition of prior participation and justified non-participation: what is the rule and what is the exception

138. In my view, the condition in Netherlands law that standing before a court under Article 9(2) requires 'the public concerned' to have also participated in the public participation procedure pursuant to Article 6 is not compatible with the former provision. Put simply, such a national rule pencils in a further condition on standing that is neither present in the text, nor compatible with the spirit of Article 9(2).

139. While I recognise fully the power of the Member States to set out the rules for fleshing out criteria for the application of Article 9(2), there are criteria and there are criteria. The criterion of prior participation goes to the very heart of what is supposed to be independently and directly guaranteed under Article 9(2): if a person is a member of 'the public concerned' and has 'sufficient interest or, alternatively, maintains impairment of right', access to a court ought to be granted. In contrast, requiring that that person has participated in the previous public participation procedure is, by its very nature, not a condition that could reasonably be included under either point (a) or point (b) of Article 9(2) of the Aarhus Convention. For all practical purposes, that amounts, rather, to the insertion of a new point (c) in that provision.

140. Such a condition is indeed at odds with the conclusions drawn from the case-law presented in the previous section. By introducing such a rule, the administrative and the judicial stage effectively become one package: the access to the second is conditional upon participation in the first. Furthermore, the nature and the impact of the criteria is not a mere procedural fleshing out of Article 9(2), but rather starts to effectively chop away what is independently guaranteed by Article 9(2).

141. This conclusion is further underlined in the light of the practical implications the operation of such a rule is likely to have on two types of 'the public concerned': NGOs, on the one hand, and other persons, in particular physical persons, on the other.

142. On the one hand, concerning the NGOs, it follows from Article 9(2) that any NGO meeting the requirements in Article 2(5), that is, of being recognised under national law as an NGO promoting environmental protection and thereby belonging to 'the public concerned', shall be deemed to fulfil the condition of having a sufficient interest or maintaining impairment of a right. Thus, NGOs are granted automatic standing under Article 9(2) once they fulfil the condition of belonging to 'the public concerned'.[64] This consideration is further supported by the finding of the Court that the equivalent provision in the third paragraph of Article 11(2) of Directive 2011/92 has direct effect in relation to NGOs belonging to 'the public concerned', meaning that this provision lays down a rule which is precise and not subject to other conditions.[65]

143. Having regard to this, and the objective of ensuring a broad access to review, a condition of prior participation in the preparatory phase undermines the automatic standing that Article 9(2) grants to NGOs belonging to 'the public concerned'. Such a condition requires, in practice, all such NGOs to participate in all public procedures within the meaning of Article 6 of the Aarhus Convention in the Netherlands, in order to ensure their right to subsequently challenge decisions resulting from these procedures in courts. The condition of prior participation thereby runs counter to the very objective of granting NGOs belonging to 'the public concerned' privileged standing rights.[66]

64 See, to the same effect, Opinion of Advocate General Sharpston in *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU:C:2009:421, points 42 to 44 and 57) and the Implementation Guide, p. 195.

65 Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, paragraphs 55 to 57).

66 See, to the same effect, the Compliance Committee, Findings and recommendations of 29 June 2012, Czech Republic (ACCC/C/2010/50, paragraph 78).

144. On the other hand, similar issues also arise with regard to other members of 'the public concerned', although for a slightly different reason. For this group, Article 9(2) indeed leaves a significant discretion to the Parties in defining what constitutes a sufficient interest or the impairment of a right.[67] However, even for that category of persons, the condition of prior participation goes, as to its impact, way beyond what could reasonably be included under national implementation of those concepts.

145. One may take the example of a natural person owning a house next to the site of the proposed pigpen. It is fair to assume that, on any national implementation of 'sufficient interest' or 'impairment of right', such a person will be concerned by such a proposed environmental activity and should have access to court if he or she wishes to challenge the permit under Article 9(2). However, in order to do so, must such a person also always participate in the public participation procedure even where that person had no problem with that activity as initially proposed and therefore saw no reason for doing so? Or what if he or she did not submit observations, because his or her views had already been presented by others participating in the decision-making process? What if parts of 'the public concerned' became aware of the draft decision only after the expiry of the deadline for the submission of observations?

146. In a similar vein to an NGO, should all the other members of 'the public concerned' also be obliged to formally register or even participate in the public participation procedure, even if at that stage, they do not think that they have anything useful to say? Should they simply be forced to do so as a precautionary measure, so as not to lose their right of access to a court, which is, by the way, granted independently by Article 9(2) of the Aarhus Convention?[68]

147. In this regard, the referring court mentioned, and the Netherlands Government further explained at the hearing, the exceptions to the duty of prior participation, provided for in Netherlands law: the condition of prior participation does not apply if the failure on the part of the public concerned to submit observations is justified.[69]

148. The existence of those exceptions surely mitigates the problem. It does not, however, really solve the structural issue of access to court in environmental matters, given as a matter of right under Article 9(2) of the Aarhus Convention, being made subject to a condition which, by its very nature, goes way beyond a mere implementation of that provision. Moreover, it adds a layer of discretion and (un)foreseeability: which cases are likely to be the ones in which the exception will be granted? At the hearing, the Netherlands Government confirmed that the determination of what constitutes instances of 'justified non-participation' in the public participation procedure is based entirely on (by its nature casuistic) case-law, and that that government itself can provide only a few illustrative examples of when that exception is likely to apply.

149. All this only highlights the true nature of the overall predicament and the consequences of the prior participation rule: it simply reverses the logic upon which Article 9(2) is built. As already recognised by the Court, for those fulfilling the criteria under that provision, access is the rule, to which exceptions might reasonably be crafted.[70] Under Netherlands law, for those who did not

67 Judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 38).

68 See also the Implementation Guide, at p. 195, which states that concerning members of 'the public concerned' other than NGOs, it 'could well be too restrictive to require that only persons who participate in the decision-making procedure would be granted access under [Article 9(2)]'.

69 Outlined above in point 18 of this Opinion.

70 See, notably, judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraphs 80 to 81), discussed above in points 129 to 132.

participate in the public participation procedure, the absence of the access is the rule, even if they meet all the criteria under Article 9(2), to which exceptions might be allowed. Therefore, unless the exceptions were to be conceived of so broadly in practice, that they would in fact reverse the rule,[71] the structure is incompatible with Article 9(2) of the Aarhus Convention.

150. I therefore conclude that Article 9(2) of the Aarhus Convention, Article 11 of Directive 2011/92, and Article 25 of Directive 2010/75, preclude a condition of prior participation in the public participation procedure for 'the public concerned' in order for the latter to have access to a review procedure before a court within the meaning of those instruments

151. In view of that conclusion, there is no need to assess separately the fourth question referred by the national court. In addition, and in any case, since neither of the four applicants have submitted any views in the public participation procedure, it is rather unclear how they could be, by definition, affected by a national rule which states that a national court may declare an action admissible only for those *parts of the decision* against which objections were made during the preparatory phase. That dimension of the fourth question thus appears entirely hypothetical in the context of the present case.

152. Finally, in view of the answer previously suggested to the second question of the national court, the same logic, as described there, is applicable to the sixth question. The rights of 'the public' at large who do not fall within 'the public concerned' within the meaning of Article 9(2) are a matter for national law. Thus, EU law is not opposed to the condition of prior participation made applicable by national law only to 'the public'.

V. Conclusion

153. I propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Limburg (District Court, Limburg, Netherlands) as follows:

(1) Article 6 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 ('the Aarhus Convention'), Article 6 of 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, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU, and Article 24 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) confer full participation rights only to 'the public concerned' within the meaning of those instruments, but not to 'the public' at large.

(2) Neither Article 9(2) of the Aarhus Convention, nor Article 11 of Directive 2011/92, nor Article 25 of Directive 2010/75, nor Article 47 of the Charter of Fundamental Rights of the European Union, are opposed to the exclusion of 'the public' who do not fall within 'the public concerned' within the meaning of those instruments, from access to court.

(3) Article 9(2) of the Aarhus Convention, Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 preclude a condition in national law which makes the right of access to justice for 'the public concerned' within the meaning of those instruments dependent on prior participation in the procedures subject to Article 6 of the Aarhus Convention, Article 6 of Directive 2011/92, and Article 24 of Directive 2010/75.

71 I certainly acknowledge that some of the exceptions outlined by the Netherlands Government at the hearing go rather far. But if that were indeed the case in the judicial practice, and leaving aside the issue of predictability, what sense does it (then) make to have the rule in the first place?