



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

14 January 2021 *

(Reference for a preliminary ruling – Aarhus Convention – Article 9(2) and (3) – Access to justice – No access to justice for the public other than the public concerned – Admissibility of the action subject to prior participation in the decision-making procedure)

In Case C-826/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Limburg (District Court, Limburg, Netherlands), made by decision of 21 December 2018, received at the Court on 28 December 2018, in the proceedings

LB,

Stichting Varkens in Nood,

Stichting Dierenrecht,

Stichting Leefbaar Buitengebied

v

College van burgemeester en wethouders van de gemeente Echt-Susteren,

intervening party:

Sebava BV,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 January 2020,

after considering the observations submitted on behalf of:

– LB, by A. Hanssen,

* Language of the case: Dutch.

- Stichting Varkens in Nood, Stichting Dierenrecht and Stichting Leefbaar Buitengebied, by M.H. Middelkamp,
- the College van burgemeester en wethouders van de gemeente Echt-Susteren, by L.M.C. Cloodt, advocaat,
- the Netherlands Government, by M.A.M. de Ree, M. Bulterman, C.S. Schillemans and J.M. Hoogveld, acting as Agents,
- the Danish Government, by J. Nymann-Lindegren, M.S. Wolff and P.Z.L. Ngo, acting as Agents,
- Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by N. Butler, Senior Counsel, and C. Hogan, Barrister-at-Law,
- the Swedish Government, by H. Eklinder, C. Meyer-Seitz, H. Shev, J. Lundberg and A. Falk, acting as Agents,
- the European Commission, by G. Gattinara, M. Noll-Ehlers and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2020,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus (Denmark) 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').
- 2 The request has been made in proceedings between (i) LB, a natural person, and Stichting Varkens in Nood, Stichting Dierenrecht and Stichting Leefbaar Buitengebied, associations for the protection of animal rights, and (ii) the College van burgemeester en wethouders van de gemeente Echt-Susteren (Municipal Council of Echt-Susteren, Netherlands) ('the municipality of Echt-Susteren'), concerning a permit granted by that municipality to Sebava BV for the purposes of constructing a pig farm building.

Legal context

International law

- 3 The 18th recital of the Aarhus Convention sets out the concern that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.
- 4 Article 2 of that convention, under the heading 'Definitions,' states in paragraph 4 that the term 'the public' means 'one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organisations or groups'.

- 5 Under Article 2(5), ‘the public concerned’ means ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’. Article 2(5) specifies that, ‘for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest’.
- 6 Article 3(5) of the Aarhus Convention provides that the provisions of that convention are not to affect the right of a party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by that convention.
- 7 Article 6 of the Aarhus Convention, under the heading ‘Public participation in decisions on specific activities’, provides the following in paragraphs 1 to 10:

‘1. Each Party:

- (a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

...

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:

- (a) the proposed activity and the application on which a decision will be taken;
- (b) the nature of possible decisions or the draft decision;
- (c) the public authority responsible for making the decision;
- (d) the envisaged procedure, including, as and when this information can be provided:
- (i) the commencement of the procedure;
 - (ii) the opportunities for the public to participate;
 - (iii) the time and venue of any envisaged public hearing;
 - (iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) an indication of what environmental information relevant to the proposed activity is available; and
- (e) the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) a description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) a description of the significant effects of the proposed activity on the environment;
- (c) a description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) a non-technical summary of the above;
- (e) an outline of the main alternatives studied by the applicant; and
- (f) in accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. 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.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.'

- 8 Article 9 of the Aarhus Convention, under the heading 'Access to justice', provides in paragraphs 2 to 4:

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

- (a) having a sufficient interest
- or, alternatively,
- (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural

legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

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

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.'

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

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. ...'

- 9 Annex I to the Aarhus Convention, under the heading 'List of activities referred to in Article 6, paragraph (1)(a)', refers, in point 15(c) thereof, to installations for the intensive rearing of pigs with more than 750 places for sows.

Netherlands law

- 10 Under Article 1:2 of the Algemene wet bestuursrecht (General Law on Administrative Law; 'the Awb'), 'interested parties' are those 'whose interests are directly affected by a decision'.
- 11 It is apparent from Article 3:10 of the Wet Algemene bepalingen omgevingsrecht (Law on General Provisions of Environmental Law; 'the Wabo') that Section 3:4 of the Awb, relating to the 'uniform public preparatory procedure' ('the preparatory procedure') for the adoption of an environmental permit concerning activities of construction and modifications of facilities for the purposes of Article 2.1(1)(a) and (e) of the Wabo, is applicable.
- 12 In the context of that procedure, Article 3.12 of the Wabo provides that anyone can submit observations on the draft decision.
- 13 Under Article 6:13 of the Awb, only interested parties that have submitted observations during the preparatory procedure may bring an action against the decision adopted as a result of that procedure, unless they cannot reasonably be criticised for not having intervened. In addition, only complaints directed against the same aspects of the contested decision as those criticised during its adoption procedure are admissible.
- 14 It is apparent from Article 8:1 of the Awb that an action before an administrative court against administrative decisions can be brought by interested parties only.

The disputes in the main proceedings and the questions referred for a preliminary ruling

- 15 On 13 October 2016, Sebava submitted to the municipality of Echt-Susteren a permit application for the extension and modification of a pigpen located in Koningsbosch (Netherlands) for the purposes of building a new pen for 855 dry and pregnant sows, exchanging 484 breeding sows for 125 farrowing sows in the existing pens and constructing a covered run for sows.
- 16 That application was submitted in respect of the preparatory procedure, in which the competent authority adopts a draft decision on the permit application, on which objections may be submitted.
- 17 In that context, the municipality of Echt-Susteren decided that an environmental impact assessment report was not necessary.
- 18 That decision and a copy of the notification file and other related documentation were made available to the public for inspection at the municipal premises. Notice of those was given in the *Staatscourant van het Koninkrijk der Nederlanden* (Official Journal of the Kingdom of the Netherlands), stating that that decision was to be regarded as a preparatory act for the purposes of Netherlands law, and that it could not therefore be the subject of an administrative or judicial review, unless it directly affected the interests of an ‘interested party.’ The permit application and the announcement of the draft permit were also published in the *Gemeenteblad van Echt-Susteren* (Municipal Gazette of Echt-Susteren).
- 19 By decision of 28 September 2017, the municipality of Echt-Susteren granted the environmental permit applied for.
- 20 LB, Stichting Varkens in Nood, Stichting Dierenrecht and Stichting Leefbaar Buitengebied applied to the Rechtbank Limburg (District Court, Limburg, Netherlands) to seek the annulment of that permit.
- 21 With regard to the action brought by LB, the referring court takes the view that it should be rejected as inadmissible on the ground that LB does not satisfy the conditions to be regarded as an ‘interested party’ for the purposes of Netherlands administrative law, since she does not live in the vicinity of the project at issue in the main proceedings but approximately 20 kilometres away from that project and therefore she does not personally experience any environmental consequences thereof. The referring court states that LB’s profession of veterinary surgeon cannot suffice for a personal interest to be recognised and that the other activities and qualities that she relied on were invoked late, after the expiry of the time limit for bringing an action.
- 22 The referring court adds that LB’s action could also be dismissed as inadmissible on the ground that the applicant did not submit any observations against that project during the preparatory procedure.
- 23 LB argues that she should be recognised as an ‘interested party’ for the purposes of Netherlands law and that she cannot reasonably be criticised for not having submitted observations during the preparatory procedure, in view of the irregularities committed during that procedure. In particular, according to LB, it was not stated that the project concerned the extension of a pigpen and only ‘interested parties’ were invited to submit observations.
- 24 In this context, the referring court raises the question of whether the limitation of access to justice to ‘interested parties’ only, within the meaning of national law, is compatible with the Aarhus Convention.
- 25 It wonders, in particular, whether Article 9(2) of that convention must be interpreted as requiring that persons who, like LB, are not regarded as ‘interested parties’ within the meaning of national law, and are moreover not part of the ‘public concerned’ within the meaning of the Aarhus Convention, may nevertheless, as members of the ‘public’ within the meaning of that convention, rely in court on

possible infringements of the rights which, according to the referring court, are conferred on them under Article 6(3) and (7) to (9) of that convention, which concerns the ‘public’ and not only the ‘public concerned’.

- 26 With regard to the environmental protection associations, which are applicants in the main proceedings, the referring court takes the view that they are ‘interested parties’ within the meaning of national law, since the welfare and the protection of animals are part of their statutory aims and it is sufficiently established that they carry out specific activities to that end.
- 27 However, that court takes the view that the action of those associations should be dismissed as inadmissible on the ground that they did not intervene in the preparatory procedure.
- 28 The referring court wonders, however, whether that condition of admissibility complies with EU law and, in particular, with Article 9(2) of the Aarhus Convention.
- 29 It also questions whether the rule of Netherlands law which provides that complaints which are not directed against the aspects of the draft decision that were contested in the context of the preparatory procedure are inadmissible complies with that provision.
- 30 In those circumstances, the Rechtbank Limburg (District Court, Limburg) decided to stay the 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 [the first question] 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 [the third question] 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 [the fourth question] 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 [the third, fourth and fifth questions] different in relation to the public (any person), in so far as that is not the public concerned (interested parties)?

Consideration of the questions referred

The first and second questions

- 31 By its first and second questions, which must be considered together, the referring court asks, in essence, whether EU law and, in particular, Article 9(2) of the Aarhus Convention precludes the members of the ‘public’ referred to in Article 2(4) of that convention from having no access as such to justice, for the purposes of challenging a decision which falls within the scope of Article 6 of that convention.
- 32 As a preliminary point, it should be noted that the project at issue in the main proceedings falls within the scope of the Aarhus Convention.
- 33 The referring court rightly refers to Article 6(1)(a) of that convention, read in conjunction with point 15 of Annex I thereto, which refers to installations for the intensive rearing of pigs with more than 750 places for sows, the authorisation procedure of which the ‘public concerned’ may participate in.
- 34 Under Article 9(2) of the Aarhus Convention, each party is to ensure, in the context of its national legislation and consistently with the objective of giving the ‘public concerned’ wide access to justice, that members of the public concerned having an interest in bringing proceedings or alternatively maintaining an impairment of a right, where such a requirement exists under national law, have access to a review procedure before a court of law or another independent and impartial body to challenge the legality of any decision falling within the scope of Article 6 of that convention and, where so provided for under national law, of other relevant provisions of that convention.
- 35 The participants in the written procedure before the Court rightly observed that Article 9(2) of the Aarhus Convention refers to the ‘public concerned’ only, which is defined in Article 2(5) of that convention as the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedure. That provision specifies that, for the purposes of that definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law are to be deemed to have an interest.
- 36 The purpose of Article 9(2) of the Aarhus Convention is therefore not to confer a right to bring an action against decisions and other acts which fall within the scope of Article 6 of that convention, relating to projects subject to public participation in the decision-making procedure, on the public in general, but to guarantee that right only to members of the ‘public concerned’ who meet certain conditions.
- 37 That interpretation is supported by the structure of Article 9 of the Aarhus Convention, since Article 9(3) provides for a more limited regime of access to justice for members of the ‘public’ in general, thus reflecting the system laid down by that convention which explicitly distinguishes between the ‘public’ in general and the ‘public concerned’ by an act or transaction.
- 38 Specific procedural rights are thus provided for members of the public concerned, who are, in principle, the only ones who may participate in the decision-making procedure, in so far as they are part of the circle, which it is for Member States to determine reasonably and in accordance with the objective of giving the public concerned wide access to justice, of persons affected or likely to be affected by the envisaged act or transaction.

- 39 It is true that Article 6 of the Aarhus Convention uses the term ‘public’ several times. However, it follows from an overall reading of that article that it applies only to the ‘public concerned’, that is only the public whose participation in the decision-making procedure is required.
- 40 While the requirements appearing in Article 6(2)(d)(ii) and (iv) of that convention specifically refer to information relating to the ‘public,’ it is clear from the first subparagraph of Article 6(2) that the right to information enshrined therein is guaranteed to the ‘public concerned’ only.
- 41 By stating, furthermore, that reasonable time frames for informing the public, within the meaning of Article 6(2) of the Aarhus Convention and for the effective preparation and participation of that public throughout the decision-making procedure must be provided for, Article 6(3) of that convention confirms that the different stages of the public participation procedure are applicable to the public concerned only.
- 42 Moreover, while paragraphs 4 and 7 of Article 6 of that convention also refer to the ‘public,’ those provisions are intended solely to set out the specific conditions of the participation procedure, that is the time at which it is to be organised and the precise form of that participation, and not to define the scope of the right of the public to participate in the procedures referred to.
- 43 This analysis is supported by the fact that a right to participate in the decision-making procedure could not be effective unless the interested party also has the right to be informed about the project and the procedure envisaged, and the right of access to information documents, which are, however, explicitly granted only to members of the ‘public concerned’ in Article 6(2) and (6) of the Aarhus Convention.
- 44 It should also be noted that a reading of Article 6 of the Aarhus Convention different from that mentioned in paragraph 39 of this judgment would, by necessarily extending access to justice to all members of the ‘public’ in order for them to rely on the rights deriving from that article, have the effect of rendering ineffective the distinction between the systems of access to justice laid down, respectively, in Article 9(2) and (3) of that convention.
- 45 In the light of all those considerations, it must be held that the purpose of Article 9(2) of the Aarhus Convention is precisely to guarantee access to the courts to challenge an act or decision falling within the scope of Article 6 of that convention only to the ‘public concerned’ which complies with certain conditions.
- 46 It follows, subject to findings of fact to be made by the referring court, that a person such as LB, who is not part of the ‘public concerned’ within the meaning of the Aarhus Convention, cannot rely on an infringement of Article 9(2) of that convention on the ground that she does not have access to justice in the main proceedings.
- 47 However, the access to justice of such a person should be subject to a different regime if the national law of a Member State grants the public a more extensive right to participate in the decision-making procedure, in particular the right to be informed in an adequate and timely manner about a project, as permitted under Article 3(5) of the Aarhus Convention, according to which parties to the Aarhus Convention may adopt measures in their national law which are more favourable than those provided for in that convention, such as measures ensuring more extensive public participation in the decision-making procedure referred to in Article 6 of that convention.
- 48 In that case, legal actions brought under those measures would fall within the scope of Article 9(3) of the Aarhus Convention, which provides that, without prejudice to the review procedures referred to in Article 9(1) and (2), each party to that convention is to ensure that, ‘where they meet the criteria, if any, laid down in its national law, members of the public’ have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

- 49 The review procedures referred to in Article 9(3) of that convention may thus be subject to ‘criteria’, from which it follows 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 (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 86).
- 50 The Court has already ruled that the right to bring proceedings set out in that provision would be deprived of all useful effect if, by imposing those conditions, certain categories of ‘members of the public’ were to be denied of any right to bring proceedings (see, to that effect, judgments of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 46 and 48, and of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, EU:C:2019:824, paragraph 34).
- 51 It follows that Article 9(3) of the Aarhus Convention precludes members of the ‘public’, within the meaning of that convention, from not being able to have any access to justice for the purposes of relying on more extensive rights to participate in the decision-making procedure which may be conferred by the national environmental law of a Member State.
- 52 In the light of the foregoing considerations, the answer to the first and second questions is that Article 9(2) of the Aarhus Convention must be interpreted as not precluding members of the ‘public’ which is referred to in Article 2(4) of that convention from having no access as such to justice for the purposes of challenging a decision which falls within the scope of Article 6 of that convention. However, Article 9(3) of that convention precludes such persons from not being able to have access to justice for the purposes of relying on more extensive rights to participate in the decision-making procedure which may be conferred on them solely by the national environmental law of a Member State.

The third to the sixth questions

- 53 Having regard to the disputes in the main proceedings and the answer given to the first and the second questions, it should be noted that the third to sixth questions concern the action of non-governmental organisations which are part of the ‘public concerned’ referred to in Article 2(5) of the Aarhus Convention and which fall within the scope of Article 9(2) of that convention, and that of a member of the ‘public’ referred to in Article 2(4) of that convention and who falls within the scope of Article 9(3) of that convention.
- 54 It must therefore be held that, by its third to its sixth questions, the referring court asks, in essence, whether Article 9(2) of the Aarhus Convention and Article 9(3) thereof preclude the admissibility of legal actions brought, respectively, by non-governmental organisations which are part of the ‘public concerned,’ and by a member of the ‘public,’ in the light, in the case of those organisations, of Article 6 of that convention and, in the case of that member of the ‘public,’ of the national environmental law of a Member State, from being made subject to their participation in the procedure preparatory to the contested decision, unless they cannot reasonably be criticised for not having intervened. That court also wishes to know whether those provisions preclude the admissibility only of complaints directed against the same aspects of the contested decision as those which were the subject of the applicant’s observations in this procedure.
- 55 It follows from the Court’s case-law that members of the ‘public concerned’ within the meaning of the Aarhus Convention must be able to bring a legal action against the acts referred to in Article 9(2) of that convention, whatever role they may have played in the examination of the application, and that the parties to that convention cannot, therefore, provide for the inadmissibility of such an action on the ground that the applicant participated in the decision-making procedure of the contested decision and was able to put forward his or her point of view on this occasion (see, to that effect, regarding

similar provisions of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631, paragraphs 38 and 39).

- 56 Participation in an environmental decision-making procedure under the conditions laid down in that convention is separate from the exercise of a legal review and has a different purpose from the latter, since that review 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 that review procedure (see, to that effect, judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631, paragraph 38).
- 57 Furthermore, with regard, in particular, to environmental protection associations, it should be recalled that in the second and third sentences of the second subparagraph of Article 9(2) of the Aarhus Convention, it is provided that non-governmental organisations which satisfy the conditions set out in Article 2(5) of that convention are to be regarded as having either a sufficient interest or rights capable of being impaired, depending on whether national law makes use of either of those admissibility criteria.
- 58 Lastly, it should be noted that the objective of ensuring ‘wide access to justice’ provided for in Article 9(2) of the Aarhus Convention and compliance with the effectiveness of that provision would not be ensured by legislation which would make the admissibility of an action brought by a non-governmental organisation conditional on the role it may or may not have played during the participatory phase of the decision-making procedure, even though that phase does not have the same purpose as the exercise of judicial proceedings and the assessment that such an organisation may have of a project may, moreover, evolve depending on the outcome of that procedure (see, to that effect, judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631, paragraphs 38, 39 and 48).
- 59 It follows from the foregoing that Article 9(2) of the Aarhus Convention precludes the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are of the ‘public concerned’ within the meaning of the Aarhus Convention, from being made subject to their participation in the decision-making procedure which led to the adoption of the contested decision.
- 60 The fact that that condition would not apply, under the national law at issue in the main proceedings, where those organisations cannot reasonably be criticised for not having participated in that procedure, cannot justify a different solution, since the failure to comply with the condition of prior participation is sufficient, in principle, to prevent those organisations from bringing proceedings.
- 61 The solution would, however, be different if those proceedings were brought by a member of the ‘public’ on the basis of more extensive rights to participate in the decision-making procedure conferred solely by the national environmental law of a Member State.
- 62 In that case, as is apparent from paragraph 48 of this judgment, it would be necessary to apply Article 9(3) of the Aarhus Convention, which provides a more flexible framework for the discretion of the parties to that convention to be exercised.
- 63 Thus, it follows from the case-law of the Court that that provision does not, in principle, preclude the admissibility of the actions to which it refers from being made subject to the condition that the applicant has submitted his or her objections in good time following the opening of the administrative procedure, since such a rule may allow areas for dispute to be identified as quickly as possible and, where appropriate, resolved during the administrative procedure so that judicial proceedings are no longer necessary (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 88 to 90).

- ⁶⁴ In such circumstances, notwithstanding the fact that it constitutes, as a precondition for bringing judicial proceedings, a limitation on the right to an effective remedy before a court within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the Court has found that such a condition may be justified, in accordance with Article 52(1) of the Charter, to the extent that it is provided for by law, it respects the essence of that law, it is necessary, subject to the principle of proportionality, and it genuinely meets objectives of the public interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 90).
- ⁶⁵ In the present case, irrespective of whether Article 47 of the Charter should be applied to judicial proceedings which would concern only the more extensive rights to participate in the decision-making procedure which are conferred solely by national law, it is apparent that the conditions set out in the previous paragraph of this judgment are, in any event, satisfied.
- ⁶⁶ It follows from the order for reference that a condition of admissibility of an action based on prior participation in the decision-making procedure is provided for by a law, for the purposes of Article 47 of the Charter. That condition moreover respects the essential content of the fundamental right to effective judicial protection, as enshrined in that article, since it does not call into question that right as such but merely imposes an additional procedural step in order to exercise it (see, to that effect, judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 64). In addition, it meets the objective of general interest referred to in paragraph 63 of this judgment and it is not evident that any disadvantages caused by the obligation to participate in the procedure preparatory to the contested decision are clearly disproportionate to that objective (see, to that effect, judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 66, 67 and 69).
- ⁶⁷ The fact that that condition is not applied where the applicant cannot reasonably be criticised for not having participated in the decision-making procedure is, moreover, such as to comply with the requirement of proportionality, provided that it is assessed in the light of the circumstances of the case.
- ⁶⁸ Lastly, it does not appear to be necessary to determine whether Article 9(2) and (3) of the Aarhus Convention precludes only complaints directed against the same aspects of the contested decision as those which were the subject of observations by the applicants during that procedure from being open to challenge before the courts, since the applicants in the main proceedings did not, in any event, participate in the preparatory procedure.
- ⁶⁹ In the light of the foregoing considerations, the answer to the first to sixth questions is that Article 9(2) of the Aarhus Convention must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the 'public concerned' referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure. However, Article 9(3) of that convention does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.

Costs

⁷⁰ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. Article 9(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 must be interpreted as not precluding members of the ‘public’ which is referred to in Article 2(4) of that convention from having no access as such to justice for the purposes of challenging a decision which falls within the scope of Article 6 of that convention. However, Article 9(3) of that convention precludes such persons from not being able to have access to justice for the purposes of relying on more extensive rights to participate in the decision-making procedure which may be conferred on them solely by the national environmental law of a Member State.
2. Article 9(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Decision 2005/370/EC must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the ‘public concerned’ referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure. However, Article 9(3) of that convention does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.

[Signatures]