C-826/18, Stichting Varkens in Nood and others v College van burgemeester en wethouders van de gemeente Echt-Susteren (Judgment of 14 January 2021) – Case Note

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C-826/18, *Stichting Varkens in Nood and others v College van burgemeester en wethouders van de gemeente Echt-Susteren* (Judgment of 14 January 2021) – Case Note

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1. Introduction

Dutch environmental and planning law has traditionally provided for a broad public-participation right and broad access to justice. In CJEU *Stichting Varkens in Nood*, in some respects, however, Dutch law seems to be less in keeping with (the EU-law implementation of) the Aarhus Convention.[1] This preliminary ruling regards the interpretation of the second and third pillars of the Aarhus Convention, ie public participation and access to justice in environmental matters.[2] The Aarhus Convention provides, inter alia, as follows:

'Article 3. General provisions

(...)

5. The provisions of this Convention shall not 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 this Convention.

(...)

Article 6. Public participation in decisions on specific activities

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;
   b. Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end,

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1 Case C-826/18 *Stichting Varkens in Nood and others v College van burgemeester en wethouders van de gemeente Echt-Susteren* [2021] EU:C:2021:7; and Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447 (Aarhus Convention), reprinted in 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (1999) 38(3) International Legal Materials 517. The Aarhus Convention entered into force 30 October 2001.

2 cf Adam Daniel Nagy, 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' in Roberto Caranta, Anna Gerbrandy and Bilan Müller (eds), *The Making of a New European Legal Culture: the Aarhus Convention* (Europa Law Publishing 2018) 19-69.

Parties shall determine whether such a proposed activity is subject to these provisions; (...)

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
(...)
7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Article 9 Access to justice
(...)
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,
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. (...)
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.'

The request for a preliminary ruling was referred by the District Court of Limburg ('Rechtbank Limburg') (the Netherlands) in a matter concerning a permit for the extension and modification of a pigpen.[3] A veterinary surgeon living 20 kilometres away had not previously submitted views on the draft permit but subsequently did bring an action before that Court against the permit granted. [4] In the order for reference, the District Court of Limburg held that the conclusion should be that the veterinary surgeon's action was inadmissible

3 Rechtbank Limburg 21 december 2018 ECLI:NL:RBLIM:2018:12159.
4 *Stichting Varkens in Nood* (n 1) para 22.

because she was not an interested party.[5] It referred to article 8:1 of the Dutch General Administrative Law Act (Algemene wet bestuursrecht, Awb), which reads:

'An interested party may bring an action before an administrative court against an administrative decision.'

Due to European legislation (Directive 2010/75/EU on industrial emissions and Directive 2011/92/EU on the assessment of certain public and private projects on the environment, EIA Directive) and the Aarhus Convention, however, the District Court was hesitant to draw the conclusion of inadmissibility.[6]

An appeal was also lodged by three NGOs, including *Stichting Varkens in Nood* (which translates as the 'Pigs in Distress Foundation'). They had not submitted views on the draft permit either and should, therefore, pursuant to Article 6:13 of the Awb, see their action against the District Court of Limburg be declared inadmissible.[7] Article 6:13 of the Awb states:

'No appeal to the administrative court may be lodged by an interested party who can reasonably be blamed for not having expressed views as referred to in Article 3:15, not having lodged an objection or not having lodged an administrative appeal.'

However, the court was uncertain whether it would be contrary to the Aarhus Convention to invoke this article against the NGOs.

All the foregoing has given rise for the District Court of Limburg to refer six questions for a preliminary ruling to the CJEU. Before addressing the preliminary ruling, I will first discuss the Dutch public-participation right and the right to bring an action before the independent administrative court in environmental and planning law. I will then address the answers of the CJEU. Finally, I will address the (temporary) solution found by (the Administrative Jurisdiction Division of) the Dutch Council of State (Raad van State) to comply with the Aarhus Convention. I will then give several considerations on the judgment of the CJEU. This will be followed by my conclusions.

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5 ibid para 21.

6 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17 (Recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02010L0075-20110106); 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 [2012] OJ L26/1, as amended (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0092-20140515); and n 3 paras 6 ff.

7 cf *Stichting Varkens in Nood* (n 1) para 27.

2. Public participation in Dutch law before Stichting Varkens in Nood

Long before the Aarhus Convention came into effect, several Dutch environmental and planning laws contained obligations on public participation.[8] Since its effective date in 1994, the Awb has included procedures for the preparation of decisions.[9] In 2005, the various preparatory procedures as included in the Awb were combined with the uniform public preparatory procedure (uniforme openbare voorbereidingsprocedure, UOV).[10] This procedure is considered an appropriate procedure to give effect to Article 6 of the Aarhus Convention, or at least the effect thereof under EU law in, eg, Directive 2010/75/EU and Directive 2011/92/EU. According to the Dutch Council of State, when the administrative authority makes the draft decision available for inspection, all options are still open within the meaning of Article 6(4) of the Aarhus Convention.[11] Formally speaking, this is correct, because, after completion of the UOV, the administrative authority can make a variety of decisions.[12]

The UOV only applies if so provided by statutory requirement or by a decision of the administrative authority.[13] The essence of the UOV is that, before making a decision, an administrative authority must make the draft for such a decision available for inspection. During the period of availability for inspection, interested parties may submit views on the draft.[14] Under various laws other than the Awb, this right is open to everyone, not just interested parties. Examples can be found in the Spatial Planning Act (Wet ruimtelijke ordening, Wro) for the zoning plan and in the Law on General Provisions of Environmental Law (Wet algemene bepalingen omgevingsrecht, Wabo) for those all-in-one permits

8 In the Netherlands as of 29 March 2005, see Staatsblad 2004, 745 (https://zoek.officielebekendmakingen.nl/stb-2004-745.html). The Aarhus Convention was ratified by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

9 cf B. A. Beijen, 'The Aarhus Convention in the Netherlands' in R. Caranta, A. Gerbrandy and B. Müller (eds), *The Making of a New European Legal Culture: the Aarhus Convention* (Groningen: Europa Law Publishing 2018) 194.

10 Wet uniforme openbare voorbereidingsprocedure Awb, Staatsblad 2002, 54 (https://zoek.officielebekendmakingen.nl/stb-2002-54.html), entry into force Staatsblad 2005, 320 (https://zoek.officielebekendmakingen.nl/stb-2005-320.html).

11 eg Council of State 2 May 2018, ECLI:NL:RVS:2018:1436, para 7.2.

12 For the words 'all options are open' within the meaning of Art. 6(4) of the Aarhus Convention, see, eg., Lorenzo Squintani and Goda Perlaviciute, 'Access to Public Participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants' in Marjan Peeters and Mariolina Eliantonio (eds), *Research handbook on EU environmental law* (Edward Elgar Publishing 2020) 144 ff.

13 art 3:10(1) Awb.

14 arts 3:15 and 3:16 Awb.

for physical aspects that are prepared using the comprehensive preparatory procedure of that Act; ie the UOV with several specific provisions.[15]

After expiry of the period of availability for inspection, the administrative authority must decide within the term set by law. Subsequently, an action may be brought before the administrative court (before the Council of State or in some cases before a District Court first).[16] Pursuant to Article 8:1 Awb, only interested parties are entitled to bring such an action, even when the right to submit views was open to all.[17]

The UOV is, therefore, an administrative preparatory procedure. It precedes an action before the administrative court. Another important administrative preparatory procedure is the objection procedure of Division 7.1 Awb. According to Article 7:1(1) Awb, the party entitled to bring an action before the administrative court must lodge an objection before bringing an action. Lodging an objection is understood to seek relief against a decision from the administrative authority that made the decision.[18] The objection procedure is the standard procedure that applies where no exceptions apply. An exception to the obligation to go through the objection procedure will apply when the UOV has been followed.[19] The difference between the UOV and the objection procedure is that, in the latter, a decision has already been made, whereas in the application of the UOV only a draft decision has been presented.

Under Dutch law, the interested party only has the right to bring an action before the administrative court if it has participated in the applicable administrative preparatory procedure. This follows from the aforementioned Article 6:13 Awb, which plays an important role in the *Stichting Varkens in Nood* judgment. In the past, the Council of State did not consider this provision to be contrary to (the translation of Article 9(2) of the Aarhus Convention in) Article 11 of Directive 2011/92/EU.[20]

All in all, under Dutch law, the UOV is of a compound nature. It comprises a method to facilitate public participation and to contribute to the accuracy of decisions to be made, thus being part of the decision-making procedure, but also harbours characteristics of individual legal protection by being the mandatory gateway to judicial review.[21]

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15 art 3.8(1)(d) Wro; art 3.12(5) Wabo; and arts 3.10 ff Wabo. For the sake of brevity, I will refer to the preparatory procedure of the Wabo below as 'UOV'.

16 cf Annex 2 to the Awb.

17 art 8:1 Awb.

18 art 1:5(1) Awb.

19 art 7:1(1, d) Awb.

20 See eg Council of State 2 December 2015, ECLI:NL:RVS:2015:3703 (Stichting Enci Stop).

21 cf R. S. Wertheim. 'Functies van de uniforme openbare voorbereidingsprocedure in het licht van recente ontwikkelingen in de rechtspraak' (2019) (4) Jurisprudentie Bestuursrecht Plus, JBplus 15-36.

3. Access to court before *Stichting Varkens in Nood*

3.1. NGOs

The Netherlands has traditionally had a broad right for non-governmental organisations (NGOs) to bring an action. Although in principle, the right to bring an action is reserved for interested parties only, legal entities that, pursuant to the objects under their articles, pursue a general or collective interest qualify as interested parties.[22] For their action to be admissible, legal entities pursuing a general interest must also perform actual activities. It appears from case law, however, that those actual activities are not subject to very strict requirements.[23]

According to Article 8:69a of the Awb, a so-called 'relativiteitsvereiste' (relativity requirement), similar to the German Schutznorm, theory applies. However, under Dutch case law,[24] an NGO can – in the words of *Trianel* – invoke a violation of a rule that 'protects only the interests of the general public and not the interests of individuals'.[25]

For an action before the administrative court to be admissible, not only must the NGO be an interested party, but given Article 6:13 Awb, as discussed above, it must also previously have participated in the applicable administrative preparatory procedure.

3.2. Individuals and legal entities other than NGOs

Individuals and legal entities who do not represent a general or collective interest may bring an action before the administrative court if they are interested parties only.[26] In environmental and planning law, it is assumed that the party that is directly and actually affected by an activity permitted by the order – such as a zoning plan or a permit – is, in principle, an interested party in respect of that order.[27]

In an admissible action, individuals and legal entities may encounter the aforesaid Article 8:69a Awb, namely to the extent that they rely on a written or unwritten rule of law or a general principle of law that does not intend to protect their interests.

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22 art 1:2(3) Awb.

23 See eg H. D. Tolsma, 'Belanghebbendebegrip: de jurisprudentie' in T. Barkhuysen and others (ed), *25 jaar Awb in eenheid en verscheidenheid* (WoltersKluwer 2019) 128.

24 cf Council of State 11 November 2020, ECLI:NL:RVS:2020:2706, para 6.6.

25 cf Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] EU:C:2011:289 (Trianel).

26 art 8:1 Awb.

27 Council of State 23 August 2017, ECLI:NL:RVS:2017:2271.

4. Interpretation of CJEU in *Stichting Varkens in Nood*

4.1. Article 9(2) of the Aarhus Convention

The right to access to justice of Article 9(2) of the Aarhus Convention is conferred on members of the public concerned that have sufficient interest or that maintain that there has been impairment of a right where the administrative procedural law of a (member) party so requires. Those requirements do not apply to non-governmental organisations meeting the requirements set by Article 2(5). According to the latter provision, for purposes of the description of the 'public concerned', non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

4.1.1. Public or public concerned

The CJEU first discusses the question as to whether access to justice under Article 9(2) of the Aarhus Convention is limited to the 'public concerned' or, more broadly, is also open to the 'public', ie also public not belonging to the 'public concerned'. The answer to that question seems obvious, since, after all, that provision expressly only refers to the 'public concerned'. In its order for reference, however, the District Court of Limburg, the referring court in this case, pointed out that Article 6 of the Aarhus Convention refers to both 'public' (paragraphs 3, 7, 8 and 9) and 'public concerned'. Based, *inter alia*, on two reports by the Aarhus Compliance Committee, the Court does not deem it implausible that access to justice should fully be in compliance with the object pursued by the Aarhus Convention on this point, namely safeguarding public-participation rights for the public, and not just for the public concerned.[28] Therefore, its first two questions for a preliminary ruling are, in essence, whether, pursuant to Article 9(2) of the Aarhus Convention, the 'public', rather than just the 'public concerned' should have access to justice and whether such right extends to the right to submit substantive complaints to the court.

What is striking is that neither the Advocate-General Bobek nor the CJEU limits themselves to an interpretation of Article 9(2) of the Aarhus Convention.[29] They also address the public-participation right under Article 6 of the Aarhus Convention and the relationship between paragraphs 2 and 3 of Article 9 of the Aarhus Convention. Pursuant to Article 6(7) of the Aarhus Convention, procedures for public participation shall allow the public to submit, in writing or, as

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28 ACCC/2006/16 (Lithuania) and ACCC/C/2009/37 (Belarus); and n 3 para 6.5.

29 Case C-826/18 *Stichting Varkens in Nood and others v College van burgemeester en wethouders van de gemeente Echt-Susteren* [2020] EU:C:2020:514, Opinion of AG Bobek.

appropriate, at a public hearing or enquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

AG Bobek finds it difficult to conceive that everyone has the right to participate, but only the interested parties may be allowed to challenge the outcome of that participation before a court.[30] In the discussion of intermediate positions concerning the scope of the access to court in question, AG Bobek emphasises that the drafters of the Aarhus Conventions expressly rejected an *actio popularis*. Based on that, he infers that not everyone should have the public-participation right within the meaning of Article 6(7).[31] That participation is open only to the 'public concerned', and Article 9(2) likewise applies only to the 'public concerned'.[32]

The CJEU points out that Article 9(2) of the Aarhus Convention regards the 'public concerned' only. The interpretation that this provision confers rights to the 'public concerned' only is supported by the structure of Article 9 of the Aarhus Convention. Article 9(3) provides a more limited regime of access to justice for members of the 'public' in general. This reflects the system of the Aarhus Convention, which distinguishes between the 'public' and the 'public concerned'.[33] The CJEU could have stopped here, but goes on, just as AG Bobek, to consider the scope of the public participation of Article 6. From the first paragraph of Article 6(2), the CJEU infers that the right to be informed, as laid down in that paragraph, is conferred on the 'public concerned' only.[34] Furthermore, the CJEU deems it relevant that that paragraph is also referred to in paragraph 3.[35] While paragraphs 4 and 7 of Article 6 refer to the 'public', those provisions are intended solely to set out the specific conditions of the participation procedure and not to define the scope of the right of the public to participate in the procedures.[36] According to the CJEU, 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 granted only to members of the 'public concerned' in Article 6(2) and (6).[37] The purpose of Article 9(2) of the Aarhus Convention is to guarantee access to the courts to challenge an act of decision falling within the scope of Article 6 of that convention

30 Opinion (n 29) para 64.
31 ibid para 91.
32 ibid para 93.
33 *Stichting Varkens in Nood* (n 1) paras 35-37.
34 ibid para 40.
35 ibid para 41.
36 ibid para 42.
37 ibid para 43.

only to the 'public concerned'.[38] An individual such as the veterinary surgeon, who is not part of the 'public concerned', can, therefore, not rely on an infringement of Article 9(2) of the Aarhus Convention.[39]

4.1.2. Condition of prior participation

Given Article 2(5) of the Aarhus Convention, the three NGOs in *Stichting Varkens in Nood* are members of the 'public concerned'. As shown above, however, they had not participated in the public participation process on the draft permit, the Dutch UOV. The same holds for the veterinary surgeon, but she is, moreover, not a member of the 'public concerned'. In its order for reference, the District Court of Limburg asks the CJEU whether Article 9(2) of the Aarhus Convention precludes a situation in which access to justice for the public concerned is made dependent on the exercise of public-participation rights within the meaning of Article 6 of that convention.[40]

AG Bobek refers to two judgments in which Article 9(2) of the Aarhus Convention played a role: *Djurgården* and *Commission v Germany*.[41] Although those judgments do not give any concrete answers to the questions relevant here, AG Bobek is bound to acknowledge that the direction is clear: the condition of prior public participation is contrary to Article 9(2) of the Aarhus Convention.[42] The CJEU comes to the same conclusion but, in its reasoning, refers to *Djurgården* only. According to the CJEU, participation in an environmental decision-making procedure 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.[43] Furthermore, the CJEU points out that, according to Article 2(5) of the Aarhus Convention, NGOs are members of the 'public concerned'. Lastly, the objective of ensuring 'wide access to justice', provided for in Article 9(2), and compliance with the effectiveness of that provision would not be ensured by legislation which would make the admissibility of an action brought by an NGO conditional on the role it may or may not have played during the participatory phase of the decision-making procedure. That phase does not have the same purpose as the exercise of judicial proceedings and the assessment that such an NGO may have of a project may, moreover,

38 ibid para 45.
39 ibid para 46.
40 ibid para 30, question 3.
41 Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] EU:C:2009:631; and C-137/14 *Commission v Germany* [2015] EU:C:2015:683.
42 Opinion (n 29) paras 136-138.
43 *Stichting Varkens in Nood* (n 1) para 56.

evolve depending on the outcome of that procedure. The CJEU concludes that Article 9(2) precludes the admissibility of the judicial proceedings to which it refers, brought by NGOs 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.[44]

4.2. Article 9(3)

Whoever thinks that this is the end of it would, however, be wrong. In its judgment, the CJEU also addresses Articles 3(5) and 9(3) of the Aarhus Convention.

4.2.1. Public or public concerned

Under Dutch law, the veterinary surgeon in *Stichting Varkens in Nood* could have submitted views on the draft permit (although she did not). After all, under Dutch law, in this particular situation, public participation is open to 'anyone'. Even if she had submitted views, she would still not have had a right to bring an action because, under Dutch law, she is not an interested party within the meaning of Article 8:1 Awb.

The CJEU holds that Article 3(5) of the Aarhus Convention permits the granting of a more extensive right to participate in the decision-making process.[45] According to the CJEU, an individual who is not part of the 'public concerned' cannot rely on an infringement of Article 9(2). According to the CJEU, where the 'public' has a more extensive public-participation right, Article 9(3) applies. That provision precludes members of the 'public', within the meaning of the Convention, from not being able to have any access to justice for the purposes of relying on more extensive public-participation rights in the decision-making procedure which may be conferred by the national environmental law of a Member State. From the word 'criteria' in Article 9(3), the CJEU does, however, infer that Member States may establish procedural rules setting out conditions that must be satisfied in order to be able to pursue the review procedures within the meaning of that provision. According to the CJEU, 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.[46]

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44 ibid paras 55-59.
45 ibid para 47.
46 ibid paras 48-51.

4.2.2. Condition of prior participation

As shown above, NGOs that are members of the 'public concerned' are not subject to the condition of participation in the administrative preparatory procedure in order to have access to justice. Also on the point of the condition of prior participation, the CJEU holds that any legal actions brought under more extensive public-participation rights in the decision-making process granted only by the national environmental laws of a Member State would fall within the scope of Article 9(3) of the Aarhus Convention. That provision does not preclude the condition of prior participation.[47] In this respect, the CJEU refers to its previous *Protect* judgment.[48] A rule pursuant to which the admissibility of an action is subject to the condition that the applicant has submitted his or her objections in good time following the opening of the administrative procedure 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.[49] In the present case, the CJEU does not take any position on the question as to whether Article 47 of the Charter of Fundamental Rights of the European Union (Charter) should be applied to an action in court that relates only to the more extensive public-participation rights in the decision-making process granted only by national law. In this case, according to the CJEU, the conditions for limitation of the right to an effective remedy within the meaning of Article 47 are in any event satisfied.[50] According to Article 52(1), such a limitation may be justified 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.[51] The Dutch condition of prior participation is provided for by a law, respects the essential content of the fundamental right to effective judicial protection, since it does not call into question that right as such but merely imposes an additional procedural step in order to exercise it. In addition, it meets the objective of general interest 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.[52] All this leads to the CJEU to conclude that Article 9(3) precludes members of the 'public' which is referred to in Article 2(4) from not being able to have access to justice

47 ibid para 63.
48 Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [2017] EU:C:2017:987.
49 *Stichting Varkens in Nood* (n 1) para 63.
50 ibid para 65.
51 ibid para 64.
52 ibid para 66.

for the purposes of relying on more extensive public-participation rights in the decision-making procedure which may be conferred on them solely by the national environmental law of a Member State.

5. Access to court in the Netherlands after Stichting Varkens in Nood

In the Netherlands, the *Stichting Varkens in Nood* judgment has meanwhile resulted in new case law of the Council of State. On 14 April 2021, it has expressed its opinion on the mandatory preparatory procedure, and on 4 May 2021 on the question as to who has access to justice.[53] In line with the structure of the paragraphs above, I will first discuss the decision of 4 May 2021.

5.1. Public or public concerned

In its decision dated 4 May 2021, the Council of State addressed the Dutch public-participation rights, which are more extensive than required by the Aarhus Convention, concerning the action before the court.[54] According to the new line set out by the Council of State in this judgment, in certain circumstances, non-interested parties (members of the public) may have participation rights too. On the condition that they have participated in that participation process, they subsequently have access to justice, where they will be allowed to submit both procedural and substantive grounds for the action. Even a non-interested party that has excusably failed to participate in the public participation process (for example, as a result of improper notification of the draft decision) may have access to justice. Although an action brought by a non-interested party may, thus, be admissible, it is conceivable that certain grounds for the action will not lead to reversal of the contested decision because of the relativity requirement.[55]

5.2. Condition of prior participation

According to judgment of the Council of State of 14 April 2021, for interested parties (in EU-law terms: the public concerned) to have access to justice, it is no longer necessary that they have participated in the preparatory procedure. Article 6:13 Awb will not be invoked against interested parties. This

53 Council of State 14 April 2021, ECLI:NL:RVS:2021:786; and Council of State 4 May 2021, ECLI:NL:RVS:2021:953.

54 The judgment refers to several environmental and planning laws that provide for more extensive national public-participation rights.

55 Council of State 4 May 2021 (n 53) paras 4.6-4.9.

applies to all situations where, in environmental and planning law cases, the UOV has been applied, which is broader than the matters covered by Article 6(1) of the Aarhus Convention. The Council of State explains that Article 6 comprises two categories of decisions: decisions on whether or not to permit activities stated in Annex I to the convention (Article 6(1)(a)) and decisions on activities not listed in Annex I that may have a significant impact on the environment (Article 6(1)(b)). According to the Council of State, the scope of application of Article 6 of the convention cannot easily be defined in advance.[56]

6. Analysis

The least surprising element in *Stichting Varkens in Nood* seems to be the CJEU's consideration that the NGOs cause of action may not be made dependent on their participation in the procedure preparatory to the contested decision. This could already be inferred from *Djurgården*.[57] That case was about the interpretation of, *inter alia*, the then Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, which directives form part of the instruments giving effect to the Aarhus Convention in the Community legal order.[58] The amended Article 10a was virtually identical to Article 9(2) of the Aarhus Convention. The referring court asked, *inter alia*, whether Article 10a also entailed that the public concerned had the right to challenge a decision rendered by a court on a permit application, in a situation where the public concerned had had the opportunity to participate, and comment, in the hearing of the permit application before the court. According to the relevant Swedish law in *Djurgården*, it was a court rather than an administrative authority that granted the permit. The CJEU held, however, that this did not make any difference for the right to bring an action of Article 10a.[59] Subsequently, in response to the said question referred for a preliminary ruling, the CJEU ruled:

'Members of the "public concerned" within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, 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.'

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56 Council of State 14 April 2021 (n 53) paras 4.6-4.7.

57 n 41.

58 cf Opinion AG Sharpston, para 7. The said Article 10a corresponds with the current Article 11 of Directive 2011/92/EU (n 6).

59 n 41 para 38.

As early as 2010, further to *Djurgården*, Jans wondered to what extent Article 6:13 Awb (as discussed above), at least to the extent relating to the submission of views, was compatible with Directive 2003/35/EC.[60] In 2011, Glinski and Rott concluded that 'on a narrow interpretation of the wording of' Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, 'it does not allow Member States not to grant legal standing to environmental organisations due to their activity or passivity before an administrative decision is made.'[61] After *Commission v Germany*, Backes felt that application of Article 6:13 Awb was no longer possible.[62] Still, the Dutch Council of State held, in 2015, in the *Stichting Enci Stop* case, that Article 6:13 Awb was not contrary to EU law.[63] The Council of State held that *Djurgården* was not relevant because *Djurgården* (merely) showed that submitting views in the decision-making procedure should not preclude the right to bring an action against the relevant decision and in *Stichting Enci Stop*, no views had been submitted. From paragraph 76 of *Commission v Germany*, the Council of State inferred that Article 11(4) of the EIA Directive did not rule out the possibility of bringing an action before an administrative authority preceding an action brought before the court.[64] Without making it explicit whether Article 9(2) or Article 9(3), of the Aarhus Convention was relevant to the case at hand, the Council of State went on to hold that, in *Lesoochranárske I*, the Court of Justice had held that Article 9(3) of the Aarhus Convention did not have direct effect.[65] In *Stichting Varkens in Nood*, the Court of Justice now makes it clear that NGOs may not be subjected to the condition of prior participation for cases falling within the scope of Article 9(2) of the Aarhus Convention.

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60 J. H. Jans, 'Naar een Europese Awb. Enkele opmerkingen over het slaan van piketpaaltjes, rechterlijke dialoog en harmonisatie via de achterdeur' in T. Barkhuysen, W. Den Ouden and J. E. M. Polak (eds), *Bestuursrecht Harmoniseren* (Boom Juridische uitgevers 2010) 616.

61 Carola Glinski and Peter Rott. 'Private Enforcement of the Public Interest and the Europeanisation of Administrative Law - The Trianel Judgment of the ECJ' (2011) 2(4) European Journal of Risk Regulation, EJJR 612.

62 C-137/14 *Commission v Germany* [2015] EU:C:2015:683; and See his case note in 'Administratiefrechtelijke Beslissingen (AB)' 2015/447. See for the issue of prior participation or 'preclusion' in general after *Commission v Germany* Adam Daniel Nagy, 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' in Roberto Caranta, Anna Gerbrandy and Bilan Müller (eds), *The Making of a New European Legal Culture: the Aarhus Convention* (Europa Law Publishing 2018) 53.

63 n 20.

64 The Council of State held, in para 21.4, that the substance of Article 9(2) of the Aarhus Convention corresponded with Article 11 of the EIA Directive and, therefore, limited itself to an assessment on the basis of the latter provision, not taking any position on the question as to whether Article 9(2) of the Aarhus Convention had direct effect.

65 Case C-240/09 *Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] EU:C:2011:125 (Lesoochranárske I, not to be confused with Lesoochranárske II, Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* [2016] EU:C:2016:838); and *Stichting Enci Stop* (n 20) para 21.10.

Although the CJEU does not expressly so hold in its answer 2, the same seems to apply to members of the 'public concerned' in general, ie not only to NGOs forming part of the public concerned. After all, in paragraph 36 of the judgment, the CJEU holds that the purpose of Article 9(2) of the Aarhus Convention is to guarantee the right to bring an action to members of the 'public concerned'.

It cannot be inferred from *Stichting Varkens in Nood* that the admissibility of a judicial review can no longer be made dependent on participation in the Dutch objection procedure.[66] In fact, according to Article 9(2) of the Aarhus Convention, 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. The difference between a procedure preparatory to the contested decision (such as the UOV) and an administrative review procedure (such as the Dutch objection procedure) is that, in the case of the latter procedure, a decision has already been made.[67] The Aarhus Convention Implementation Guide, which, in itself, is not binding but may be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, also states that a requirement to exhaust administrative review procedures is allowed under the Convention.[68]

Given the wording of that provision, it is not surprising that the CJEU interprets Article 9(2) of the Aarhus Convention as to contain merely a right to bring an action for NGOs (forming part of the public concerned) (and, as stated above, probably for members of the public concerned in general), and not also for members of the public not forming part of the public concerned. It is much more surprising, however, that the Court of Justice would link its interpretation of Article 9(2) of the Aarhus Convention to an interpretation of Article 6, particularly paragraph 7, of the Aarhus Convention. According to the reasoning of the CJEU as set forth above, the latter paragraph grants public-participation rights to the 'public concerned' only. Apparently – following on from AG Bobek,

66 See text to n 18.

67 cf Carola Glinski and Peter Rott. 'Private Enforcement of the Public Interest and the Europeanisation of Administrative Law - The Trianel Judgment of the ECJ' (2011) 2(4) European Journal of Risk Regulation, EJJR 612: 'Member States may (...) to exhaust an administrative review procedure prior to recourse to judicial review; which still requires an administrative decision that can be reviewed in the first place. German preclusion rules, in contrast, abolish the right to have the first decision reviewed if one has not participated in the administrative procedure that has led to that decision and has not raised objections there.'

68 cf Case C-182/10 Marie-Noëlle Solvay and Others v Région wallonne EU:C:2012:82 [2012], para 27; and United Nations, *The Aarhus Convention. An Implementation Guide* (United Nations Economic Commission for Europe E.13.II.E.3 2014) 196.

who, in this respect, refers to *leges imperfectae* – the CJEU fails to see how there could be any public-participation rights without a right of access to justice (as also becomes evident from its interpretation of Article 9(3) of the Aarhus Convention, to be discussed below).[69] Nevertheless, the question arises whether Article 6(7) of the Aarhus Convention cannot still be understood to grant participation rights to the 'public' (ie 'anyone').

The public-participation rights granted by Article 6 of the Aarhus Convention apply only in the event of adoption of a decision on proposed activities that are listed in Annex I to that Convention, or activities not that are listed there but could still have a considerable impact on the environment.[70] Unlike the CJEU, the Implementation Guide assumes that those public-participation rights apply to anyone.

'The term "public" in article 2, paragraph 4, is not in itself subject to any conditions or restrictions. Thus, where the Convention conveys rights on "the public" without expressly adding any further qualifications on who of the public may enjoy those rights, the public are entitled to exercise those rights irrespective of whether they personally are "affected" or otherwise have an interest. Articles 4, 5, 6, paragraph 7 and 9, and article 8 are examples of provisions which follow this approach.'[71]

and:

'And, when a public hearing, enquiry or other opportunity for the public to comment is organised under article 6, paragraph 7, it is not sufficient to allow one or several organisations, selected randomly or because they are best-known to the governmental officials, to submit comments. Any member of the public must be granted the right to submit comments.'[72]

and:

'Paragraph 7 differs from some of the other provisions of article 6 in that it grants rights not only to the public concerned, but to the public generally. (...) The public authority cannot reject any comments, information, analyses or opinions on the ground that the particular member of the public is not a part of the public concerned. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee confirmed that legislation that limits the right to submit comments to the public concerned fails to guarantee the full scope of the rights envisaged by the Convention.'[73]

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69 Opinion (n 29) paras 81 ff.

70 Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [2017] EU:C:2017:987, para 64.

71 Implementation Guide (n 68) para 55.

72 ibid 56.

73 ibid 153, referring in a footnote to ECE/MP.PP/2008/5/Add.6, para 80.

The Compliance Committee subsequently reiterated the quoted position on several occasions.[74]

In its interpretation of (*inter alia*) Article 6(7) of the Aarhus Convention, the Court of Justice does not seem to be aware that participation in decision-making is not only the gateway to individual legal protection but, just as is assumed for Dutch law, has other functions as well.[75] The recitals to the Aarhus Convention state, for example, the furtherance of 'the accountability of and transparency in decision-making' and the strengthening of 'public support for decisions on the environment'. To realise those objectives, it does not seem necessary to give all the members of the 'public' access to justice. Giving them the right to participate in the decision-making process might, however, contribute to that, and would be in line with the recitals and the letter of Article 6(7) of the Aarhus Convention.

According to the opinion of AG Bobek in *Stichting Varkens in Nood*, an *actio popularis* had been rejected during the negotiation of the Aarhus Convention. In this respect, he refers to two opinions by the advocate-general Sharpston.[76] Sharpston referred, *inter alia*, to the proposal of the Commission (which was never adopted) for a directive on access to justice in environmental matters, but that proposal only discussed the *actio popularis* concerning legal standing, not in relation to the right to participate in the decision-making process.[77] The same holds true for her reference to the Implementation Guide, since that document, too, only mentions the *actio popularis* in relation to standing under Article 9(3) of the Aarhus Convention.[78]

The Court of Justice chooses an approach that may be slightly more convincing by – in sum – pointing out that the right to be informed is conferred on the 'public concerned' only, and that a right to participate in the decision-making process cannot be effective if the person involved does not also have the right to be informed.[79] In this digital day and age, however, it seems that that argument should be put into perspective, especially in the Dutch situation, where

74 eg ACCC/C/2009/37 (Belarus) and ACCC/C/2010/45 & ACCC/C/2011/60 (United Kingdom of Great Britain and Northern Island) para 78.

75 cf text to n 21.

76 Opinion (n 29) para 46.

77 Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] EU:C:2009:421, Opinion of AG Sharpston, para 63; Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM(2003) 624 final 12-13 (withdrawn with 2014/C 153/03 [2014] OJ C153/3).

78 Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [2017] EU:C:2017:760, Opinion of AG Sharpston, para 81; Implementation Guide (n 68) p 198; and Incidentally, in these cases, Sharpston did not have to take a position on the scope of the public-participation right under Art. 6(7) of the Aarhus Convention because this issue was not expressly addressed in *Djurgården* and *Protect*.

79 *Stichting Varkens in Nood* (n 1) paras 40 and 43.

documents for purposes of the UOV are often available in digital form and can be downloaded by anyone.

The CJEU further refers to the structure of Article 9 of the Aarhus Convention, which distinguishes between the 'public concerned' (paragraph 2) and the 'public' (paragraph 3), which supposedly shows that the members of the public concerned are the only ones who may participate in the decision-making procedure.[80]

Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, imposes – as held, *inter alia*, in *Protect* – on the Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law. Although Article 9(3) refers to 'criteria, if any, laid down in ... national law', it would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings.[81] If EU law, because of Article 6(7) of the Aarhus Convention, were to include a public-participation right for anyone, given that, effective judicial protection of such a right should, indeed, be guaranteed.

If, however, the wording of Article 9(3) of the Aarhus Convention is not taken literally, but more weight is attached to the mutual coherence of the various provisions of that Convention (as the CJEU does in its interpretation of Article 6), an interpretation might also be conceivable where Article 9(3) of the Aarhus Convention does not grant all the members of the public the right, in court proceedings, to invoke non-compliance with the public participation duties of Article 6(7) of the Aarhus Convention. Contrary to what the CJEU has now held, that paragraph would then not have to lead to a right to bring an action for individuals who do not form part of the 'public concerned' but derive public-participation rights solely from national law. Such an interpretation is – admittedly – difficult but, on the other hand, may do justice to the idea that participation in an environmental decision-making procedure has a 'different purpose from a legal review'.[82] Contrary to the interpretation now given by the CJEU to Article 9(3) of the Aarhus Convention for more extensive national public-participation rights, such an interpretation would, moreover, not entail the risk of the Member States abandoning such more extensive public-participation rights, which are not mandatory pursuant to EU law, for fear of the associated right to bring an action. After all, Article 3(6) of the Aarhus Convention does not ex-

80 ibid paras 36-38.
81 *Protect* (n 48) paras 45-46.
82 cf *Djurgården* (n 77) para 38.

clude the possibility of a Party reducing existing rights.[83] Although, indeed, the authors of the Aarhus Convention did not wish to introduce an *actio popularis*, they did create an important role for NGOs. So, a public-participation right for 'anyone', without giving 'anyone' access to justice, would respect that idea.[84] It is striking that, by the back door of Article 9(3) of the Aarhus Convention, the Court of Justice has, in fact, introduced a kind of *actio popularis* after all, ie for situations where a Member State grants more extensive public-participation rights based on Article 3(5) of the Aarhus Convention.[85]

In a general sense, public participation is attributed an important role in environmental law, although, in practice, public participation does not always work well.[86] Anyway, it is clear that the authors of the Aarhus Convention have attributed an important role to public participation, even if not all the members of the public, but only the members of the 'public concerned' should have public-participation rights.

Incidentally, it should be noted that, in *Stichting Varkens in Nood*, the CJEU does not expressly hold that there should be a right to bring an action before the administrative court. Under Dutch law, the civil court acts as the 'ordinary court' in situations where, in sum, the administrative court cannot offer sufficient legal protection.[87] So, perhaps the Dutch Council of State did not, *contra legem* (ie contrary to Article 8:1 Awb) have to make it possible for non-interested parties to bring an action before the administrative court, although Dutch legal literature has advocated that because of, among other reasons, the higher costs

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83 cf Implementation Guide (n 68) p 68.

84 The Implementation Guide (n 68) p 195 chooses yet another approach: 'It is consistent with the objectives of the Convention to hold that actual participation in a decision-making procedure under article 6, paragraph 7, would indicate that the member of the public has the status of a member of the public concerned.'

85 The fact that Article 9(3) of the Aarhus Convention potentially leads to an *actio popularis* was already noted by K. J. De Graaf and L. Squintani, 'Sustainable development, principles of environmental law and the energy sector' in M. M. Roggenkamp, De Graaf, K J and R. Fleming (eds), *Energy Law, Climate Change and the Environment* (Encyclopedia of Environmental Law: volume IX, Edward Elgar Publishing 2021) 50.

86 See eg S. Akerboom. 'Between public participation and energy transition : the case of wind farms' (Universiteit van Amsterdam 2018) and K. J. De Graaf and L. Squintani, 'Sustainable development, principles of environmental law and the energy sector' in M. M. Roggenkamp, De Graaf, K J and R. Fleming (eds), *Energy Law, Climate Change and the Environment* (Encyclopedia of Environmental Law: volume IX, Edward Elgar Publishing 2021) 49; and See eg Lorenzo Squintani and Goda Perlaviciute, 'Access to Public Participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants' in Marjan Peeters and Mariolina Eliantonio (eds), *Research handbook on EU environmental law* (Edward Elgar Publishing 2020) 133.

87 cf H. A. J. Gierveld. 'Arrest Varkens in Nood: twee richtinggevende uitspraken van de Afdeling bestuursrechtspraak' (2021) 2 Tijdschrift voor Omgevingsrecht 123.

of civil proceedings in connection with Article 9(4) of the Aarhus Convention, the administrative court should, indeed, have jurisdiction.[88]

According to the Court of Justice, Article 9(3) of the Aarhus 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. The considerations of the CJEU on Dutch law in paragraph 66 in themselves are understandable and, after *Protect*, are not exactly new.[89] Nevertheless, it may be noted that, in terms of the 'disadvantages caused by the obligation to participate in the procedure preparatory to the contested decision', Dutch administrative law does not provide for mandatory legal representation, and notifications of draft decisions are not required to point out the consequences of not participating in the decision-making procedure.[90] The question is whether, in situations where a citizen litigates without representation, and has missed the decision-making procedure, or thinks they may wait and see if the decision is actually made, the said disadvantages would not still be disproportionate to the objective of general interest referred to by the CJEU.

As also shown above, in paragraph 66, the CJEU refers to Article 47 of the Charter, not taking any position on whether that provision 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. After *Protect*, the reference to Article 47 of the Charter is not new either and fits the trend that CJEU case law seems to attach less and less weight to the principle of equivalence and the principle of effectiveness.[91] According to *Stichting Varkens in Nood*, individuals not forming part of the 'public concerned' who, nevertheless, have public-participation rights pursuant to national law, should also have some form of access to justice. It is peculiar to associate this with Article 47 of the Charter which, after all, refers to violations of rights guaranteed by the law of the Union. Individuals who do not form part of the

88 Council of State 4 May 2021 (n 53), para 4.6; See for the problems of the *contra legem* interpretation Adam Daniel Nagy, 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' in Roberto Caranta, Anna Gerbrandy and Bilan Müller (eds), *The Making of a New European Legal Culture: the Aarhus Convention* (Europa Law Publishing 2018) 63-64; and eg R. Benhadi. 'Nederlands bestuursprocesrecht op onderdelen in strijd met het Verdrag van Aarhus' (2021) 2(8) Jurisprudentie Bestuursrecht Plus 108.

89 *Protect* (n 48) paras 87-90.

90 cf Council of State 11 February 2009, ECLI:NL:RVS:2009:BH2535, para 2.2.1.

91 See eg R. Widdershoven. 'Case C-73-16, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, EU:C:2017:725' (2018) 15(118) Administratiefrechtelijke Beslissingen (AB) 781 (note); Mariolina Eliantonio. 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the 'language of rights'?' (2019) 12(2) Review of European Administrative Law 95-116 and R. Widdershoven. 'National Procedural Autonomy and General EU Law Limits' ibid 25-34.

'public concerned' are, by definition (given Article 2(5) of the Aarhus Convention) not affected or likely to be affected by, or having an interest in, the environmental decision-making. It might, therefore, be stated that they do not have any rights that could be violated within the meaning of Article 47 of the Charter either, or, at best, their public-participation right. AG Bobek emphasises, however, that 'EU law does not provide any such right of participation to "the public" in the first place', and that, '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.'[92] Such emphasis on the identification of rights conferred by EU law has been contested by Prechal in the past.[93] The question of whether Article 47 of the Charter applies pursuant to Article 51(1) of the Charter is not always easy to answer, which is shown in the Conclusion of AG Bobek and the legal literature.[94] All in all, it is not clear why the CJEU does not take any position on whether Article 47 of the Charter is applicable. What is striking is the fact that it no longer refers to that provision in the eventual answers to the questions referred for a preliminary ruling, but only refers to Article 9(3) of the Aarhus Convention. Just as individuals not forming part of the 'public concerned', NGOs in themselves do not have an interest in the environmental decision-making, but they are deemed to have such interest according to Article 2(5) of the Aarhus Convention. Perhaps that is why the Court of Justice did mention Article 47 of the Charter in its answers to the questions referred for a preliminary ruling in the *Protect* case, but perhaps the CJEU's line in respect of Article 47 of the Charter is not always clear.[95]

It may be conceded to the Dutch Council of State that it will not always be clear in advance whether a case falls within the scope of Article 6(1) of the Aarhus Convention.[96] However, it seems even more difficult to determine whether a case falls within the scope of Article 9(3) of the Aarhus Convention. In the *Stichting Varkens in Nood* case, the CJEU assumes that it does. This seems to make sense, because it has been established that the case falls within one of the categories as listed in Annex 1 pertaining to the categories referred to in Article 6(1)(a) of the Aarhus Convention and as becomes clear from the judgment

92 Opinion (n 29) para 111.

93 eg Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Christophe Paulussen and others (ed), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (T.M.C. Asser Press 2016) 143.

94 eg Sacha Prechal (n 93), Tobias Lock, 'Article 51 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019).

95 *Protect* (n 48); and cf Mariolina Eliantonio. 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the 'language of rights'?' (2019) 12(2) Review of European Administrative Law 95-116.

96 See text to n 56.

of the District Court of Limburg, within the scope of Directive 2010/75/EU and Directive 2011/92/EU.[97] It could, therefore, be argued that – in the words of *Lesoochranárske I* – this is a case where the Union has exercised its powers (if the emphasis is put on the Directives), or in any event, an 'issue' that 'is regulated in agreements concluded by the European Union and the Member State', and 'a field in large measure covered by it' (which is the key focus of the Aarhus Convention), so that the CJEU has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention.[98]

Where the CJEU refers to 'access to justice for *the purposes of relying* on more extensive rights to participate',[99] it remains unclear whether the individuals referred to can fully challenge a decision in court proceedings or that they can complain only about a violation of their public-participation rights. According to *Commission v Germany*,[100] the application of a *Schutznorm* is permitted for individuals (but not for NGOs). Individuals who do not form part of the 'public concerned' are, by definition (given Article 2(5) of the Aarhus Convention) not affected or likely to be affected by, or do not have an interest in, environmental decision-making. Here, too, it could, therefore, be argued that, apart, perhaps, from their public-participation rights, they do not have any subjective rights. Individuals should at least be able to invoke a possible violation of those public-participation rights because, otherwise, the second part of the first answer given by the CJEU in response to the questions referred for a preliminary ruling in *Stichting Varkens in Nood* would be meaningless.

7. Conclusion

Stichting Varkens in Nood shows that EU law can have far-reaching consequences for national administrative procedural law. With this judgment, a new element has been added to the patchwork of access to justice.[101]

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97 *Stichting Varkens in Nood* (n 1) paras 32-33; and Rechtbank Limburg (n 3), para 2.

98 Lesoochranárske I (n 65), paras 34-43; See also Jan H. Jans. 'Who is the referee? Access to Justice in a Globalised Legal Order. ECJ Judgment C-240/09 Lesoochranárske zoskupenie of 8 March 2011' (2011) 4ibid87; and Martin Hedemann-Robinson. 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? - Part 1' (2014) European Energy and Environmental Law Review 112 ff and Barbara Iwańska and Mariusz Baran. 'Access of an Environmental Organisation to Court in Light of the EU Standard Set by the Principle of Effective Legal (Judicial) Protection' (2019) ibid 54.

99 Emphasis added.

100 *Commission v Germany* (n 62) para 33.

101 cf Adam Daniel Nagy, 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' in Roberto Caranta, Anna Gerbrandy and Bilan Müller (eds), *The Making of a New European Legal Culture: the Aarhus Convention* (Europa Law Publishing 2018) 54, referring to Nicolas de Sadeleer, *Environnement et marché intérieur* (Ed. de l'Université de Bruxelles 2010) 188.

Most striking, however, is the CJEU's interpretation of the scope of the participatory rights granted by Article 6(7) of the Aarhus Convention. *Stichting Varkens in Nood* makes it clear that the Member States may restrict participatory rights to the 'public concerned' (which includes NGOs) for decisions covered by Article 6 of the Aarhus Convention. If they do, under Article 9(2) of the Aarhus Convention, they are not allowed to make access of the public concerned to justice dependent on their participation in the decision-making procedure. However, if, in environmental matters, Member State offer participatory rights to others using Article 3(5) of the Aarhus Convention, they will also have to offer them some form of access to justice. The CJEU derives this from Article 9(3) of the Aarhus Convention. The scope of that right is not entirely clear from *Stichting Varkens in Nood*. It is possible that in legal proceedings such persons may only complain about the violation of their participatory rights. What is clear is that the Member States may make the right of access to justice for such persons dependent on their participation in the decision-making procedure.

The questions referred for a preliminary ruling on the interpretation of Article 9 of the Aarhus Convention in *Stichting Varkens in Nood* will certainly not be the last. For now, in response to *Stichting Varkens in Nood*, the Dutch Council of State has opted for a generous application of the Aarhus Convention, but we will have to wait and see whether the Dutch legislator will try partially to reverse that line. An interesting question is whether, just as the Netherlands, other Member States also have more extensive public-participation rights and will be confronted with the consequences of *Stichting Varkens in Nood*. The judgment may lead those Member States to abolish those more extensive public participation rights because they do not want to provide the right of access to justice of Article 9(3) of the Aarhus Convention. The question is whether the authors of the Aarhus Convention were aware of such a possible consequence when drafting Articles 6 and 9.