TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-826/18

Between

LB, Stichting Varkens in Nood, Stichting Dierenrecht, Stichting Leefbaar Buitengebied
Applicants

And

College van burgenmeester en wethoders van de gemeente Echt-Susteren
Defendant

WRITTEN OBSERVATIONS OF IRELAND

Pursuant to the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union, Ireland, represented by M Browne, Chief State Solicitor, acting as Agent and accepting service by e-Curia, with an address at the , assisted by N Butler SC and C Hogan BL both of the Bar of Ireland, submits the following written observations to the Court of Justice on the questions referred for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union by the *Rechtbank Limburg (Netherlands)*, lodged at the Registry of the Court of Justice on 28 December 2018.

Dated 28 August 2017

I. INTRODUCTION

1. As a preliminary matter, the terms of the questions refer specifically to articles of the Aarhus Convention ("the Convention"), rather than to the provisions of the EU Directives which also apply to the case, namely Directive 2010/75 (the Industrial Emissions Directive) and Directive 2011/92 (the Environmental Impact Assessment Directive).

2. Furthermore, it is stated at paragraph 5 of the referring Court's summary of the request for a preliminary ruling[1] that the Rechtbank proceeds on the assumption that in the interpretation of the requirements laid down in the European legal framework, the Aarhus Convention is paramount, and in the case of conflict, takes precedence. Therefore, the focus of these observations shall be on the Convention rather than the terms of the directives, unless otherwise indicated.

[1] Pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice.

II. FIRST AND SECOND QUESTIONS REFERRED

3. In the summary of the reasons for the referral, the Rechtbank deals with the first and second questions together. The same approach shall be adopted in these observations. Question 1 and the first limb of Question 2 are closely related in their focus on standing, whereas the second limb of Question 2 deals with the scope of review.

Context for Referral

4. The context for referral of the first two questions is as follows. In the Netherlands, pursuant to Article 3.10 of the Wabo,[2] section 3.4 of the Awb[3] is applicable. This provides for a "public preparatory procedure", under which competent authorities first make draft decisions in respect of which, under Article 3.12(5) of the Wabo, anyone can express objections. A decision is then taken by the administrative authority, against which legal action may be brought but only by "interested parties". Under Article 1:2 of the Awb, "interested parties" are those whose interests are directly affected by a decision. This is assessed by the administrative court. LB is an individual who cannot, on the basis of relevant Dutch law, be regarded as an interested party. However, the Rechtbank questions if that is correct, and *"whether the applicant, as a member of the public, should not be able to have recourse to the courts for an assessment of a possible breach of procedural requirements and public participation rights, as provided for in Article 6 of the Aarhus Convention."*[4]

5. LB accepts that she did not submit any objections, but she argues that she cannot reasonably be criticised on that ground, because the defendant gave an incorrect and inadequate notification of the draft permit. Amongst other grounds, she claims it was incorrectly stated that interested parties alone could submit views whereas, on the basis of Article 3:12 of the Wabo, views can be submitted by anyone. LB also claims the environmental permit was not issued in accordance with the prescribed procedure, regarding the publication of the notification and of the environmental permit itself. She wishes to make procedural and substantive arguments against the environmental permit. However, under national law LB's action would have to be declared inadmissible.

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[2] Wet algemene bepalingen omgevingsrecht (Law on General Provisions of Environmental Law).
[3] Algemene wet bestuursrecht (General Law on Administrative Law).
[4] Paragraph 9 of the Request for a Preliminary Ruling.

"The Public Concerned" as distinct from "The Public" – a Textual Analysis of Article 9(2) and other Access to Justice Provisions

6. The answer to the first two questions is contained in the clear wording of Article 9(2) of the Aarhus Convention, which is set out hereunder for clarity:

> *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 organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.*

7. Article 9(2) provides for access to justice regarding *"any decision, act or omission"* subject to the provisions of Article 6 which in turn concerns the decision making process for permitting "specific" and other activities which may have a significant environmental effects. The core obligation under Article 6 is that those processes are subject to a requirement for public participation in accordance with the terms of the article.[5] In effect, those public participation requirements confer rights on those who are concerned and entitle them to ask for a judicial review of the resulting decision.

8. The term "public concerned" is defined in Article 2(5) of the Convention:

> *"The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*

[5] A list of some of the specific activities covered by article 6 is set out in annex I to the Convention.

9. The Convention distinguishes between three categories of decisions, acts and omissions in Article 9; the "Access to Justice" provision. The basis for legal standing varies according to the decision, act or omission which is being challenged.

10. Article 9(1) concerns refusals and inadequate handling by public authorities of requests for environmental information. Any "natural or legal person" submitting an information request enjoys legal standing.[6]

11. Article 9(3) is directed to all other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment. Here, the intended beneficiary of legal standing is *"the public"*. This article provides:

> *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.*

12. The term *"the public"* is specially defined in Article 2(4) of the Convention and is broader than the *"public concerned"* (the term used in article 9(2)). Article 2(4) states:

> *"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;*

13. In contrast to the definition of *"the public concerned"*, there is no reference to being "*affected or likely to be affected by, or having an interest in the environmental decision-making"*.[7] The questions posed by the referring court suggest that there may be no distinction between "the public" and "the public concerned" in the context of Article 9(2). This would ignore the clear language of the Convention and disrupt the scheme of Article 9 and it is submitted that this Court should refrain from taking such a step.

14. Although the term "interested party" appears to be a specific concept in Dutch law, by distinguishing between "the public" and the "public concerned" the Convention recognises that for some purposes members of the public may be required to demonstrate a specific interest in the decision making process under review. The Implementation Guide to the Aarhus Convention states *"The definition of public should be interpreted as applying the "any person" principle"*.[8] Furthermore, it is stated:

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[6] See the Access to Environmental Information Directive, 2003/4/EC.
[7] However, Article 9(3) provides that the public must *"meet the criteria, if any, laid down in its national law".* This grants the contracting parties a certain degree of discretion to establish the criteria for standing.
[8] The Aarhus Convention: An Implementation Guide, second edition 2014, at 55.

> *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 "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.*[9]

15. However, as the Implementation Guide instructs, "the public concerned" are in a different and special category:

> *The term "public concerned" refers to a subset of the public at large who have a special relationship to a particular environmental decision-making procedure. To be a member of the "public concerned" in a particular case, the member of the public must be likely to be affected by the environmental decision-making, or the member of the public must have an interest in the environmental decision-making. The term can be found in article 6 on public participation in decisions on specific activities, and the related access to justice provision, article 9, paragraph 2.*[10]

16. When one is accessing justice pursuant to the provisions of Article 9(2), the Convention limits the legal entitlement to members of the "public concerned". It cannot be the case that everyone must be able to avail of that provision simply by being a member of "the public", as this would deprive the distinction between "the public" and "the public concerned" of all significance, and frustrate the intentions of the drafters of the Convention.

17. The Aarhus Convention Compliance Committee ("the ACCC"), in a Report relating to Belgium, stated that "*the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical"*.[11] The Committee went on to specifically reference the distinction in standing:

> *Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned. Contrary to paragraph 2 of article 9, however, paragraph 3 does not refer to "members of the public concerned", but to "members of the public".*[12]

18. The distinction between being a member of the public on the one hand, and being an interested/affected person on the other, has a long pedigree. The term *"being affected"* has been used since 1991 by the Espoo Convention for the purpose of defining the public which should be allowed to participate in transboundary EIA.[13]

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[9] Ibid.
[10] Ibid, at 57.
[11] Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26.
[12] Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 28.
[13] The Aarhus Convention: An Implementation Guide, second edition 2014, at 57.

19. As a matter of principle, the Court ought to adopt a literal interpretation of the Convention. The Interpretation Guide accompanying the Aarhus Convention often calls in aid the Vienna Convention on the Law of Treaties.[14] The Vienna Convention provides the following *"General Rule Of Interpretation"* in Article 31: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* The ordinary meaning of the term *"the public concerned"* in Article 9(2) is that it is a specially defined term which is narrower than and distinct from the broader term *"the public".* This Court would be exceeding its competence and jurisdiction in allowing the broader concept of *"the public"* to creep into Article 9(2).

20. Indeed the category of *"public concerned"* is already extremely generous. In its Report on Compliance by the Czech Republic, the ACCC remarked:

> *While narrower than the definition of "the public", the definition of "the public concerned" under the Convention is still very broad. Whether a member of the public is affected by a project depends on the nature and size of the activity. For instance, the construction and operation of a nuclear power plant may affect more people within the country and in neighbouring countries than the construction of a tanning plant or a slaughterhouse. Also, whether members of the public have an interest in the decision- making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity. Importantly, this provision of the Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned. Rather, article 2, paragraph 5, deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest*.[15]

21. Furthermore, it is generally recognised in domestic law that actual participation in a decision-making procedure by a member of the public, elevates that member of the public to the status of a member of the public concerned.[16]

22. Significantly the ACCC has held that the Parties to the Convention "*are not obliged to establish a system of popular action ("actio popularis") in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment.*"[17] It follows that an interpretation of Article 9(2) which achieves that effect is neither required by nor consistent with the Convention.

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[14] Ibid, at 44 and 45.
[15] Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 April, 2012, para. 66
[16] The topic of prior participation shall be revisited in Section III.
[17] Findings on communication Belgium ACCC/C/2005/11**,** ECE/MP.PP/C.1/2006/4/Add.2., 28 July 2006, para 35.

Case Law Cited by the Referring Court and Relevant to these Questions

23. The Rechtbank discusses several cases which shall be analysed hereunder. First, it I suggested that *WWF-UK v Council of the European Union*,[18] supports the proposition that access to justice for the assessment of an alleged breach of procedural rights is possible without leading to the admissibility of substantive complaints. However the circumstances of that case are materially different such that it does not provide a useful analogy for a consideration of the specific terms of an international convention.

24. This case concerned the environmental organisation WWF-UK Ltd, which was a member of the Executive Committee of the North Sea Regional Advisory Committee (RAC). RACs advise the Commission on matters of fisheries management in respect of certain sea areas or fishing zones, with the aim of facilitating participation by the stakeholders in the Common Fisheries Policy.[19] The RAC in question sent a report to the Council and the Commission on the proposal for a Council regulation fixing fishing limits for 2007. That report made reference to a minority viewpoint held by three environmental organisations (including WWF-UK) to the effect that they were unable to support the proposal for stated reasons.

25. WWF-UK subsequently sought the partial annulment of the Regulation fixing the Total Allowable Catches (TACs) for cod for 2007.[20] The Court of First Instance (CFI) dismissed the action as inadmissible on the basis that the regulation was not of individual concern to WWF-UK. WWF-UK appealed the order of the CFI to the ECJ which also held that WWF-UK was not individually concerned by the contested decision. The fourth paragraph of Article 230 EC confers on individuals the right to challenge any decision which, although in the form of a regulation, is of direct and individual concern to them.[21] The ECJ agreed that a person's involvement in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to the measure in question only if the applicable Community legislation grants him or her certain procedural guarantees. The Court continued (in paragraphs relied upon by the Rechtbank):

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[18] Case C-355/08P.

[19] The RAC was established under EC Regulation No. 2372/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

[20] Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required.

[21] Which provides:

> Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

> *Moreover, where a provision of Community law requires, for the adoption of a Community act, a procedure to be followed under which a person may claim rights, such as the right to be heard, the particular legal position in which that person is thereby placed sets him apart for the purposes of the fourth paragraph of Article 230 EC (see, to that effect, Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, paragraph 13, and order in Schmoldt and Others v Commission, paragraph 40 and the case-law cited). Where such procedural rights are conferred on an entity composed of a number of members, only the entity expressly named in the Community provision conferring those rights may be regarded as individually concerned for the purposes of the fourth paragraph of Article 230 EC, and not its members taken individually (see the order in Schmoldt and Others v Commission, paragraphs 41 and 42).*
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> *However, the fact remains that a person or entity enjoying such a procedural right will not, as a rule, where there is any type of procedural guarantee, have standing to bring proceedings contesting the legality of a Community act in terms of its substantive content. The precise scope of an individual's right of action against a Community measure depends on his legal position as defined by Community law with a view to protecting the legitimate interests thus afforded him (see, to that effect, Metro SB-Großmärkte v Commission, paragraph 13, and Fediol v Commission, paragraph 31). It follows that the line of argument put forward by the appellant is at variance with the letter and the spirit of the fourth paragraph of Article 230 EC (see, to that effect, the order of the President of the Court of 12 October 2000 in Case C-300/00 P(R) Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council [2000] ECR I-8797, paragraph 39)*[22]

26. The Court concluded that the mere fact of relying on the existence of a procedural guarantee before the Community judicature does not mean that an action will be admissible where it is based on pleas alleging the infringement of substantive rules of law. Thus, even assuming that WWF-UK Ltd enjoyed procedural guarantees in its own right, that would not mean that it was entitled to challenge the substance of the contested regulation.

27. It is difficult to understand why this case is being introduced to advance the argument that members of the public generally (non-interested parties), ought to have access to justice under Article 9(2) by reference to the objective of the Aarhus Convention. The judgment is authority for the proposition that in an action for annulment pursuant to Article 230 EC, a person who has standing in the sense of being "individually concerned" to protect a procedural right, will not as a general rule be entitled to challenge the substance of a contested measure. It appears that the Rechtbank suggests by analogy that allowing members of the public access to justice for an assessment of a possible breach of procedural requirements and public-participation

[22] Paragraphs 43-44.

rights will not lead to opening Pandora's Box, in the sense that a person can be confined in their pleas.

28. However, this case concerned the interpretation of Article 230(4) EC and the propositions of law expressed therein by the Court are tied to that Article and incapable of being applied to an analysis of a very different provision – Article 9(2) of the Aarhus Convention. Furthermore, it is of note that prior to the question of procedural versus substantive challenges, the ECJ assessed the standing of WWF-UK Ltd pursuant to the test in the text of Article 230(4), and associated case law, which requires "individual concern". By the same token, it is submitted that the text of Article 9(2) should be adhered to, and that only "the public concerned" are guaranteed access to justice under that provision.

29. The Rechtbank also highlights the judgment in ***Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland***[23] as authority for the proposition that *"it is very important that individuals should be able to assert their public-participation rights".* ***Kraaijeveld*** concerned with a national law which certain types of projects from the requirement for EIA. The question referred to the court was whether this law was compatible with the original EIA Directive (Directive 85/337/EEC). In summary, the Court decided that excluding a requirement for EIA in respect of entire categories of projects exceeds the limits of the Member State's discretion unless the project category is created with the characteristic of not being likely to have significant effects on the environment.

30. The Court considered whether the national court was required to raise of its own motion the question whether an environmental impact assessment should have been carried out pursuant to the directive, and observed:

> *As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of*

[23] Case C-72/95.

its discretion set out in the directive (Verbond van Nederlandse Ondernemingen, paragraphs 22 to 24).[24]

31. The above passage encapsulates a very general and uncontroversial proposition of EU law to the effect that individuals should be able to rely on EU Directives before their national courts, and that national courts should be able to determine whether national laws have kept within the limits of the discretion afforded to them under the relevant Directive. The decision does not support the proposition that the Court should alter well-established standing requirements under the Aarhus Convention.

Aarhus Convention Compliance Committee Reports Cited by the Referring Court

32. The Rechtbank states: *"It does not seem unreasonable to the rechtbank that access to justice should have to comply in full with the objective pursued by the Aarhus Convention in the following respect; ensuring public-participation rights and not only in regard to the public concerned"*. The Rechtbank refers to two reports from the Aarhus Convention Compliance Committee. However, neither report supports the proposition that access to justice under Article 9(2) should be granted to members of the public generally, as opposed to the members of the public concerned, as those terms are defined under the Aarhus Convention.

33. In its Report on the Compliance by **Lithuania** with its obligations under the Convention, the ACCC considered a complaint by a community association that the Lithuanian authorities failed to comply with provisions of Article 6 of the Convention with respect to decision-making on the establishment of a landfill.

34. The focus of this Report was squarely on public participation under Article 6 rather than access to justice. The Committee concluded that the public were not properly notified about the nature of possible decisions, and that they were not informed in an effective manner, contrary to Article 6(2) of the Convention. In addition, the time frame of only 10 working days for getting acquainted with the documentation, including the EIA report, and for preparing to participate in the decision-making process concerning a major landfill, was not "reasonable" under Article 6(3). Reliance solely on the developer for providing for public participation was not in line with Article 6(5). Article 6(7) was also breached.

[24] In paragraph 56, referred to by the Rechtbank.

35. On access to justice, the communicant alleged that it had no opportunity to challenge the decision on the landfill due to the fact that it had not received the relevant decisions. In particular, the communicant maintained that, due to inadequate notification, it did not have a chance to challenge the decisions within the time period prescribed by Lithuanian law (one month). It brought this matter before the national courts and they initially refused to accept the claim due to lack of convincing evidence for being unable to submit a claim within the period prescribed. On appeal, as the communicant was not able to establish the exact time when it finally obtained the information about the decisions, the court was unable to ascertain whether the one month period was met and the communicant was not able to pursue the matter.

36. The ACCC remarked as follows:

> *The communicant has attempted to make use of the domestic remedies available at the early stage. The Committee finds some merit in the argument of the communicant that deficiencies in applying public participation procedures effectively deprived it of its rights under article 9, paragraph 2, of the Convention, i.e. the possibility to challenge the decisions taken at the early stage of decision-making*.[25]

37. In the one paragraph of the Report which examined the access to justice aspect of the claim, the ACCC concluded:

> *The Committee notes the communicant's claim that its right to initiate the review procedures in accordance with article 9, paragraph 2, was compromised by the manner and the timing of the notification of the decisions on the detailed plan and the EIA. However, the Committee also notes that the court was ready to reinstate the time limit for appeal from the time that the communicant first learned of the decisions and that the communicant did not pursue this possibility. The Committee therefore does not consider that there is enough evidence to reach the conclusion that there was a failure to implement article 9, paragraph 2, of the Convention.*[26]

38. The Committee found clear deficiencies in the public participation procedures, and saw "some merit" in the argument that such problems frustrated the access to justice rights of the communicant in this case. It is axiomatic that if aspects of public participation rights, such as notification are compromised, then parties may be at a disadvantage in accessing justice. This is an entirely logical proposition.

39. Furthermore, the Committee was prepared to consider that Lithuania might also be in breach of Article 9(2) as well as, and indeed consequent upon, being in breach of Article 6. However, notwithstanding its findings as regards inadequate notification, the

[25] Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 63.
[26] Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 87.

Committee did not purport to impose a rule that any "member of the public" must be able "to have recourse to the courts for an assessment of a possible breach of procedural requirements and public participation rights, as provided for in Article 6". Article 9(2) contains a clear textual limitation; national legislation must provide access to justice in the sense of administrative or judicial review of decisions on specific activities for "the public concerned".

40. The second Report referred to by the Rechtbank, which examined compliance by **Belarus** with its obligations under the Convention[27] was also primarily concerned with public participation rights. The Committee found that in relation to a hydropower plant project, Belarus had not provided for adequate, timely and effective public notice, and therefore failed to comply with Article 6(2); that it did not provide the public with sufficient possibilities to submit any comments, information, analyses or opinions relevant for the HPP project, and thus failed to comply with Article 6(7); and by not informing the public promptly about the environmental experts conclusions, it failed to comply with Article 6(9). The Report does not refer to access to justice or Article 9(2).

41. On the contrary, the ACCC has consistently upheld the standing requirements in Article 9(2). In its Report on a Communication involving Germany, the Committee first noted the link between Articles 6 and 9(2):

> *The Committee recalls that article 9, paragraph 2, of the Convention is directly linked to article 6, which grants the rights of the **public concerned** to participate in permitting procedures for specific activities. The Parties must ensure that in such procedures, members of the **public concerned** can fully exercise their participatory procedural rights set out in article 6 of the Convention* (emphasis added).[28]

42. The Committee had to consider the allegation that the national courts systematically refused to review applications as non-admissible or ill-founded when the applicants alleged that procedural rights under Article 6 of the Convention had been infringed. The communicant did not sufficiently substantiate the allegation. However, the Committee remarked:

> *The Committee nevertheless raises a concern about the lack of clarity of the legal system of Party concerned as to whether a violation of the procedural rights prescribed under article 6 would be considered as a fundamental error of procedure to allow for fulfilment of the rights prescribed under article 9, paragraph 2, of the Convention. The Committee emphasizes that if German courts in practice were to deny review of the appeals and/or arguments of members of the public concerned, including environmental NGOs, regarding the procedural legality of*

[27] Belarus ACCC/C/2009/37; ECE/MP.PP/2011/11/Add.2, 24 September 2010.
[28] Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, para. 82

decisions subject to article 6, this would amount to non-compliance with article 9, paragraph 2.[29]

43. This passage shows that the Committee notes the effect on Article 9(2) access to justice which downgraded or diminished Article 6 participation rights can have. However, it should be observed that the Committee referred to *"appeals and/or arguments of members of the* ***public concerned****, including environmental NGOs"* in the context of a breach of Article 9(2). The ACCC has never once mandated or suggested that Article 9(2) standing requirements can be overlooked. (Emphasis added).

Consideration of the Relevant Dutch Law

44. Dutch law stipulates that one must be an interested party in order to have access to justice. Whilst the reference does not explain fully the concept of an "interested party" under Dutch law, the imposition of some limit on those who may seek the review of a decision to which Article 6 applies is clearly within the bounds of Article 9(2), which does not require "the public" generally to have such access. Ireland does not propose to comment further on the specific provisions of the applicable Dutch law and whether they are consistent with Article 9(2). What is significant as a matter of principle is that Article 9(2) does not require a general right of action to be vested in the public (*actio popularis*) and consequently does permit national legislation to confine such a right to "the public concerned".

The Scope of Review for the "Public Concerned"

45. In the second limb of the second question, the referring Court asks whether it is important that "*the public concerned (interested parties) should have access to justice in that respect and can also raise substantive complaints before the courts".* With the words *"in that respect"*, it is assumed that the referring Court means "*in the event of an alleged infringement of the procedural requirements and public-participation rights applicable";* a scenario detailed in the first limb of the question.

46. This question can be sub-divided in two. It is important that the public concerned have access to justice and this is envisaged in the clear wording of Article 9(2) of the Aarhus Convention. However, Article 9(2) of the Convention does not give a right to any person to raise substantive complaints before the Court. The full text of Article 9(2), set out at

[29] Ibid, at para. 90.

paragraph 6 above, provides that the public concerned should have a review mechanism "*to challenge the substantive and procedural legality of any decision".*

47. The access to justice provisions of the Convention are clearly intended to provide a means of challenging the substantive and procedural legality of any decision, act or omission – not the substantive merits of the decision. Dealing with the substance of the decision is a matter for expert bodies, not the courts. As the Implementation Guide provides:

> *The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered*.[30]

48. If the substance of a law, including a law governing public participation in the decision making process, has been violated then a review of the substantive legality of the decision meets the requirements of the Convention. There is no entitlement to an appeal on the merits.

49. The Compliance Committee interpreting the Convention has always adhered to the "substantive and procedural legality" framework, and for this Court to hold that a broader review involving the raising of "substantive complaints" is possible would be to distort the wording of the Aarhus Convention and its aims and intentions.

50. For example, in a Report concerning the United Kingdom, the Committee noted that Article 9(2) "*addresses both substantive and procedural legality".*[31] The Committee considered in detail the nature of judicial review in the UK as a means to review the substantive legality of decisions, acts and omissions within the scope of the Convention.[32] Judicial review in the UK tradition, as in Ireland, does not provide for a substantive appeal on the merits. Rather, as the UK submitted and the Committee accepted, a right to challenge the "substantive and procedural legality" of a decision precisely reflects the scope of judicial review in the law of England and Wales. Thus, the Committee did not accede to the arguments that there should be opportunities to challenge various aspects relating to the substantive merits of the case.[33]

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[30] The Aarhus Convention: An Implementation Guide, second edition 2014, at 196.
[31] United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 123.
[32] Ibid, at para. 127.
[33] Ibid, at para. 26.

51. The views of the ACCC as regards judicial review complying with the requirements of Article 9(2) were echoed by the CJEU in Case C-71/14 ***East Sussex County Council v Information Commissioner*** which concerned Directive 90/313/EEC and 2003/4 on access to information on the environment reflecting Articles 4 and 9(1) of the Aarhus Convention. The specific issue concerned the fact that under UK law the "reasonableness" of the charge imposed for supplying certain types of environmental information was subject only to limited administrative and judicial review. The Court held that provided that the review complied with the principles of equivalence and effectiveness and allowed for a consideration of whether the conditions in the directive had been complied with, "limited administrative and judicial review as provided for in English law" was acceptable. It stated at paragraphs 57 and 58:

> *In the present case, the referring tribunal observes that the wording of regulation 8(3) of the EIR 2004, interpreted in accordance with the principles of English administrative law, limits the extent of administrative and judicial review to the question whether the decision taken by the public authority concerned was irrational, illegal or unfair, with very limited scope for reviewing the relevant factual conclusions reached by that authority.*
>
> *In this respect, the Court has held that the exercise of the rights conferred by EU law is not made impossible in practice or excessively difficult merely by the fact that a procedure for the judicial review of decisions of the administrative authorities does not allow complete review of those decisions. However, also according to that case-law, any national judicial review procedure must none the less enable the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgments in Upjohn, C-120/97, EU:C:1999:14, paragraphs 30, 35 and 36, and HLH Warenvertrieb and Orthica, C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraphs 75 to 77). Judicial review that is limited as regards the assessment of certain questions of fact is thus compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgment in HLH Warenvertrieb and Orthica, C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraph 79).*

Suggested Answers to Questions 1 and 2

52. Article 9(2) confers a right of access to a review procedure only on "members of the public concerned". Therefore, the language of the first question in speaking of the Aarhus Convention "precluding" a different standard is unhelpful and inappropriate. Article 3(5) and 3(6), establish that the Convention is a "floor, not a ceiling".[34]

[34] Article 3(5) provides:

> 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

Consequently, Member States are free to allow a broader category of persons to have standing than members of "the public concerned" as defined in the Convention, but the key point is that the Article 9(2) of Convention does not *require it.* Furthermore, it is submitted that the term "total exclusion" in the first question posed is superfluous and unnecessary. Finally, it is necessary for absolute clarity to refer to the definition sections of the Convention concerning *"the public"* and *"the public concerned"*.

53. Therefore, the answer to the first question should be:

European law, and in particular Article 9(2) of the Aarhus Convention must be interpreted as not requiring a right of access to justice for "the public", as defined in Article 2(4) of the Convention, insofar as the latter is broader than "the public concerned", as defined in Article 2(5) of the Convention.

54. Moving to the second question, the first limb is essentially an expansion of the first question, and as has been discussed extensively above: it is only the *"public concerned"* who have the right to a review under Article 9(2) although the national law of a Member State may confer broader standing to challenge environmental decisions. Therefore, question two should be answered as follows:

European law and, in particular, Article 9(2) of the Aarhus Convention cannot be interpreted as meaning that it follows therefrom that "the public", as defined in Article 2(4) of the Convention 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. Article 9(2) of the Aarhus Convention provides access to justice only for "the public concerned", as defined in Article 2(5) of the Convention.

Article 9(2) of the Aarhus Convention requires that the public concerned have access to justice to challenge the "substantive and procedural legality" of any decision, act or omission within the scope of the Convention; which challenge cannot be interpreted as extending to a full review of the substantive merits of the decision.

III. THIRD TO SIXTH QUESTIONS REFERRED

55. The summary provided by the referring Court groups these questions together, and it is proposed to follow that template. As a preliminary observation, while questions one and two concerned principally the position of the applicant LB, questions three, four and five concern the second, third and fourth applicants ("the foundations"); who although they are "interested parties" under Dutch law, failed to participate at the early stage. Question 6 refers back to "the public" and so concerns the position of LB.

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decision-making and wider access to justice in environmental matters than required by this Convention.

Article 3(6) provides:

This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

Context for Referral

56. The foundations did not submit any objections to the draft permit. The defendant and the permit holder argue that their actions should be declared inadmissible for that reason. Under Dutch law, the foundations (all of which are environmental NOGs) are interested parties. However, Article 6:13 of the Awb provides that an interested party who may reasonably be criticised for not having expressed a view during the preparatory procedure cannot bring an action before the administrative court. The phrase *"who may reasonably be criticised"*[35] is interpreted in national case law as meaning that, if the legal requirements for public inspection and notification are fulfilled, so that everyone has had the opportunity to give their reaction to the draft decisions, a failure to do so is not excusable.

57. The Rechtbank questions *"whether that link between public participation in decision-making and access to justice — by virtue of which legal protection does not have an independent role and function — is compatible with the [European] legislation ….and, in particular, the Aarhus Convention".*[36]

Public Participation and Access to Justice – Textual Analysis of Article 9(2) of the Aarhus Convention

58. Article 9(2) of the Convention establishes two criteria in respect of standing. First one must be a member of the "public concerned", a term defined in Article 2(5). Secondly, one must either have either a sufficient interest or maintain impairment of a right under national law (see conditions (a) and (b) set out above in the full text of Article 9(2)).

59. Article 9(2) allows sufficiency of interest and impairment of a right to be determined *"in accordance with requirements of national law".* However this discretion is conditioned by two limitations in the text of Article 9(2). First, the definition of what constitutes a sufficient interest or impairment of a right must be consistent *"with the objective of giving the public concerned wide access to justice within the scope of the Convention".* It is clearly not permissible to abuse this discretion in order to limit the entitlement of members of the public concerned to seek access to justice.

[35] 'aan wie redelijkerwijs kan worden verweten'
[36] Paragraph 9 of the Request for a Preliminary Ruling.

60. Second, Article 9(2) states that NGOs meeting the requirements of Article 2(5) are deemed to have a sufficient interest, and to have rights capable of being impaired. Thus, it is important to consider what Article 2(5) states about NGOs, which is that they will be deemed to have an interest if they are both *"promoting environmental protection and meeting any requirements under national law".*

61. Thus it is permissible for the "requirements of national law" to include a requirement for the public concerned, including both individuals with sufficient interest and NGOs, to have participated in the procedure leading up to a decision, prior to seeking review of that decision.

62. In the case of individuals such as LB, Article 9(2) allows sufficiency of interest and impairment of a right to be determined *"in accordance with requirements of national law",* so long as this is consistent *"with the objective of giving the public concerned wide access to justice within the scope of the Convention*." In the case of the foundations, as they must meet the requirements in Article 2(5) in order to have standing under Article 9(2), and as the former article permits the national law requirements, so too can the national law impose a prior participation requirement.

63. In relation to Article 2(5), the Implementation Guide states:

> *Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention's principles, such as nondiscrimination and the avoidance of technical and financial barriers. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary*.[37]

64. In respect of Article 9(2), in a Report relating to Belgium, the Committee stipulated that the objective of wide access to justice was paramount:

> *Article 9, paragraph 2, applies to decisions with respect to permits for specific activities where public participation is required under article 6. For these cases, the Convention obliges the Parties to ensure standing for environmental organizations. Environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it*

[37] The Aarhus Convention: An Implementation Guide, second edition 2014, at 58.

> *must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention*.[38]

65. In that regard, the national law requirement ought to be a reasonable, legitimate and fair one. This shall be considered further below.

66. The referring Court does not point to any ACCC reports where it was held that prior participation could not be a legitimate requirement. The Implementation Guide provides the following guidance:

> *Article 6 has provisions applying to the "public" as well as the "public concerned" (paragraphs 7 and 9). 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. Yet, it could well be too restrictive to require that only persons who participate in the decision-making procedure would be granted access under article 9, paragraph 2.*[39]

67. Thus it is envisaged that a member of *"the public"* can become a member of *"the public concerned"* by virtue of participating in the decision-making procedure. This is an acknowledgement that it is open to national laws to require prior participation in order to demonstrate sufficient interest. The Guide acknowledges that the imposition of a mandatory requirement of prior participation in all circumstances may well be too restrictive. However, this does not preclude such a requirement in principle, provided that provision is made for the exclusion of the requirement in appropriate cases.

68. Whether or not a prior participation requirement will be too restrictive depends on the nature of the law in question, along with analysis of other requirements. For instance, are persons or NGOs automatically excluded if they have not participated in the decision, or is there some discretion to excuse their failing? In the case of individuals, can a lack of participation be overlooked if one lives in reasonably close physical proximity to the development in question, or if one has an established connection with a particular amenity value which might arguably be impaired by the proposed development?

69. It is undoubtedly important that national courts should interpret national standing requirements consistent with the objective of giving the public concerned wide access to justice. However, this does not equate to an obligation to remove a reasonable prior

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[38] Belgium ACCC/C/2005/11**,** ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 27.
[39] The Aarhus Convention: An Implementation Guide, second edition 2014, at 195.

participation requirement, particularly where such a requirement is a feature of national law in other areas (principle of equivalence).

Case Law Cited by the Referring Court and Relevant to these Questions

70. The referring Court holds that it appears to follow from the judgment of the Court of Justice in ***Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*** *v* ***Bezirkshauptmannschaft Gmünd***,[40] *"that the effective exercise of rights from the administrative procedure stage onwards may be mandatory under national law and that this need not necessarily of itself be at variance with European law".*

71. This case concerned a review of Austrian legislation which did not allow ENGOs to have "party" status in administrative procedures outside the scope of the EIA Directive for compatibility with Article 9(3). It is thus of limited application to the question posed. The case concerned national law implementing Directive 2000/60/EC (the Water Framework Directive). Pursuant to the restrictive national procedural rules, an environmental organisation such as Protect could not obtain the status of a party to the procedure for the purpose of participating.

72. The permit was granted, and Protect then brought an action against the decision, alleging an infringement of Article 9(3) of the Aarhus Convention and the provisions of the Water Framework Directive. The national court rejected the action on the basis that Protect lost its party standing by failing to bring its interventions in the administrative procedure in good time. On referral the CJEU found the Austrian law to be deficient in that Article 9(3) in conjunction with article 47 of the Charter of Fundamental Rights required that a recognised NGO must be able challenge a decision which might violate article 4 of the Water Framework Directive.

73. The Court also had to consider paragraph 42 of the AVG,[41] which provided that a person could lose their status as a party to a hearing if they failed to submit objections with the authority during business hours no later than the day before the beginning of the hearing or during the hearing.

74. As the referring Court has noted, the Court acknowledged that such rules regarding standing in the Member States could in principle serve legitimate interests:

[40] Case C-664/15.
[41] The Allgemeines Verwaltungsverfahrensgesetz (General law on administrative procedure).

> *In principle, Article 9(3) of the Aarhus Convention does not preclude a rule imposing a time limit, such as the one set out in Paragraph 42 of the AVG, obliging the effective exercise, from the administrative procedure stage, of the right of a party to the procedure to submit objections regarding compliance with the relevant rules of environmental law, since such a rule may allow areas for dispute to be identified as quickly as possible and, where possible, resolved during the administrative procedure so that judicial proceedings are no longer necessary.*[42]

75. Being an ENGO, Protect could not become a party to the procedure under Austrian law. Thus, to use Protect's failure to submit its intervention in a timely fashion would be unfair in the sense of requiring that organisation to fulfil an obligation that it could not. For those reasons, although the imposition of a precondition requiring submissions to have been made on time and within the decision making process was in principle acceptable, there was a breach of Article 9(3) of the Convention on the particular facts of the case.

76. The referring Court notes that the judgment concerns a different procedure to the public consultation procedure which was at play in the case giving rise to the reference, and questions whether the Court's acceptance of rules "*obliging the effective exercise, from the administrative procedure stage, of the right of a party to the procedure to submit objections"* applies to participation in the light of Article 6 of the Aarhus Convention. It points to paragraph 61 of the decision which provides:

> *However, the question of whether Protect also derives from the Aarhus Convention a right to participate in the administrative stage of the permit procedure in order to be able, in the context of that procedure, to allege a potential infringement of Article 4 of Directive 2000/60, is a separate question that must be assessed solely in the light of Article 6 of that convention, a provision that, as the Court has noted, forms an integral part of the EU legal order (judgment of 8 November 2016, Lesoochranárske zoskupenie VLK, C-243/15, EU:C:2016:838, paragraph 45).*

77. However, this observation is largely irrelevant, as the case is not about the right of LB or the foundations to participate in the administrative stage of the procedure. Their right to participate is undisputed and under Dutch law they could have participated; what is in issue is the legal consequence of their having failed to do so.

78. Insofar as the judgment has any relevance, the Court has indicated that national procedural rules which would result in party losing party status (and therefore concomitant rights to judicial review) for failure to timely intervene do not *a priori* run afoul of article 9(3) and 9(4). Any such rules and their application are to be reviewed

[42] Ibid, at para 88.

on a case-by-case basis, and in this case they were only disallowed as they represented unfair and impossible standards.

79. The referring Court also refers to the case of ***Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd***.[43] This case concerned the interpretation of Article 10a of the original EIA directive.[44] The ECJ was asked via the preliminary reference procedure to consider Sweden's Environmental Act, which imposed conditions on the right of non-profit making associations to appeal against judgments and decisions on development consent.

80. One of the questions asked of the referring court was whether Article 10a of Directive 85/337 implies that members of the public concerned are to have access to a review procedure to challenge a 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, even where they have had the opportunity to participate in the court's examination of the question of development consent and to express their views.

81. Sweden had essentially argued that because small, locally-based associations had the right to participate in the decision-making process, it was not necessary for them also to have access to a review procedure in respect of the outcome of that process. The Court rejected this argument, holding:

> *The fact that development consent for housing electric cables and groundwater abstraction such as that at issue in the main proceedings, which is a decision within the meaning of Article 10a of Directive 85/337, is given by a court exercising administrative powers does not prevent an association fulfilling the conditions set out in paragraph 35 of this judgment, and in accordance with the detailed rules laid down by national law, from exercising its right of access to a review procedure in order to challenge that decision.*
>
> *First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore,*

[43] Case C-263/08.
[44] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. This was amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, to align the provisions on public participation with the Aarhus Convention. Of course, the initial Directive of 1985 and its amendments were codified by Directive 2011/92/EU. Directive 2011/92/EU was amended in 2014 by Directive 2014/52/EU.

> *participation in the decision-making procedure has no effect on the conditions for access to the review procedure.*
>
> *Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, 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.*[45]

82. The Court rejected the idea that as certain NGOs had an entitlement to make submissions to the decision-making body, this could be a *justification* for excluding them from the review procedure applicable to decisions of that body. However, the Court of Justice did not intend to lay down a bright-line rule that there can be no prior participation requirement – and this was simply not in issue in the case.

Consideration of the Relevant Dutch Law on Prior Participation and its Interpretation

83. For the reasons discussed above, it is submitted that the imposition of a reasonable prior participation requirement is permissible under existing law. Furthermore, there are many principled reasons for imposing a prior participation requirement under national law. Such a requirement encourages all interested parties to ventilate their concerns at the earliest possible stage, in order that the issues of concern are identified and discussed from the outset. This can help avoid or least narrow the scope of very costly litigation at the later stage. Whilst access to justice is an important element in the overall structure of the Aarhus Convention, the pursuit of litigation should not be allowed to become a substitute for participation in the decision making process itself.

84. Article 6:13 of the Awb provides that an interested party who may reasonably be criticised for not having expressed a view during the preparatory procedure cannot bring an action before the administrative court. Therefore, a failure to participate in the permission granting process does not automatically exclude an interested person from having standing. This distinction is notable, as presumably, there is scope for interested parties to argue that the legal requirements for public inspection and notification have not been fulfilled, and that the interested party did not have the opportunity to give their reaction to the draft decisions. Therefore, it seems, although further information is required, that a person might successfully argue that their failure to participate during the preparatory procedure is indeed excusable.

[45] Ibid, at 37-39.

85. Ireland cannot comment on how this legal provision has been interpreted and applied in Dutch case law, save to observe that in principle it represents the type of legitimate and fair criterion which is permissible to maintain as a national law requirement. It is accepted that in determining whether it is reasonable to criticise a person for non-participation in the decision making process, the national court must be able to consider whether the requirements of European Law have been complied with (see **East Sussex** discussed at paragraph 51 above).

86. In ***Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others***[46] in the context of an analysis of Directive 2011/92*,* the Court stated that Member States have *"significant discretion to determine what constitutes 'sufficient interest' or 'impairment of a right'".* However, the Court also cautioned:

> *[I]t is apparent from the wording of Article 11(3) of Directive 2011/92 and the second paragraph of Article 9(2) of the Aarhus Convention, that that discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned.*[47]

87. It is important to stress that the access to justice limb of the Convention does not impose an autonomous European or international law requirement on Member States. Instead, it allows Member States to maintain their existing standing rules, provided that they are not so restrictive as to prevent *"wide access to justice"*.[48] Furthermore, the principles of equivalence and effectiveness also condition the autonomy of Member States. National standing rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

88. In conclusion, national standing rules must be consistent with broad access to justice. Furthermore, in interpreting national standing rules, the courts of Member States are required to ensure that those rules meet the *"wide access to justice"* objective, and to respect the principles of equivalence and effectiveness. A requirement that if a party may "*reasonably be criticised"* for failure to participate in the decision-making stage they may be blocked from later challenge does not in the circumstances appear to be an illegitimate one, so long as the national court ensures that the rule meets the wide access to justice standard in its implementation.

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[46] Case C-570/13.
[47] Ibid, at paras 38-39.
[48] See also *Commission v Ireland* C-427/2007, at paras 82-83.

Suggested Answers to Questions 3, 4, 5 and 6

89. For the foregoing reasons, the suggested response to the third question is:

European law and, in particular, Article 9(2) of the Aarhus Convention cannot 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. It is permissible for Member States to maintain a reasonable prior participation requirement as part of their national law requirements for standing.

90. It is submitted that the fourth question should be answered as follows:

European law and, in particular, Article 9(2) of the Aarhus Convention cannot 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.

91. It is submitted that the fifth question should be answered as follows:

The national court is free 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" for failure to participate in the public preparatory procedure, so long as such opinion is consistent with the objective of giving the public concerned wide access to justice, and respects the principles of equivalence and effectiveness.

92. Question 6 reverts back to a consideration of the legal position of *"the public"* as opposed to *"the public concerned"*, and asks to what extent are the answers to Questions 3, 4 and 5 different in relation to the public (any person), in so far as that is not the public concerned (interested parties). As has already been extensively argued in Section II in relation to Questions 1 and 2, Article 9(2) of the Aarhus Convention should not be interpreted as requiring access to justice for *"the public"*, as its clear terms only require a review procedure for *"the public concerned"*. Therefore, it is submitted that as the underlying premise for Question 6 is not accepted, there is no necessity to re-consider Questions 3, 4 and 5.

Dated 29 April 2019

Signed: T Joyce
Agent for Ireland
On behalf of M Browne, Chief State Solicitor

Signed: G Hodge
Agent for Ireland
On behalf of M Browne, Chief State Solicitor