LEGAL UPDATE

European Court of Justice: domestic administrative procedural law contrary to the Aarhus Convention

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The judgment of the Court of Justice of the European Union (the "CJEU") of 14 January 2021 had been eagerly awaited. In this judgment, the CJEU found that not submitting observations may not impede interested parties having access to justice if the Aarhus Convention applies. Non-interested parties that have taken part in the preparatory administrative proceedings must also have access to justice. The CJEU thus broadly follows the opinion of Advocate-General Bobek. As a result, some aspects of Dutch administrative procedural law are contrary to the Aarhus Convention.

In our previous Legal Update, we discussed Advocate-General Bobek's opinion and the background to the dispute. In this Legal Update we discuss the CJEU's judgment and the implications it has for Dutch administrative procedural law. Before discussing the merits of the judgment, we will first briefly outline the legal framework and the background to this judgment.

The current legal framework in the Netherlands

Certain environmental permit applications, as specified in section 3.10 of the Environmental Law (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*, or '*Wabo*') must be prepared via uniform public preparatory procedure as referred to in part 3.4 of the General Administrative Law Act ('*Awb*').

Under the uniform public preparatory procedure, the administrative body must first prepare a draft decision regarding the permit application and make it available for inspection (s.3:11(1) *Awb*) so that anyone can submit their observations (s.3:15(2) *Awb* in conjunction with s.3.12(5) Wabo). Next, an appeal may be filed with the court by those who are both interested parties within the meaning of s.1:2 *Awb*, pursuant to s.8:1 Awb *and* have taken part in the uniform public preparatory procedure (i.e. have submitted observations). This channelling of the appeal proceedings is also known as the 'funnel effect' of administrative law, or, more specifically, the 'party trap'. A party must join the proceedings at an early stage in order to maintain its 'right to appeal'.

Certain applications for environmental permits moreover fall within the scope of the Aarhus Convention. The Aarhus Convention imposes rules on access to information, public participation in the decision-making and access to justice in *environmental matters*. Such applications are subject to the procedures for public participation provided by article 6(2) to (11) of the Convention. Article 9 of the Convention moreover regulates access to justice.

Background to the judgment

At the end of 2018, the single-judge division of the Limburg District Court referred six questions for a preliminary ruling to the CJEU. At issue was an environmental permit that the municipality of Echt-Susteren (Netherlands) had granted for the construction of a pigsty. The claimants, a natural person and three environmental foundations, submitted that their appeal should have been declared admissible even though they had not submitted observations.

The District Court wanted to know from the CJEU, among other things, whether *not* being an interested party meant that the claimant (natural person) did not have any access at all to justice in light of the Aarhus Convention. The District Court also wanted to know whether having to exercise rights in the public participation procedure is permitted in light of the Convention or whether that

obligation on interested parties constitutes an unlawful impediment to access to justice. Previously, the Administrative Jurisdiction Division of the Council of State ('the Division') had found that the Aarhus Convention did not oppose the application of s.6:13 *Awb*.

The CJEU's ruling
The following two important conclusions can be drawn from the judgment:

1. Interested Parties (referred to as the 'public concerned' in the Aarhus Convention) may not be denied access to justice in Aarhus cases, not even if they had not previously submitted observations. Although the CJEU only mentions non-governmental organisations in this context, the foregoing is likely to apply to natural persons who are interested parties too, according to the Case Law.
2. Non-interested parties (referred to as the 'public' in the Aarhus Convention) that are entitled to participate in decision-making on the grounds of domestic law *and* that have availed themselves of that right, must also have access to justice. In a nutshell, in that case participation in the public participation procedure may be imposed as a requirement for access to justice. With reference to earlier case law, the CJEU finds that such a requirement is a justified limitation on the right to an effective remedy before the court as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (para. 66). NB: The Netherlands provides more rights to participate in decision-making, i.e. to everyone, than required by the Aarhus Convention.

Conclusion
It is now for the Limburg District Court to issue a final ruling. The judges have to apply the judgment. While the previous opinion of Advocate-General Bobek did not yet bind the Dutch administrative courts, the CJEU's judgment does. In other words, Dutch administrative courts will have to act in accordance with the CJEU's judgment with immediate effect.

The Dutch legislature also needs to align the Dutch administrative procedural law applicable to Aarhus cases with the CJEU's judgment.

It is not jumping to conclusions to state that the judgment is momentous for Dutch environmental law. Broadly speaking, the judgment means that the appeals of more appellants will be declared admissible in cases put to the administrative court in relation to environmental activities to which the Aarhus Convention applies. Whether, in specific proceedings, a case is an Aarhus case will be scrutinised closely.

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