Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 3 March 2022 [1]

Case C-873/19

Deutsche Umwelthilfe eV
v
Bundesrepublik Deutschland,
joined party:
Volkswagen AG

(Request for a preliminary ruling
from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court,
Schleswig-Holstein, Germany))

(Reference for a preliminary ruling – Environment – Aarhus Convention – Access to justice – Article 9(3) – Charter of Fundamental Rights of the European Union – Article 47, first paragraph – Right to effective judicial protection – Approved environmental association – Standing to bring an action before a national court against EC type-approval granted to vehicles – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 5(2) – Diesel engine – Reduction of nitrogen oxide emissions limited by a 'temperature window' – Defeat device – Authorisation of such a device where the need is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle – State of the art)

I. Introduction

1. In the case in the main proceedings, the national EC type-approval authority took the decision to authorise, for vehicles manufactured by the motor vehicle manufacturer Volkswagen AG and equipped with a Euro 5 generation diesel engine, software installed in the electronic engine controller which, under certain external temperature conditions, reduces the recirculation of exhaust gases, which results in an increase in nitrogen oxide (NOx) emissions.

2. Deutsche Umwelthilfe eV, an approved environmental association, brought an action against that decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany), claiming that that software constitutes an unlawful 'defeat device', for the purposes of Article 5(2) of Regulation (EC) No 715/2007. [2]

[1] Original language: French.

[2] Regulation of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1), as amended by Commission Regulation (EC) No 692/2008 of 18 July 2008 (OJ 2008 L 199, p. 1) ('Regulation No 715/2007').

3. According to the referring court, Deutsche Umwelthilfe does not have standing to bring proceedings under national law to challenge that decision. The referring court therefore asks the Court, first, whether Article 9(3) of the Aarhus Convention,[3] read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), requires that such an association be entitled to challenge, before the national courts, an administrative decision granting EC type-approval of vehicles in the light of Article 5(2) of Regulation No 715/2007.

4. Secondly, if the answer is in the affirmative, the referring court seeks to ascertain whether the 'need' for a defeat device, within the meaning of Article 5(2) of that regulation, is to be assessed according to the state of the art existing on the date of the EC type-approval of the vehicles concerned and whether account must be taken of other circumstances which may render such a defeat device permissible.

II. Legal framework

A. International law

5. Article 1 of the Aarhus Convention, entitled 'Objective', states:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

6. Article 2 of that convention, entitled 'Definitions', provides in paragraphs 4 and 5 thereof:

'4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;

5. "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 organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

7. Article 9 of that convention, entitled 'Access to justice', reads as follows in paragraphs 2 and 3:

'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,

[3] Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

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

…

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.'

B. European Union law

1. Regulation (EC) No 1367/2006

8. Article 1 of Regulation (EC) No 1367/2006,[4] entitled 'Objective', states in paragraph 1 thereof:

'The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as "the Aarhus Convention", by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

…

(d) granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.'

9. Article 2 of that regulation, entitled 'Definitions', provides in paragraph 1(f):

'For the purposes of this Regulation:

…

[4] Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

(f) "environmental law" means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems'.

2. Regulation No 715/2007

10. Recitals 1, 6 and 7 of Regulation No 715/2007 state:

'(1) … The technical requirements for the type approval of motor vehicles with regard to emissions should … be harmonised to avoid requirements that differ from one Member State to another, and to ensure a high level of environmental protection.

…

(6) In particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution. …

(7) In setting emissions standards it is important to take into account the implications for markets and manufacturers' competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions.'

11. Article 1 of that regulation, entitled 'Subject matter', provides in paragraph 1 thereof:

'This Regulation establishes common technical requirements for the type approval of motor vehicles (vehicles) and replacement parts, such as replacement pollution control devices, with regard to their emissions.'

12. Article 3 of that regulation, entitled 'Definitions', provides in point 10 thereof:

'For the purposes of this Regulation and its implementing measures the following definitions shall apply:

…

10. "defeat device" means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

13. Article 5 of that same regulation, entitled 'Requirements and tests', provides in paragraphs 1 and 2:

'1. The manufacturer shall equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with this Regulation and its implementing measures.

2. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall not apply where:

(a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle;

(b) the device does not function beyond the requirements of engine starting;

or

(c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.'

14. Annex I to Regulation No 715/2007, entitled 'Emission limits', lays down NOx emission limit values, in particular for Euro 5 generation vehicles, which are set out in Table 1.

3. Directive 2007/46/EC

15. Directive 2007/46/EC[5] was repealed by Regulation (EU) 2018/858,[6] with effect from 1 September 2020, pursuant to Article 88 of the regulation. However, in view of the date of the facts at issue, that directive remains applicable to the dispute in the main proceedings.

16. Article 1 of the directive, entitled 'Subject matter', stipulated:

'This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community.

…

Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV.'

[5] Directive of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 214/2014 of 25 February 2014 (OJ 2014 L 69, p. 3) ('Directive 2007/46').

[6] Regulation of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC (OJ 2018 L 151, p. 1).

17. Article 3 of that directive, entitled 'Definitions', provided in point 5:

'For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

…

5. "EC type-approval" means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI'.

18. Annex IV to that directive, entitled 'Requirements for the purpose of EC type-approval of vehicles' referred, in Part I, entitled 'Regulatory acts for EC type-approval of vehicles produced in unlimited series', to Regulation No 715/2007 with regard to 'emissions (Euro 5 and 6) light duty vehicles/access to information'.

C. German law

19. Paragraph 42 of the Verwaltungsgerichtsordnung (Administrative Court Rules),[7] in the version applicable to the dispute in the main proceedings ('the VwGO'), states:

'1. An action may seek to have an administrative measure set aside (action for annulment) or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoinder).

2. Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his or her rights have been impaired by the administrative measure or by the refusal or failure to act.'

20. Paragraph 113(1) of the VwGO provides:

'In so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure and, where appropriate, the decision following an appeal. …'

[7] BGBl. 1991 I, p. 686.

21. Paragraph 1(1) of the Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG- Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz) (Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC [8] (Law on actions in environmental matters)),[9] in the version applicable to the dispute in the main proceedings ('the UmwRG'), provides:

'This law shall apply to actions against the following decisions:

…

5. administrative measures or public law contracts authorising projects other than those referred to in points 1 to 2b pursuant to environmental provisions of Federal law, *Land* law or directly applicable acts of EU law; and

6. administrative measures concerning supervisory or control measures taken in order to implement or enforce the decisions referred to in points 1 to 5, intended to ensure compliance with the environmental provisions of Federal law, *Land* law or directly applicable acts of EU law.

This law shall also apply where, contrary to the provisions in force, a decision referred to in the first sentence has not been taken. …

…

The first and second sentences shall not apply where a decision within the meaning of this subparagraph has been adopted as a result of a decision of the administrative courts deciding a dispute.'

22. Paragraph 2(1) of the UmwRG is worded as follows:

'A domestic or foreign association recognised under Paragraph 3 may bring an action in accordance with the VwGO to challenge a decision within the meaning of the first sentence of Paragraph 1(1) or a failure to adopt such a decision, without being required to maintain an impairment of its own rights, where the association

(1) asserts that a decision referred to in the first sentence of Paragraph 1(1), or the failure to adopt that decision, is contrary to provisions which may be relevant for the purposes of the decision;

(2) asserts that it is affected by a decision referred to in the first sentence of Paragraph 1(1), or by the failure to adopt that decision, within its statutory field of activity of helping to achieve the objectives of environmental protection, and

(3) in the case of a procedure referred to in

   (a) points 1 to 2b of the first sentence of Paragraph 1(1), was entitled to participate in it;

8 Directive of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

9 BGBl. 2017 I, p. 3290.

(b) point 4 of the first sentence of Paragraph 1(1), was entitled to participate in it and, in that context, it expressed a view on the substance in accordance with the provisions in force, or it was not given the opportunity to express its view, contrary to the provisions in force.

In the event of an appeal against a decision referred to in points 2a to 6 of the first sentence of Paragraph 1(1), or against the failure to take that decision, the association must also rely on an infringement of provisions relating to the environment.'

23. Under Paragraph 25(2) of the Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung) (Regulation on the EC type-approval for motor vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles (EC motor vehicle type-approval regulation)),[10] in the version applicable to the dispute in the main proceedings ('the EG-FGV'):

'1. If the Kraftfahrt-Bundesamt [(Federal Motor Transport Authority, Germany) ("the KBA")] finds that vehicles, systems, components or separate technical units do not conform to the approved type, it may take the necessary measures under that directive which is applicable to the type concerned out of Directives [2007/46], 2002/24/EC [11] or 2003/37/EC [12] to ensure that production conforms to the approved type.

2. In order to remedy any deficiencies which have come to light and to ensure the conformity of vehicles already put into circulation, and of components or separate technical units, the Federal Motor Transport Authority may retroactively impose ancillary provisions.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

24. Volkswagen produced, inter alia, VW Golf Plus TDI motor vehicles, equipped with a Euro 5 generation EA 189-type diesel engine with a capacity of two litres ('the vehicles concerned'). Those vehicles have a valve for the recycling of exhaust gas.

25. The vehicles concerned initially contained software installed in the electronic engine controller which had a 'mode 0' and a 'mode 1' ('the switch system'). Mode 1 was used for the approval test for pollutant emissions, called the 'New European Driving Cycle' (NEDC), which is conducted in a laboratory. If the characteristic conditions of that approval test did not exist, mode 0 was applied and, in that case, the exhaust gas recirculation rate decreased. In real-world operation, those vehicles were almost exclusively in mode 0, meaning that they did not comply with the NOx limit values laid down in Regulation No 715/2007. It is apparent from the order for reference that the switch system was therefore a prohibited defeat device within the meaning of Article 5(1) and (2) of that regulation. In the EC type-approval procedure for the vehicles concerned, Volkswagen did not notify the KBA of the existence of that system.

10 BGBl. 2011 I, p. 126.

11 Directive of the European Parliament and of the Council of 18 March 2002 relating to the type-approval of two or three-wheel motor vehicles and repealing Council Directive 92/61/EEC (OJ 2002 L 124, p. 1).

12 Directive of the European Parliament and of the Council of 26 May 2003 on type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery, together with their systems, components and separate technical units and repealing Directive 74/150/EEC (OJ 2003 L 171, p. 1).

26. On 15 October 2015, the KBA adopted a decision, pursuant to Paragraph 25(2) of the EG-FGV, by which, inter alia, it ordered Volkswagen to ensure that the Euro 5 generation EA 189-type engines complied with the national and EU legislation in force. The KBA stated that the solutions had to be submitted to it for approval before they were implemented in practice.

27. In that context, Volkswagen updated the software installed in the electronic engine controller for the vehicles concerned ('the software at issue'). That software established a temperature window in which the exhaust gas recirculation rate, that is to say the portion of the exhaust gas redirected to the engine, is 0% when the external temperature is less than -9 °C, 85% when it is between -9 and 11 °C, and increases from 11 °C upwards to reach 100% from an external temperature of 15 °C ('the temperature window').

28. By decision of 20 June 2016 ('the contested decision'), the KBA granted authorisation for the software in question. In that regard, it held, inter alia, that there were no impermissible defeat devices, within the meaning of Regulation No 715/2007, taking the view that the defeat devices still present were permissible.

29. On 15 November 2016, Deutsche Umwelthilfe, an association which is entitled to bring legal proceedings under Paragraph 3 of the UmwRG, brought an administrative action against the contested decision, which had not yet been the subject of a decision on the date of the present request for a preliminary ruling.

30. On 24 April 2018, that association brought an action before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein), the referring court, seeking annulment of the contested decision. It argued that the software at issue created a defeat device which had to be regarded as unlawful for the purposes of Article 5(2) of Regulation No 715/2007 since it becomes active when the average temperatures existing in Germany, namely approximately 10.4 °C in 2018, are reached. According to the association, car manufacturers are, in principle, able to design engines which do not require a reduction, for technical reasons, of the performance of NOx emission control systems at average temperatures, that is to say under normal operating conditions.

31. The Bundesrepublik Deutschland (Federal Republic of Germany) has submitted that Deutsche Umwelthilfe does not have standing to bring proceedings against the contested decision and, consequently, that its action is inadmissible.

32. In the referring court's view, Deutsche Umwelthilfe does not, in the present case, have standing to bring proceedings under Paragraph 42(2) of the VwGO, under which, unless otherwise provided for by law, the action is admissible only if the applicant asserts that his or her rights have been impaired by the administrative measure at issue. There is no provision in the law which, unlike the system of individual actions on which that provision is based, may exceptionally confer standing on that association.

33. In particular, the case in the main proceedings does not fall within the scope of the UmwRG, as defined in Paragraph 1(1) of that law. Among the decisions which may be the subject of an action brought by an environmental organisation, the only category that could be envisaged in the present case is that referred to in Paragraph 1(1), first sentence, point 5, of the UmwRG, according to which that law is applicable to actions against administrative measures or public-law contracts authorising projects other than those referred to in Paragraph 1(1), points 1 to 2b, pursuant to environmental provisions of Federal law, *Land* law or directly applicable acts of

EU law. In that regard, according to the referring court, Article 5(2) of Regulation No 715/2007 is linked to the environment and is not merely a technical provision intended to regulate the internal market, as is apparent from recitals 1, 4 and 7 of that regulation.

34. However, Paragraph 1(1), first sentence, point 5, of the UmwRG concerns only administrative measures authorising 'projects'. The term 'project', within the meaning of that provision, was adopted in connection with Directive 85/337/EEC,[13] Article 1(2) of which defines a 'project' as 'the execution of construction works or of other installations or schemes' (first indent) and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (second indent). In that context, the national legislation concerns only fixed installations or measures which constitute direct intervention. Both the EC type-approval of vehicles and the amendment of the EC approval covered by the contested decision relate to the 'authorisation' of a product and do not constitute a 'project' within the meaning of national law, in so far as they do not relate to a fixed installation and do not involve any direct intervention in the natural surroundings and landscape.

35. Moreover, in the referring court's view, a broad interpretation of 'project', within the meaning of Paragraph 1(1), first sentence, point 5, of the UmwRG, does not allow a different conclusion to be reached. It is true that the Court has noted that it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.[14] However, because of the clear definition of 'project' in national law, the referring court is prevented from extending that concept in the present case to the authorisation for updating the software at issue in order to bring the vehicles concerned into line with the legislation in force.

36. Furthermore, it is not possible to apply the provisions of the UmwRG by analogy, on the basis of an unintended lacuna in the national legislation, that is to say an instance where the legislature had not identified or could not identify the interest in question because of a subsequent change in circumstances. In the course of the legislative process which led to the amendment of the UmwRG in 2017, which sought, inter alia, to adapt the law to the requirements of public international law resulting from Article 9(3) of the Aarhus Convention and to take account of the judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125), the question of the application of the concept of a 'project', within the meaning of Paragraph 1(1), first sentence, point 5, of that law, to product approvals was identified and discussed. In that regard, it was expressly stated that that law does not concern the product sector, including with respect to vehicles. Moreover, the explanatory memorandum to that law expressly states that the national legislature has refrained from transposing Article 9(3) of the Aarhus Convention into a general provision on the ground that that would constitute a source of major difficulties with respect to delimitation and legal uncertainty.

37. Nor can Deutsche Umwelthilfe claim that it has standing to bring proceedings derived directly from Article 9(3) of the Aarhus Convention. Since that provision, in itself, has no direct effect in EU law, as stated in the judgment of 20 December 2017, *Protect Natur-, Arten- und*

[13] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40). That directive was repealed by 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 (OJ 2012 L 26, p. 1).

[14] Judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 50).

Landschaftsschutz Umweltorganisation (C-664/15, EU:C:2017:987; 'the judgment in *Protect*'; paragraph 45), it does not constitute a legislative provision for the purposes of the first phrase of Paragraph 42(2) of the VwGO.

38. The referring court adds that Deutsche Umwelthilfe has no standing to bring proceedings against the contested decision under the second phrase of Paragraph 42(2) of the VwGO either, under which the applicant must assert that his or her rights have been impaired by the administrative measure at issue. The system of individual actions provided for in the VwGO is based on subjective rights. However, the case in the main proceedings does not appear to concern a subjective right of a natural person which has been infringed. Infringement of the prohibition on using defeat devices laid down in Article 5(2) of Regulation No 715/2007, which alone may be relevant in the present case, does not confer any subjective right on a natural person, since that provision is not intended to protect a group of persons who are decisively distinct from the general public.

39. According to the referring court, the outcome of the main proceedings therefore depends on whether Deutsche Umwelthilfe may claim standing to bring proceedings which is derived directly from EU law. In the light of the judgment in *Protect*, that standing to bring proceedings could result from the combined provisions of Article 9(3) of the Aarhus Convention and the first paragraph of Article 47 of the Charter. In that regard, the referring court points out that the case in the main proceedings does not fall within the scope of Article 9(2) of that convention since, first, the contested decision is not a decision governed by Article 6 of that convention and, secondly, there is no provision of national law, for the purposes of the first sentence of Article 9(2) of that convention, which would render other provisions of the convention applicable.

40. The referring court states that, as regards the consequences of the judgment in *Protect* for national procedural law, the national courts have given divergent decisions, which gives rise to its doubts as to whether EU law allows an approved environmental association to challenge, even beyond the possibilities of bringing an action already provided for by the UmwRG, an administrative authorisation for a product of the type at issue in the present case if the action of that association seeks to ensure compliance with provisions of EU environmental law which do not give rise to any subjective right.

41. In the event that the Court considers that an environmental association has standing to challenge the EC type-approval of vehicles, the referring court takes the view that the lawfulness of the contested decision depends crucially on the interpretation of Article 5(2) of Regulation No 715/2007, in particular with regard to the concept of the 'need' for a defeat device. That court asks whether vehicle manufacturers must take account of the current state of the art in order to ascertain whether a defeat device is in fact necessary in terms of protecting the engine against damage or accident and for the safe operation of the vehicle.

42. It was in those circumstances that the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 9(3) of the [Aarhus Convention,] in conjunction with Article 47 of the [Charter], to be interpreted as meaning that it must in principle be possible for environmental associations to challenge before the courts a decision approving the manufacture of diesel passenger cars with defeat devices that are potentially in breach of Article 5(2) of Regulation [No 715/2007]?

(2) If Question 1 is answered in the affirmative:

(a) Is Article 5(2) of Regulation [No 715/2007] to be interpreted as meaning that the yardstick for determining whether the need for a defeat device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle is, in principle, the state of the art, in the sense of what is technically feasible at the time when the EC type approval is granted?

(b) In addition to the state of the art, should account be taken of other circumstances which may lead to the permissibility of a defeat device, even though, according to the current state of the art alone, the "need" for such a device would not be "justified" within the meaning of Article 5(2)(a) of Regulation [No 715/2007]?'

43. Written observations were submitted by Deutsche Umwelthilfe, the KBA, Volkswagen, and by the European Commission. Those parties and interested parties also replied in writing to the questions put by the Court.

IV. Analysis

A. The first question referred for a preliminary ruling

44. By its first question, the referring court asks, in essence, whether Article 9(3) of the Aarhus Convention, read in conjunction with the first paragraph of Article 47 of the Charter, must be interpreted as meaning that an approved environmental association, which is entitled to bring legal proceedings under national law, must be able to challenge before a national court an administrative decision granting EC type-approval of vehicles which may be contrary to Article 5(2) of Regulation No 715/2007, a provision which prohibits, subject to certain exceptions, the use of defeat devices which reduce the effectiveness of emission control systems.

45. Under Article 9(3) of the Aarhus Convention, without prejudice to the review procedures referred to in Article 9(1) and (2), each party is to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

46. In order to answer this question, I shall examine the scope of Article 9(3) of the Aarhus Convention and then the implications of that provision when read in conjunction with the first paragraph of Article 47 of the Charter.

1. The scope of Article 9(3) of the Aarhus Convention

47. It should be noted at the outset that the case in the main proceedings concerns the possibility of *bringing legal proceedings to challenge the act of a public authority*, namely the EC type-approval of vehicles. Those conditions referred to in Article 9(3) of the Aarhus Convention are therefore satisfied. The other conditions relate to the scope *ratione materiae* and the scope *ratione personae* of that provision, which will be addressed in turn.

48. As far as its scope *ratione materiae* is concerned, Article 9(3) of the Aarhus Convention requires that the act in question contravene 'provisions of … national law relating to the environment'. In the present case, the measure invoked by Deutsche Umwelthilfe is Regulation No 715/2007 and, in particular, Article 5(2) thereof. It must therefore be ascertained whether that provision falls within the scope of 'national law relating to the environment'.

49. In that regard, first, contrary to the KBA's submissions, I share the referring court's view that that regulation does fall within the scope of environmental law and must therefore not be regarded solely as a technical regulation intended to regulate the internal market. It seems to me that that issue was resolved by the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040; 'the judgment in *CLCV*'; paragraph 113), which stated that the objective pursued by Regulation No 715/2007 is to ensure a high level of environmental protection and improve air quality within the European Union.

50. The KBA also states that that regulation is based on Article 95 EC (now Article 114 TFEU), which concerns measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. However, Article 95(3) EC provides that the Commission, in its proposals concerning health, safety, *environmental protection* and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Consequently, the fact that that regulation is not founded on a specific legal basis relating to the environment, namely Article 175 EC, is not such as to exclude the link between that regulation and environmental law.

51. In any event, Article 2(1)(f) of Regulation No 1367/2006 defines 'environmental law' as 'Community legislation which, *irrespective of its legal basis*, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: *preserving, protecting and improving the quality of the environment*, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems'.[15] That is indeed the case with Regulation No 715/2007.

52. With regard more specifically to Article 5(2) of that regulation, that provision concerns 'defeat devices' within the meaning of Article 3(10) thereof. Although that provision is of a technical nature, it forms part of that regulation and is intended to limit the emission of gaseous pollutants, thereby helping to protect the environment. More generally, as Deutsche Umwelthilfe has stated, it is inconceivable to separate environmental law and technical regulations as a matter of principle since an environmental provision is often of a technical nature. In that regard, I note that recital 1 of Regulation No 715/2007 states that the 'technical requirements for the type approval of motor vehicles with regard to emissions should therefore be harmonised to avoid requirements that differ from one Member State to another, and to ensure a high level of environmental protection'. That recital therefore expressly establishes a link between the technical rules concerning EC type-approval and environmental protection.

[15] Emphasis added.

53. Secondly, the provision of EU law on which Deutsche Umwelthilfe relies, namely Article 5(2) of Regulation No 715/2007, is directly applicable in the Member States and must be regarded as forming part of the provisions of *national* law relating to the environment. [16]

54. As regards the scope *ratione personae* of Article 9(3) of the Aarhus Convention, that provision states that 'members of the public' who 'meet the criteria, if any, laid down in … national law' have the rights set out in that provision. In that regard, it is clear from the order for reference that Deutsche Umwelthilfe is an approved environmental association which is entitled to bring legal proceedings in accordance with Paragraph 3 of the UmwRG and whose purpose, according to its articles of association, is to contribute to the protection of nature and the environment and also to health- and environment-related consumer protection, in particular by providing information and advice to consumers. Consequently, that association satisfies the conditions to bring legal proceedings before the national courts to promote environmental protection.

55. Accordingly, an association such as Deutsche Umwelthilfe falls not only within the scope of 'the public', within the meaning of Article 2(4) of the Aarhus Convention but also 'the public concerned', within the meaning of Article 2(5) of that convention. Under the latter provision, non-governmental organisations promoting environmental protection and meeting any requirements under national law must be deemed to have an interest.

56. Finally, the referring court asks whether the expression 'criteria … laid down in … national law', within the meaning of Article 9(3) of the Aarhus Convention, covers only criteria concerning those who have a right to bring proceedings since the national legislature has defined those criteria in a binding manner in Paragraph 3 of the UmwRG. In my view, that expression also concerns the subject matter of an action and those criteria must comply with EU law. That question will be examined below.

2. The implications of Article 9(3) of the Aarhus Convention when read in conjunction with the first paragraph of Article 47 of the Charter

57. According to the case-law of the Court, the review procedures referred to in Article 9(3) of the Aarhus Convention may be subject to 'criteria', from which it follows that Member States may, in the context of the discretion they have in that regard, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue such review procedures. [17] In that regard, as the referring court states, the reform of the UmwRG during 2017 was intended, inter alia, to bring the law into line with the requirements of public international law resulting from Article 9(3) of the Aarhus Convention.

58. According to the national court, Deutsche Umwelthilfe does not have standing to bring proceedings under national law to challenge an administrative decision granting EC type-approval. [18] Moreover, Article 9(3) of the Aarhus Convention, as such, has no direct effect in

[16] See, to that effect, Aarhus Convention Compliance Committee, findings and recommendations of 29 April 2008, Denmark (ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, paragraph 27), according to which, in the context of Article 9(3) of the Aarhus Convention, EU law relating to the environment should be considered to be part of the national law of a Member State. The English-language version of that document can be found at: https://unece.org/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_4_e.pdf.

[17] Judgment of 14 January 2021, *Stichting Varkens in Nood and Others* (C-826/18, EU:C:2021:7, paragraph 49 and the case-law cited).

[18] See points 32 to 40 of this Opinion.

EU law.[19] In those circumstances, if the national law does not provide that an approved environmental association has standing to bring proceedings, that provision, by itself, cannot confer such standing on it.

59. However, the national court referred to the judgment in *Protect* to justify its request for a preliminary ruling. In that regard, that judgment makes the link between Article 9(3) of the Aarhus Convention and Article 47 of the Charter in respect of the right of access to justice of environmental organisations.[20] The reasoning adopted by the Court in that judgment seems to me to be readily transposable to the present case, as follows.

60. Under Article 3(5) of Directive 2007/46, EC type-approval means the procedure whereby a *Member State certifies* that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of that directive and of the regulatory acts listed in Annex IV or XI to that directive. Annex IV referred to Regulation No 715/2007, Article 5(2) of which is binding in nature.

61. Therefore, where a Member State lays down rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007, in order for decisions of the competent national authorities to be reviewed in the light of their obligations under that provision, the Member State is implementing an obligation stemming from that provision and must therefore be regarded as implementing EU law, for the purposes of Article 51(1) of the Charter, with the result that the Charter is applicable.[21]

62. Although Article 9(3) of the Aarhus Convention, in itself, has no direct effect in EU law, the fact remains that that provision, read in conjunction with the first paragraph of Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law.[22]

63. The right to bring proceedings set out in Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing criteria laid down in national law, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental associations that satisfy the requirements laid down in Article 2(5) of that convention, were to be denied any right to bring proceedings.[23] Those associations cannot be deprived of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest.[24]

[19] Judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraph 45 and the case-law cited).

[20] With regard to the scope of Article 47 of the Charter, see Safjan, M. and Düsterhaus, D., 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', *Yearbook of European Law*, 2014, vol. 33, No 1, pp. 3-40.

[21] See, to that effect, the judgment in *Protect*, paragraph 44 and the case-law cited.

[22] See, to that effect, the judgment in *Protect*, paragraph 45, and judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18, EU:C:2019:824, paragraph 33).

[23] See, to that effect, the judgment in *Protect*, paragraph 46, and judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18, EU:C:2019:824, paragraph 34).

[24] See, to that effect, the judgment in *Protect*, paragraph 47 and the case-law cited.

64. Although they imply that contracting States retain discretion as to the implementation of that provision, the words 'criteria, if any, laid down in its national law' in Article 9(3) of the Aarhus Convention cannot allow those States to impose criteria so strict that it would be effectively impossible for environmental organisations to contest the actions or omissions that are the subject of that provision. [25]

65. In the present case, it is apparent from the order for reference that Deutsche Umwelthilfe does not have standing to bring proceedings to challenge an administrative decision granting EC type-approval on the ground, inter alia, that that approval constitutes a 'product approval' and that, for such an approval, national law does not allow an environmental association, even if it falls within the scope of 'the public concerned', within the meaning of Article 2(5) of the Aarhus Convention, to bring proceedings before a national court against an administrative decision granting EC type-approval to vehicles. By thus denying environmental associations any right to bring an action against such a decision to grant a permit, the relevant national procedural law is contrary to the requirements flowing from a combined reading of Article 9(3) of the Aarhus Convention and the first paragraph of Article 47 of the Charter. [26]

66. In other words, the effectiveness of Article 5(2) of Regulation No 715/2007, seen from the viewpoint of the fundamental right to an effective judicial remedy, requires that the right to challenge an administrative decision granting EC type-approval be granted to approved environmental associations. [27]

67. It should be added that, while the freedoms guaranteed by the Charter may be limited, any limitation on their exercise must, in accordance with Article 52(1) thereof, be provided for by law and respect the essential content of those freedoms. Moreover, as is clear from that provision, in accordance with the principle of proportionality, limitations may be made only if they are necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. [28] However, in the present case, I fail to see which objective of general interest recognised by the European Union could justify prohibiting an environmental association from having access to justice in order to challenge the EC type-approval of vehicles. [29]

68. According to the referring court, even a broad, or analogous, interpretation of national law does not make it possible to confer standing on an environmental association to challenge a decision granting EC type-approval. Nevertheless, I note that that court refers to a judgment of the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) of 18 April 2018 concerning the lawfulness of the authorisation for the regular operation of certain megatrucks and the extension of the trial phase of certain other megatrucks, according to which the second phrase of Paragraph 42(2) of the VwGO confers standing to bring proceedings on an approved environmental association which seeks to enforce compliance with provisions based on EU environmental law. Moreover, as the KBA points out, Deutsche Umwelthilfe submitted in the main proceedings that its standing to bring proceedings was derived directly from Paragraph 1(1), first sentence, point 6, and from Paragraph 2(1) of the UmwRG.

[25] The judgment in *Protect*, paragraph 48.

[26] See, to that effect, the judgment in *Protect*, paragraph 52.

[27] See, to that effect, Opinion of Advocate General Sharpston in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:760, point 91).

[28] Judgment of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 84 and the case-law cited).

[29] The KBA submits that the Grundgesetz (German Basic Law) has made a systematic choice in favour of the protection of subjective rights.

69. It is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring proceedings, in accordance with both the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental association, such as Deutsche Umwelthilfe, to challenge before a national court a decision that may be contrary to EU environmental law. [30]

70. However, if such a compliant interpretation were to be found to be impossible, it follows from the established case-law of the Court that a national court which is called upon, within the exercise of its jurisdiction, to apply rules of EU law is under a duty to give full effect to those rules, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means. [31]

71. The referring court asks whether Article 9(3) of the Aarhus Convention must be interpreted as meaning that, in view of the large number of decisions that are linked to the environment, the Member States may exempt certain administrative decisions from judicial review on the initiative of environmental associations, such as those relating to product approvals, the possibility of bringing an action being limited to certain decisions that are serious in terms of their environmental impact. However, I consider that such an approach finds no support, whether in the provisions of that convention or in the case-law of the Court. In any event, as Deutsche Umwelthilfe submits, a decision granting EC type-approval may concern a large number of vehicles and cannot therefore be regarded as being only of minor importance for environmental protection. In that regard, as stated in recital 6 of Regulation No 715/2007, a considerable reduction in NOx emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution.

72. Moreover, the referring court notes that, unlike the facts which gave rise to the judgment in *Protect*, related to Austrian law, environmental associations, under German law, have the possibility, within the framework of the UmwRG, to have the approval of projects reviewed and therefore a total exclusion of the right of associations to bring proceedings does not exist. Procedural law does not therefore contain a gap in legal protection which is comparable to that found in that judgment. However, as the referring court points out, an association such as Deutsche Umwelthilfe has no access to justice in order to challenge a decision granting EC type-approval. Therefore, I am of the opinion that the case-law in the judgment in *Protect* is fully applicable for the purpose of ensuring compliance with a rule of EU environmental law.

73. The KBA and Volkswagen submit that the *actio popularis* is structurally extraneous to German procedural law and that an environmental association must therefore always be able to claim that, as a result of action taken by the authorities, its rights may have been infringed. However, in the present case, the application of Article 9(3) of the Aarhus Convention, read in conjunction with the first paragraph of Article 47 of the Charter, does not lead to an *actio popularis*. [32] The right of access to justice in a case such as that in the main proceedings

[30] See, to that effect, the judgment in *Protect*, paragraph 54, and judgment of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 39).

[31] See, to that effect, the judgment in *Protect*, paragraph 56.

[32] In her Opinion in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:760, point 81), Advocate General Sharpston stated that the authors of the Aarhus Convention did not opt to introduce an *actio popularis* in environmental matters and that they decided to strengthen the role of environmental organisations. The Advocate General added that, in so doing, they steered a middle course between the maximalist approach (*actio popularis*) and the minimalist approach (a right of individual action available only to parties having a direct interest at stake).

presupposes that national law has conferred on the association concerned the right to be a party to legal proceedings since its articles of association have been approved by the competent national authorities. Such an organisation therefore provides assurances of its reliability and competence in the performance of its duties.[33] Since the interest which those organisations have in environmental protection is recognised in law, they are concerned by an infringement of directly applicable provisions of EU environmental law to an extent sufficient to enable them to rely on those provisions before the national courts.[34]

74. In the light of all the foregoing, I propose that the answer to the first question should be that Article 9(3) of the Aarhus Convention, read in conjunction with the first paragraph of Article 47 of the Charter, must be interpreted as meaning that an approved environmental association, which is entitled to bring legal proceedings under national law, must be able to challenge before a national court an administrative decision granting EC type-approval of vehicles which may be contrary to Article 5(2) of Regulation No 715/2007, a provision which prohibits, subject to certain exceptions, the use of defeat devices which reduce the effectiveness of emission control systems.

B. The second question referred for a preliminary ruling

75. By its second question, which is raised in the event that the first question is answered in the affirmative, the national court asks, in essence, whether Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that the 'need' for a defeat device in terms of protecting the engine against damage or accident and for safe operation of the vehicle is to be assessed in the light of the state of the art at the time when the EC type-approval is granted to the vehicles concerned and whether it is necessary to take account of circumstances other than that 'need' in order to examine the lawfulness of a defeat device.[35]

76. Under Article 5(2) of Regulation No 715/2007, the use of defeat devices that reduce the effectiveness of emission control systems is prohibited. However, there are three exceptions to that prohibition, including that in point (a) of that provision, namely where the 'need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'.

77. As a preliminary point, I note that, in its question, the referring court assumes that the temperature window constitutes a 'defeat device' within the meaning of Article 3(10) of Regulation No 715/2007. In the judgment in *CLCV*, the Court held that a device which detects any parameter related to the conduct of the approval procedures provided for by Regulation No 715/2007 in order to improve the performance of the emission control system during those procedures, and thus obtain approval of the vehicle, constitutes a 'defeat device' even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.[36]

[33] As Advocate General Sharpston noted in her Opinion in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:760, point 74), environmental organisations promoting environmental protection and meeting objectively justified, transparent and non-discriminatory requirements facilitating access to justice under national law must be entitled to rely on Article 9(3) of the Aarhus Convention.

[34] See, to that effect, Opinion of Advocate General Kokott in *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:491, point 49).

[35] In its second question, the national court refers to 'defeat devices'. However, since the case in the main proceedings concerns the temperature window only, I shall refer to that single defeat device.

[36] The judgment in *CLCV*, paragraph 102.

78. The Court also held that the prohibition laid down in Article 5(2)(a) of that regulation would be devoid of substance and deprived of any effectiveness if car manufacturers were permitted to equip motor vehicles with such defeat devices with the sole aim of protecting the engine against clogging up and ageing.[37] That case-law was delivered in the context of the examination of the conformity of the switch system with EU law.

79. Cases C-128/20, *GSMB Invest*, C-134/20, *Volkswagen*, and C-145/20, *Porsche Inter Auto and Volkswagen*, however, concern a temperature window which is similar to that which is the subject of the present question. In my Joined Opinion in those three cases,[38] which I delivered on 23 September 2021, I proposed that the Court should take the view that Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, is to be interpreted as meaning that a device which, under real driving conditions of a motor vehicle, ensures exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m, whereas, outside that window, per 10 °C, and above an altitude of 1 000 m, per 250 m of altitude, the exhaust gas recirculation rate decreases in a linear way down to zero, with the result that NOx emissions increase beyond the limit values laid down in the regulation, constitutes a 'defeat device'.[39] Those considerations can be transposed to the present case.

80. By Question 2(a), the referring court seeks to ascertain whether the 'need' for a defeat device in terms of protecting the engine against damage or accident and for safe operation of the vehicle must be assessed in the light of what is technically feasible at the time when the EC type-approval is granted to the vehicles concerned.

81. I agree with that court that, in order to answer that question, the date of the EC type-approval must be used as the basis. The EC type-approval concerns new vehicles which must comply with the regulatory acts in force at the time of approval, including those referred to in Annex IV to Directive 2007/46, which include Regulation No 715/2007.

82. With regard to the technical requirements concerning that type-approval, I took the view in my Opinion in Cases C-128/20, *GSMB Invest*, C-134/20, *Volkswagen*, and C-145/20, *Porsche Inter Auto and Volkswagen*, that nowhere in Regulation No 715/2007 is it stated that a particular technology should be used for EC type-approval.[40] In other words, as Volkswagen submits, that regulation, like Directive 2007/46, is designed to be neutral from a technological perspective.

83. I also recalled that, as is stated in recital 7 of that regulation, 'in setting emissions standards it is important to take into account the implications for markets and manufacturers' competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions'. Accordingly, when the EU legislature determined the limit values of pollutant emissions, account had already been taken of the interests of vehicle manufacturers. It is therefore for those manufacturers to adapt to and to apply the appropriate technical means to comply with those limit values, without the technology used *necessarily being the best possible or being required*.[41]

37 The judgment in *CLCV*, paragraph 113.

38 Opinion in *GSMB Invest, Volkswagen and Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758).

39 Point 104 of that Opinion.

40 Point 129 of that Opinion.

41 Opinion in *GSMB Invest, Volkswagen and Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758, point 129).

To that effect, as the KBA points out, it may be sufficient to use modern medium technologies which are widely used on the market, provided that they comply with the requirements for EC type-approval.

84. I added that permitting a defeat device under Article 5(2)(a) of Regulation No 715/2007 solely because, for example, research costs are high, the technical device is expensive or vehicle maintenance is more frequent or more costly for the user would render the regulation meaningless. [42]

85. Again, I take the view that those considerations can be transposed to the present case. In that regard, I agree with the referring court that any exception under Article 5(2) of Regulation No 715/2007 should, as a matter of principle, be excluded where, for financial reasons, the manufacturer designs engines in such a way that, under normal operating conditions, the safety of the engine is not guaranteed by effective technology to control emissions and that feature is largely deactivated for that reason.

86. The 'need' for a defeat device exists only where no solution makes it possible to avoid immediate risks of damage which create a specific hazard when the vehicle is driven. [43]

87. In addition, by Question 2(b), the referring court asks whether, in addition to the state of the art, account should be taken of other circumstances which may lead to the permissibility of a defeat device, even though, according to the current state of the art alone, there is no 'need' for that device, within the meaning of Article 5(2)(a) of Regulation No 715/2007.

88. In that respect, with regard to the concept of 'need', it follows from the judgment in *CLCV* that, since Article 5(2)(a) of that regulation constitutes an exception to the prohibition on the use of defeat devices which reduce the effectiveness of emission control systems, it must be *interpreted strictly*. [44]

89. In those circumstances, in the absence of a 'need' for the defeat device at issue in the present case, as the referring court states in Question 2(b), [45] there are, in my view, no other circumstances which may lead to the permissibility of a defeat device. Since the other two exceptions provided for in Article 5(2)(b) and (c) of Regulation No 715/2007 are not applicable in the case in the main proceedings, that regulation does not provide any additional justification for authorising a defeat device.

90. Therefore, I propose that the Court answer the second question to the effect that Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that the 'need' for a defeat device in terms of protecting the engine against damage or accident and for safe operation of the vehicle is not to be assessed in the light of the state of the art at the time when the EC type-approval is granted and it is not necessary to take account of circumstances other than that 'need' in order to examine the lawfulness of a defeat device.

[42] Opinion in *GSMB Invest, Volkswagen and Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758, point 130).

[43] See, to that effect, the judgment in *CLCV*, paragraph 114.

[44] The judgment in *CLCV*, paragraph 112.

[45] This is a factual assessment which is a matter for the referring court.

V. Conclusion

91. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany) as follows:

(1) Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that an approved environmental association, which is entitled to bring legal proceedings under national law, must be able to challenge before a national court an administrative decision granting EC type-approval of vehicles which may be contrary to Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, a provision which prohibits, subject to certain exceptions, the use of defeat devices which reduce the effectiveness of emission control systems.

(2) Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that the 'need' for a defeat device in terms of protecting the engine against damage or accident and for safe operation of the vehicle is not to be assessed in the light of the state of the art at the time when the EC type-approval is granted and it is not necessary to take account of circumstances other than that 'need' in order to examine the lawfulness of a defeat device.