ECLI:EU:C:2022:857

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

8 November 2022 (*)

(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 – Environmental association – Standing of such an association to bring an action before a national court against EC type-approval granted to certain vehicles – Regulation (EC) No 715/2007 – Article 5(2)(a) – Motor vehicles – Diesel engine – Pollutant emissions – Valve for exhaust gas recirculation (EGR valve) – Reduction of nitrogen oxide (NOx) 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)

In Case C-873/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany), made by decision of 20 November 2019, received at the Court on 29 November 2019, in the proceedings

Deutsche Umwelthilfe eV

v

Bundesrepublik Deutschland,

joined party:

Volkswagen AG,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos, E. Regan, P.G. Xuereb (Rapporteur), Presidents of Chambers, M. Ilešič, J.-C. Bonichot, A. Kumin, N. Jääskinen, N. Wahl and I. Ziemele, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Deutsche Umwelthilfe eV, by R. Klinger, Rechtsanwalt,

– the Bundesrepublik Deutschland, by F. Liebhart, acting as Agent,

– Volkswagen AG, by B. Wolfers and R.B.A. Wollenschläger, Rechtsanwälte,

– the European Commission, by A.C. Becker, G. Gattinara and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (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'), of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 5(2)(a) 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 (OJ 2007 L 171, p. 1).

2 The request has been made in proceedings between Deutsche Umwelthilfe eV, an environmental association, and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Kraftfahrt-Bundesamt (Federal Motor Transport Authority, Germany; 'the KBA'), concerning the decision by which the KBA authorised, for certain vehicles produced by Volkswagen AG, the use of software reducing the recirculation of gaseous pollutants according to outside temperature.

Legal context

International law

3 The eighteenth recital of the Aarhus Convention states:

'Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced'.

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

'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.’

5 Article 9 of the Aarhus Convention, entitled ‘Access to justice’, provides in paragraphs 3 and 4:

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

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.’

European Union law

Regulation (EC) No 1367/2006

6 Article 1(1) of Regulation (EC) No 1367/2006 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) provides:

‘The objective of this Regulation is to contribute to the implementation of the obligations arising under the [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 [European] Community level under the conditions laid down by this Regulation.’

7 Article 2 of that regulation, entitled ‘Definitions’, provides in paragraph 1(f):

‘For the purpose of this Regulation:

…

(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’.

The Framework Directive

8 Directive 2007/46/EC 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 (EC) No 1060/2008 of 7 October 2008 (OJ 2008 L 292, p. 1) ('the Framework Directive'), was repealed by Regulation (EU) 2018/858 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), with effect from 1 September 2020. However, in view of the date of the facts of the dispute in the main proceedings, the Framework Directive remains applicable to that dispute.

9 Article 1 of the Framework Directive provided:

'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.'

10 Article 3(5) of the Framework Directive provided:

'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'.

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

Regulation No 715/2007

12 Recitals 1, 6, 7 and 12 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 [NOx] 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 [(CO2)] emissions.

…

(12) Efforts should be continued to implement stricter emission limits, including reduction of [CO2] emissions, and to ensure that those limits relate to the actual performance of vehicles when in use.'

13 Article 1(1) of that regulation provides:

'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.'

14 Article 3(10) of Regulation No 715/2007 provides:

'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'.

15 Article 4(1) and (2) of that regulation states:

'1. Manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the Community are type approved in accordance with this Regulation and its implementing measures. Manufacturers shall also demonstrate that all new replacement pollution control devices requiring type approval which are sold or put into service in the Community are type approved in accordance with this Regulation and its implementing measures.

These obligations include meeting the emission limits set out in Annex I and the implementing measures referred to in Article 5.

2. Manufacturers shall ensure that type approval procedures for verifying conformity of production, durability of pollution control devices and in-service conformity are met.

In addition, the technical measures taken by the manufacturer must be such as to ensure that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, throughout the normal life of the vehicles under normal conditions of use. …

…’

16 Article 5(1) and (2) of Regulation No 715/2007 provides:

‘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;

…’

17 Annex I to that regulation, entitled ‘Emission limits’, lays down, inter alia, emission limit values for NOx.

German law

18 Paragraph 42 of the Verwaltungsgerichtsordnung (Administrative Court Rules) of 21 January 1960 (BGBl. 1960 I, p. 17), in the version applicable to the dispute in the main proceedings (BGBl. 1991 I, p. 686) (‘the VwGO’), sets out the conditions governing the admissibility of actions in the following terms:

‘1. An action may seek to have an administrative measure annulled (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.’

19 The first sentence of 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 annul the administrative measure and, where appropriate, the decision following an appeal.’

20 Paragraph 1(1) of the Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz – UmwRG) (Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC), of 7 December 2006 (BGBl. 2006 I, p. 2816), in the version applicable to the dispute in the main proceedings (BGBl. 2017 I, p. 3290) (‘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, …

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

…'

21 Paragraph 2(1) of the UmwRG states:

'A domestic or foreign association approved under Paragraph 3 may bring an action in accordance with the VwGO to challenge a decision within the meaning of the first subsubparagraph 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 subsubparagraph 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 subsubparagraph 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, …

…

In the event of an appeal against a decision referred to in points 2a to 6 of the first subsubparagraph 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.'

22 Paragraph 3 of the UmwRG lays down the conditions which national or foreign associations must fulfil in order to be approved and to bring proceedings under that law, as well as the approval procedure. According to Paragraph 3(1) of the UmwRG, such an association is, on request, approved where: in essence, it promotes, in accordance with its statutes, ideally and not temporarily, mainly environmental protection objectives; it has been in existence for at least three years at the date of approval and has been active during that period; it offers a guarantee of proper performance of its tasks, in particular adequate participation in the decision-making procedures of the authorities; it pursues objectives of general interest; and it allows any person who supports its objectives to become a member.

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 – EG-FGV) (Rules 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 rules)), of 3 February 2011 (BGBl. 2011 I, p. 126), in the version applicable to the dispute in the main proceedings:

'1. If 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 the directive which is applicable to the type concerned out of Directives [2007/46], 2002/24/EC [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)] or 2003/37/EC [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),] 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 [KBA] may retroactively impose ancillary provisions.'

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

24 Volkswagen is a car manufacturer which marketed motor vehicles, in particular VW Golf Plus TDI vehicles, which were equipped with a Euro 5 generation EA 189-type diesel engine. Those vehicles had a valve for exhaust gas recirculation ('the EGR valve'), which is one of the technologies used by car manufacturers, including Volkswagen, to control and reduce NOx emissions.

25 According to the information provided by the referring court, those vehicles originally had software installed in the electronic engine controller to operate the EGR system in two modes, namely mode 0, which is activated when the vehicle is driven on a road, and mode 1, which operates during the approval test for pollutant emissions, called the 'New European Driving Cycle' (NEDC), conducted in a laboratory. When mode 0 was activated, the EGR rate was reduced. Under normal conditions of use, the vehicles concerned were almost exclusively in mode 0 and did not comply with the emission limit values for NOx laid down in Regulation No 715/2007.

26 In the EC type-approval procedure for those vehicles, Volkswagen did not notify the KBA of the existence of such software.

27 On 15 October 2015, the KBA adopted a decision pursuant to Paragraph 25(2) of the Rules 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 rules), in the version applicable to the dispute in the main proceedings, in which it found that that software constituted a 'defeat device' within the meaning of Article 3(10) of Regulation No 715/2007, which was not consistent with Article 5 of that regulation; the KBA ordered Volkswagen to remove that device and to take the necessary measures to ensure that the vehicles complied with the national legislation concerned and the EU legislation.

28 Following that decision, Volkswagen updated the software. The effect of that update was to set the EGR valve to regulate the EGR rate such that that rate was 0% when the outside temperature was below -9 °C, 85% when it was between -9 and 11 °C, and increased above 11 °C to be 100% operational only at outside temperatures above 15 °C. Thus, the exhaust-gas purification by that recirculation system was fully effective only if the external temperature was greater than 15 °C ('the temperature window').

29 By decision of 20 June 2016 ('the contested decision'), the KBA granted authorisation for the software at issue in the main proceedings. In that regard, it took the view that the defeat devices still present in the vehicles concerned ('the vehicles at issue in the main proceedings') were lawful.

30 On 15 November 2016, Deutsche Umwelthilfe, an association which is authorised to bring legal proceedings under Paragraph 3 of the UmwRG, lodged an administrative appeal against the contested decision, which has not yet been the subject of a decision.

31 On 24 April 2018, Deutsche Umwelthilfe brought an action before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany), the referring court, seeking annulment of the contested decision. It submits that the vehicles at issue in the main proceedings were still equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, since that device becomes active when the average temperatures recorded in Germany are reached. Furthermore, it submits that car manufacturers are able to design engines which do not require a reduction, for technical reasons, of the performance of emission control systems at average temperatures, and which would, therefore, operate under normal conditions of use.

32 The Federal Republic of Germany, the defendant in the main proceedings, contends, first, that Deutsche Umwelthilfe does not have standing to bring proceedings against the contested decision and that its action is, therefore, inadmissible. Secondly, the temperature window available to the vehicles at issue in the main proceedings after the updating of the software concerned is, in its view, compatible with EU law.

33 As regards the admissibility of the action in the main proceedings, the referring court considers, in the first place, that Deutsche Umwelthilfe does not 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. That provision is thus an expression of the fact that the system of individual actions provided for in the VwGO is based on individual rights. However, the dispute in the main proceedings does not appear to concern an individual's right which has been infringed by the contested decision. The prohibition on using defeat devices which reduce the effectiveness of emission control systems, laid down in the first sentence of Article 5(2) of Regulation No 715/2007 and relied on by Deutsche Umwelthilfe, does not confer any individual right on a natural person, since that provision is not intended to protect citizens individually.

34 In the second place, the referring court considers that that association cannot derive standing to bring proceedings from Paragraph 2(1) of the UmwRG, read in conjunction with Paragraph 1(1) of the UmwRG, which provides for a statutory exemption from the requirement for an individual right, within the meaning of the first phrase of Paragraph 42(2) of the VwGO. That court states, in that regard, that only the decisions listed in Paragraph 1(1) are actionable by an environmental association pursuant to the UmwRG. Of those decisions, only those referred to in the first subsubparagraph, point 5, of that provision are relevant, namely 'administrative measures or public law contracts authorising projects … pursuant to environmental provisions of Federal law, *Land* law or directly applicable acts of EU law'.

35 However, the contested decision does not constitute a decision within the meaning of point 5 of the first subsubparagraph of Paragraph 1(1) of the UmwRG, since by that decision authorisation was granted to a 'product', not to a 'project'. The concept of 'project' within the meaning of that provision is derived from town and country planning law and was defined on the basis of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Article 1(2) of which provides that the term 'project' means 'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. In that regard, it is apparent from the national legislation at issue in the main

proceedings that that concept relates only to fixed installations or measures which constitute direct interventions in the natural surroundings and landscape. Consequently, the EC type-approval of light passenger vehicles and the amendment of such EC approval which are the subject of the contested decision cannot be regarded as authorisation for a 'project', within the meaning of the national law, since they do not relate to a fixed installation and do not involve any direct intervention in the natural surroundings and landscape.

36 Furthermore, the provisions of the UmwRG cannot be applied by analogy given that, during the proceedings which led to the amendment of the UmwRG, which took place in 2017, it was expressly stated that that amendment did not concern the product sector, including with regard to vehicles.

37 In the third place, according to the referring court, nor can Deutsche Umwelthilfe derive standing from Article 9(3) of the Aarhus Convention, since, as the Court held in the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraph 45), that provision, in itself, has no direct effect. Accordingly, Article 9 does not constitute a statutory exemption from the requirement for an individual right, within the meaning of the first phrase of Paragraph 42(2) of the VwGO.

38 In those circumstances, the referring court considers that the admissibility of the action in the main proceedings depends on whether Deutsche Umwelthilfe may derive standing to bring proceedings directly from EU law. It notes in that regard that, in the light of the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraph 45), Deutsche Umwelthilfe's standing to bring proceedings could result from the application of Article 9(3) of the Aarhus Convention in conjunction with the first paragraph of Article 47 of the Charter.

39 The referring court states that, in the light of the divergent case-law which exists between the national courts as to the inferences to be drawn from that judgment, it is necessary for it to ascertain 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 it is possible for an environmental association, even beyond the possibilities of bringing proceedings already provided for in the UmwRG, to challenge the administrative authorisation for a product, such as the authorisation at issue in the main proceedings, if the action brought by that association seeks to ensure compliance with provisions of EU environmental law which do not give rise to any individual rights.

40 The referring court states that its doubts concern the interpretation of the concept of 'criteria laid down in national law' within the meaning of Article 9(3) of the Aarhus Convention. First, that concept could be interpreted as covering only criteria which serve to delimit those persons entitled to bring an action and, consequently, the Member States would have leeway only with regard to the question of to which environmental associations they wish to grant the right to defend the public interest in environmental matters. If that interpretation were to be followed, Deutsche Umwelthilfe would have standing to bring proceedings in the main proceedings, given that the German legislature laid down those criteria in Paragraph 3 of the UmwRG and Deutsche Umwelthilfe was approved in accordance with that provision.

41 Secondly, the concept of 'criteria laid down in national law' could be interpreted as meaning that Member States have the power to determine criteria also in relation to the subject matter of the action and, therefore, to exclude certain administrative decisions from any judicial review sought by environmental associations. According to the referring court, such a limitation of the standing of those associations to certain decisions, in particular decisions which have a serious environmental

impact, could be justified by reason of the large number of administrative decisions linked to the environment. As regards, more specifically, product approvals, the referring court notes that, admittedly, such approvals cannot be regarded as never being of major importance for the environment. However, in the light of the large number of individual product approvals, practical considerations also support the argument that Member States must be able, by way of categorising considerations, to avoid subjecting certain individual decisions to the uncertainty of being challenged by third parties, such as environmental associations.

42 Should the Court consider that an environmental association has standing to challenge the contested decision, the referring court raises the question of the interpretation to be given to Article 5(2)(a) of Regulation No 715/2007.

43 The referring court takes the view that the temperature window at issue in the main proceedings constitutes a defeat device within the meaning of Article 3(10) of Regulation No 715/2007. It considers that, even if the concept of 'conditions which may reasonably be expected to be encountered in normal vehicle operation and use', in that provision, is not defined by Regulation No 715/2007, it should be found, having regard to the objectives of that regulation, and in particular recitals 4 and 6 thereof, that only actual driving conditions can be regarded as normal operating conditions. In that regard, the referring court considers that the objective of reducing NOx emissions can be achieved only if those emissions are in fact reduced during actual vehicle use and not only in artificial conditions. It notes that, in Europe, temperatures below 15 °C form part of the 'normal conditions' which 'may reasonably be expected' within the meaning of that provision. Indeed, for the year 2018, the average annual temperature in Germany was 10.4 °C. Thus, the EGR rate of the vehicles at issue in the main proceedings was already reduced and the emissions control system partially deactivated, whereas the temperatures were entirely average.

44 The referring court is uncertain, however, whether the concept of 'need' for the defeat device, within the meaning of Article 5(2)(a) of Regulation No 715/2007, must be interpreted in the light of the current state of the art in order to ascertain whether a defeat device is actually necessary in terms of protecting the engine against damage or accident and for safe operation of the vehicle concerned. It is also uncertain whether other circumstances, such as costs for manufacturers and the impact on their competitiveness, should also be taken into account.

45 In those circumstances the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein) decided to stay the proceedings and to refer the following questions to the Court of Justice 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]?’

Consideration of the questions referred

The first question

46 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 precluding a situation where an environmental association, which is authorised to bring legal proceedings under national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007.

47 It is apparent from request for a preliminary ruling that the first question is based on the fact that, according to the referring court, the applicable national legislation does not confer on Deutsche Umwelthilfe standing to bring proceedings against an administrative decision granting or amending EC type-approval, such as that at issue in the main proceedings.

48 First of all, it should be borne in mind that the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Aarhus Convention, which was signed by the Community and subsequently approved by Decision 2005/370, and the provisions of which therefore form an integral part of the EU legal order (judgments of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 30, and of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy*, C-470/16, EU:C:2018:185, paragraph 46 and the case-law cited).

49 Under Article 9(3) of the Aarhus Convention, without prejudice to the review procedures referred to in paragraphs 1 and 2 of that article, each party must 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.

50 In the first place, it must be found that an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007 falls within the material scope of Article 9(3) of the Aarhus Convention, since it constitutes an ‘act’ of a public authority which is alleged to contravene the provisions of ‘national law relating to the environment’.

51 It should be borne in mind, first, that the Court has held, in the judgments of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040, paragraphs 67, 86 and 87); of 14 July 2022, *GSMB Invest* (C-128/20, EU:C:2022:570, paragraph 43); and of 14 July 2022 *Volkswagen* (C-134/20, EU:C:2022:571, paragraph 50), that the objective pursued by Regulation No 715/2007, is, as is apparent from recitals 1 and 6 thereof, to ensure a high level of environmental protection and, more specifically, considerably to reduce the NOx emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

52 The finding that Regulation No 715/2007, and in particular Article 5(2) thereof, has such an environmental objective and therefore forms part of the ‘law relating to the environment’, within the meaning of Article 9(3) of the Aarhus Convention, is not, contrary to what the KBA maintains, in any way undermined by the fact that that regulation was adopted on the basis of 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.

53 In that regard, it must be recalled that Article 114(3) TFEU provides that the Commission, in its proposals for measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States concerning environmental protection, is to take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Consequently, as the Advocate General observed in point 50 of his Opinion, the fact that Regulation No 715/2007 was not adopted on the basis of a specific legal basis relating to the environment, such as Article 175 EC, now Article 192 TFEU, is not such as to exclude the environmental objective of that regulation and its belonging to the 'law relating to the environment'.

54 That finding is supported, first, by Regulation No 1367/2006, whose objective, in accordance with Article 1(1)(d) thereof, is to contribute to the implementation of the obligations arising under the Aarhus Convention, by laying down rules to apply the provisions of that convention to EU institutions and bodies, in particular by granting access to justice in environmental matters at EU level. Thus, Article 2(1)(f) of that regulation states that 'environmental law' means, for the purposes of that regulation, EU legislation which, 'irrespective of its legal basis', contributes to the pursuit of the objectives of EU policy on the environment as set out in the FEU Treaty, including preserving, protecting and improving the quality of the environment and protecting human health.

55 Secondly, the abovementioned finding is reinforced by the Aarhus Convention implementation guide, that is, the document published by the United Nations Economic Commission for Europe entitled 'The Aarhus Convention: An Implementation Guide' (Second Edition, 2014), which, according to settled case-law of the Court, may be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting that convention, even if the observations in the guide have no binding force and do not have the normative effect of the provisions of the convention (judgment of 20 January 2021, *Land Baden-Württemberg (Internal communications)*, C-619/19, EU:C:2021:35, paragraph 51 and the case-law cited).

56 Indeed, that guide confirms the broad meaning to be given to the expression 'provisions of national law relating to the environment', as set out in Article 9(3) of the Aarhus Convention, in so far as, at page 197 of that guide, it is stated that 'national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws'.

57 Moreover, the allegedly technical nature of the first sentence of Article 5(2) of Regulation No 715/2007, which provides that the use of defeat devices that reduce the effectiveness of emission control systems must be prohibited, in no way alters the fact that that provision seeks, by means of such a prohibition, precisely to limit emissions of gaseous pollutants and thus to contribute to the environmental protection objective pursued by that regulation.

58 Furthermore, Article 5(2) of Regulation No 715/2007, as a provision of environmental law which, moreover, is directly applicable in all Member States, in accordance with Article 288(2) TFEU, must be regarded as forming part of 'national law' within the meaning of Article 9(3) of the Aarhus Convention.

59 In the second place, it should be noted that an environmental association authorised to bring legal proceedings falls within the personal scope of Article 9(3) of the Aarhus Convention. In that regard, it must be borne in mind that, in order to be entitled to the rights provided for in that provision, an applicant must, inter alia, be a 'member of the public' and meet 'the criteria, if any, laid down in … national law'.

60 In accordance with Article 2(4) of the Aarhus Convention, the term 'public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups. It therefore follows from Article 2(4) and Article 9(3) of that convention that the parties to the convention may lay down in their national law criteria which an environmental association must meet in order to enjoy the rights provided for in the latter provision.

61 It is apparent from the request for a preliminary ruling that, under German law, those criteria are laid down in Paragraph 3(1) of the UmwRG and that Deutsche Umwelthilfe – the object of which, according to its statutes, is to contribute to the protection of nature and the environment as well as to consumer protection in so far as it relates to the environment and health – meets those criteria and that it has indeed been approved as an environmental association authorised to bring legal proceedings in accordance with Paragraph 3 of the UmwRG.

62 It should be further noted that such an association is also part of the 'public concerned', within the meaning of Article 2(5) of the Aarhus Convention, which means the public affected or likely to be affected by, or having an interest in, the environmental decision-making. Thus, in the words of that provision, non-governmental organisations promoting environmental protection and meeting any requirements under national law are to be deemed to have such an interest.

63 In the third place, as regards the referring court's questioning, which seeks, more specifically, to determine whether the concept of 'criteria laid down in … national law', within the meaning of Article 9(3) of the Aarhus Convention, allows the parties to that convention to lay down such criteria not only in relation to those persons entitled to bring an action, but also with regard to the subject matter of the action, it must be borne in mind that the Court has held that it follows from that provision – and in particular from that fact that, in accordance with the wording thereof, the review procedures referred to therein may be made subject to 'criteria' – 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 (judgments of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 86, and of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7, paragraph 49).

64 However, first, it must be noted that, according to the actual wording of Article 9(3) of the Aarhus Convention, such criteria relate to the determination of those persons entitled to bring an action, not to the determination of the subject matter of the action in so far as the latter concerns infringement of provisions of national environmental law. It follows that Member States may not reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law.

65 Secondly, 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 article, the Member State is implementing EU law for the purposes of Article 51(1) of the Charter and must, therefore, ensure compliance, inter alia, with the right to an effective remedy, enshrined in Article 47 thereof (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 44 and 87 and the case-law cited).

66 Consequently, while it is true that Article 9(3) of the Aarhus Convention does not have direct effect in EU law and cannot, therefore, be relied on, as such, in a dispute falling within the scope of EU law, in order to disapply a provision of national law which is contrary to it, the fact remains that, first, the primacy of international agreements concluded by the European Union requires that national law be interpreted, to the fullest extent possible, in accordance with the requirements of those agreements and, secondly, that Article 9(3) of the Aarhus Convention, read in conjunction with 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 (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 45).

67 However, the right to bring proceedings provided for in Article 9(3) of the Aarhus Convention, which is intended to ensure effective environmental protection (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 46), 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 by 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 the Aarhus Convention – were to be denied of any right to bring proceedings against acts and omissions by private persons and public authorities which contravene certain categories of provisions of national law relating to the environment (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 46).

68 Imposing those criteria must not deprive environmental associations in particular 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 (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 47 and the case-law cited).

69 Although they imply that Member 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 associations to challenge the acts or omissions that are the subject of that provision (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 48).

70 In the present case, it seems to follow from the information provided by the referring court, set out in paragraphs 33 to 35 above, that, under German law, since an environmental association lacks standing to bring proceedings against an approval decision for 'a product', it cannot, even if it meets the requirements laid down in Paragraph 3(1) of the UmwRG, bring an action before a

national court in order to challenge a decision granting or amending an EC type-approval which may be contrary to the prohibition on the use of defeat devices which reduce the effectiveness of emission control systems, laid down in Article 5(2) of Regulation No 715/2007.

71 By thus denying environmental organisations any right to bring an action against such a decision granting or amending EC type-approval, the relevant national procedural law is contrary to the requirements flowing from a combined reading of Article 9(3) of the Aarhus Convention and Article 47 of the Charter (see, by analogy, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 52).

72 In particular, the fact that an environmental association, although authorised for the purposes of having access to the judicial procedures referred to in Article 9(3) of the Aarhus Convention, cannot access justice in order to challenge a decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007 and, therefore, contrary to a 'provision of national law relating to the environment' within the meaning of Article 9(3) of that convention, constitutes a limitation of the right to an effective remedy, guaranteed by Article 47 of the Charter. Such a limitation cannot be considered justified.

73 In that respect, as regards the argument that such a limitation of the standing of environmental associations to bring proceedings to certain decisions, in particular those having a serious environmental impact, could be justified on account of the large number of administrative decisions linked to the environment, it must be held that, as the Advocate General observed, in essence, in point 71 of his Opinion, first, it is not apparent from Article 9(3) of the Aarhus Convention that the right to bring an action provided for therein could be limited solely to decisions with significant consequences for the environment. Secondly, decisions granting or amending an EC type-approval are likely to concern many vehicles and cannot therefore, in any event, be regarded as being of only minor importance for the environment. In that regard, as is apparent from recital 6 of Regulation No 715/2007, in particular, a considerable reduction in NOx emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution. However, decisions granting or amending EC type-approval in breach of the prohibition on the use of defeat devices which reduce the effectiveness of emission control systems, laid down in Article 5(2) of that regulation, are liable to frustrate the attainment of those environmental protection objectives.

74 Furthermore, contrary to what the KBA contends, the fact that it is impossible for an environmental association, such as Deutsche Umwelthilfe, to bring an action against decisions granting or amending EC type-approval, is in no way necessary in order to avoid an *actio popularis*. As the Advocate General observed in point 73 of his Opinion, where an association has been approved in accordance with the criteria laid down by national law and has, therefore, been granted the right to be a party to legal proceedings in environmental matters, it must be regarded as being sufficiently concerned by the infringement of the provisions of EU environmental law in order to be able to rely on such an infringement before the national courts.

75 Consequently, 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 a manner consistent 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 court a decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007 (see, by analogy, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 54).

76 In that regard, it should be noted that the referring court made reference, in its request for a preliminary ruling, to a judgment delivered in Germany following the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987), which recognised, by such a consistent interpretation of the second phrase of Paragraph 42(2) of the VwGO, that such an association has standing to bring proceedings when it seeks to ensure compliance with provisions based on EU environmental law. Thus, it does not seem a priori to be excluded that such standing could be granted to an environmental association, such as Deutsche Umwelthilfe, on the basis of an interpretation of German law which meets the requirements of Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter.

77 If such a consistent interpretation should prove impossible, it must be recalled that any national court, hearing a case within its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 161 and the case-law cited).

78 As is apparent from paragraph 66 above, Article 9(3) of the Aarhus Convention does not, as such, have direct effect, with the result that that provision cannot compel the referring court to disapply a national provision which is contrary to it.

79 However, the discretion conferred on the Member States to lay down rules governing the right to bring proceedings, referred to in that provision, does not affect their obligation to ensure a right to an effective remedy enshrined in Article 47 of the Charter, as, moreover, also alluded to in Article 9(4) of the Aarhus Convention. Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 162 and the case-law cited). Thus, that article may be relied on as a limit on the discretion left to the Member States under Article 9(3) of the Aarhus Convention.

80 Accordingly, in the situation referred to in paragraph 77 above, it will be for the referring court to disapply the provisions of national law precluding an environmental association, such as Deutsche Umwelthilfe, from being able to challenge a decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007.

81 In the light of all the foregoing, the answer to the first question is that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007.

The second question

82 By parts (a) and (b) of its second question, which it is appropriate to examine together, the referring 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, within the meaning of that provision, must be assessed in the light of the state of the art as at the date of the EC type-approval and

whether it is necessary to take into consideration circumstances other than that ‘need’ for the purposes of examining the lawfulness of that defeat device.

83 First of all, it must be recalled that Article 3(10) of Regulation No 715/2007 defines a ‘defeat device’ as being ‘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’.

84 In the present case, it is apparent from the request for a preliminary ruling that the software at issue in the main proceedings has established a temperature window under which the EGR rate is 0% when the outside temperature is below -9 °C, 85% when it is between -9 and 11 °C, and increases above 11 °C to be 100% operational only at outside temperatures above 15 °C. As the referring court notes, the EGR rate is, therefore, reduced to 85% where the average temperatures recorded in Germany – which for 2018 would have been 10.4 °C – are reached.

85 In that regard, the Court has held, as regards a temperature window identical to that at issue in the main proceedings, that Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, must be interpreted as meaning that a device which ensures compliance with the emission limit values laid down by that regulation only where the outside temperature is between 15 °C and 33 °C and the driving altitude is below 1 000 metres constitutes a ‘defeat device’ within the meaning of Article 3(10) of that regulation (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 47, and of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 54).

86 Under Article 5(2) of Regulation No 715/2007, the use of defeat devices that reduce the effectiveness of emission control systems must be prohibited. However, there are three exceptions to that prohibition, including the exception in Article 5(2)(a) of that regulation, 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’.

87 In so far as it lays down an exception to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems, that provision must be interpreted strictly (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 50; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 63; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 61).

88 It is apparent from the very wording of Article 5(2)(a) of Regulation No 715/2007 that, in order to fall within the exception provided for in that provision, the need for a defeat device must be justified not only in terms of protecting the engine against damage or accident, but also in terms of the safe operation of the vehicle. Indeed, in view of the use of the coordinating conjunction ‘and’ in that provision, it must be interpreted as meaning that the conditions laid down therein are cumulative (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 61; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 73; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 72).

89 Consequently, in view of the strict interpretation to be given to that exception, a defeat device such as that at issue in the main proceedings can be justified under that exception only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the EGR system, of such a serious nature

as to give rise to a specific hazard when a vehicle fitted with that device is driven. However, such a determination is, in the main proceedings, part of the assessment of the facts which falls to the referring court alone (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 62; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 74; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 73).

90 Furthermore, as regards a temperature window identical to that at issue in the main proceedings, the Court has held that, while it is true that Article 5(2)(a) of Regulation No 715/2007 does not formally impose any further conditions for the application of the exception laid down in that provision, the fact remains that a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective pursued by that regulation, from which that provision allows derogation only in very specific circumstances, and would result in a disproportionate infringement of the principle of limiting NOx emissions from vehicles (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 63; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 75; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 74).

91 The Court has therefore concluded that, in view of the strict interpretation that must be given to Article 5(2)(a) of Regulation No 715/2007, such a defeat device cannot be justified under that provision. Indeed, to accept that such a defeat device may fall within the exception provided for in that provision would result in that exception being applicable for most of the year under real driving conditions prevalent in the territory of the European Union, with the result that the principle of the prohibition of such defeat devices, laid down in Article 5(2) of Regulation No 715/2007, could, in practice, be applied less frequently than that exception (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraphs 64 and 65; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraphs 76 and 77; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraphs 75 and 76).

92 In that regard, the Court has stated, first, that it is apparent from recital 7 of Regulation No 715/2007 that, when the EU legislature determined the emission limits for pollutants, it took into account the economic interests of manufacturers and, in particular, the costs imposed on undertakings by the need to comply with those limits. It is thus for manufacturers to adapt and apply technical devices capable of complying with those limits as that regulation does not require the use of any particular technology (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 67; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 79; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 78).

93 Secondly, the objective pursued by Regulation No 715/2007, which consists in guaranteeing a high level of protection of the environment and improving air quality within the European Union, means NOx emissions being effectively limited throughout the normal life of vehicles. Permitting a defeat device under Article 5(2)(a) of that regulation 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 jeopardise that aim (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 68; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 80; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 79).

94 In those circumstances, and in view of the fact that that provision must be interpreted strictly, it must be held that the ‘need’ for a defeat device, within the meaning of that provision, exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other

technical solution makes it possible to avoid immediate risks of damage or accident to the engine, which give rise to a specific hazard when driving the vehicle (judgments of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 69; of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 81; and of 14 July 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, paragraph 80).

95 Consequently, the answer to the second question is that Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device can be justified under that provision only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, the 'need' for a defeat device, within the meaning of that provision, exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine, which give rise to a specific hazard when driving the vehicle.

Costs

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

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

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 precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval 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.**

2. **Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device can be justified under that provision only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, the 'need' for a defeat device, within the meaning of that provision, exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine, which give rise to a specific hazard when driving the vehicle.**

[Signatures]

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* Language of the case: German.