In a case against the adoption of a zoning plan, the Administrative Law Division of the Council of State (Division) extends the access to the administrative courts in environmental law decisions in the Netherlands, following the judgment of the ECJ C-826/18 (Stichting Varkens in Nood).

The judgment of 14 April 2021
According to Article 6:13 of the Dutch General Administrative Law Act (GALA), only interested parties (in the terms of the Aarhus Convention: the public concerned) that have submitted observations during the preparatory procedure may bring an action against the decision adopted as a result of that procedure, unless they cannot reasonably be criticised for not having intervened. In this case, the Municipal Council of Almelo therefore declared the appellants inadmissible, since they had not put forward any observations during the preparatory procedure of the draft zoning plan. When it concerns environmental law cases however, the Division finds that this requirement, as laid down in Article 6:13 of the GALA, infringes upon Article 9(2) of the Aarhus Convention (Convention). This means that the public concerned can no longer be required to put forward observations during the preparatory procedure of a draft decision in order to have access to a court at a later stage. The Division consequently rules that the appellants in this case are admissible.

Background of the judgment of the Division of 14 April 2021: Stichting Varkens in Nood
The Division’s ruling that Article 6:13 of the GALA infringes upon Article 9(2) of the Convention is a direct result of the ‘Stichting Varkens in Nood’ judgment of 14 January 2021 of the ECJ.

The Stichting Varkens in Nood judgment concerned a permit granted by the Municipal Council of Echt-Susteren, for the purposes of constructing a pig farm building. The ECJ ruled that:

2. Article 9(2) [...] must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the ‘public concerned’ referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure. However, Article 9(3) of that convention does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.

Legislative amendment of the GALA necessary
The Division emphasises that the ECJ judgment requires a legislative amendment to Article 6:13 of the GALA. Awaiting a change in the law, the right of appeal of the public concerned in environmental law cases can no longer depend on the earlier submission of an observation in preparatory procedures to a draft decision.