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Double Standards?

With respect to whether or not EU environmental law is compatible with the Aarhus Convention, almost everything that can be said, has been said. But still the saga continues.

In the case ACCC/C/2008/32 (Part II) concerning compliance by the European Union in connection with access by members of the public to review procedures before the Aarhus Compliance Committee, the European Commission agreed on a postponement of a final decision by the recent Budva Meeting of the Parties (MoP) until next MoP in 2021.

My own position in the debate is probably known. At least it has been consistent throughout the years:

- Standing requirements under Article 263(4) TFEU, in particular the *Plaumann*-requirement that applicants have to be affected in an individual capacity are too strict to satisfy the requirements under Aarhus;
- And this is not corrected by the Aarhus Regulation, as this Regulation has imported the same (or even stricter) requirements of the said doctrine and
- The 'indirect' route and outsourcing the EU's Aarhus-responsibilities via the national courts and the preliminary rulings procedure cannot compensate fully for those failures.

The ACCC's findings are more or less in line with the observations just made and the ACC recommended, that 'either the jurisprudence of the CJEU should change to take a fuller account of the obligations under Article 9(3) and (4) of the Aarhus Convention when it interprets EU law and assesses the legality of EU implementing measures, or that the Aarhus Regulation is amended or new legislation implementing the Aarhus Convention is adopted.'

The European Commission was not impressed. According to the European Commission these findings ignore 'with all due respect, the specific features of a regional economic integration organization like the EU, with its special institutional framework and unique legal order, being a Party to the Convention'. When I read this and the subsequent Commission observations, it reminded me of my childhood days when my father (or was it my mother?) said to me, helping me with my homework: 'I will explain it to you one more time…'.

According to the Commission, the EU is so special that even the distinguished legal experts of the Aarhus Compliance Committee are unable to appreciate its specific features. To be honest, the Commission did not impress me with its statement on the special institutional EU framework. It reminded me also to my early academic life as a junior lecturer in European law, teaching a basic course for the first time. Preparing for a lecture on the infringement-procedure I read all the cases of the Court of Justice and was impressed by the ingenuity of the Member States in bringing arguments in order to avoid condemnation by the Court: 'we did all we could', 'we did our utmost best', 'we did not know that we were in violation of European law', 'we have no money to finance the required measures' and of course the ultimate argument 'our Constitution prohibits compliance' and 'Parliament refused to enact the necessary

laws to comply'. Of course, we all know the standard response and case law of the Court: 'A member state cannot plead internal circumstances in order to justify a failure to comply with obligations resulting from EU law.' This case law, of course, is more or less the EU-version of Article 27 of the Vienna Convention on the Law of Treaties: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)'. It is therefore rather surprising to see the EU use this line of argumentation.

Let us take a quote by the European Union at the recent Budva-meeting: 'In this respect, we would like to underline that in view of the separation of powers it is not possible in the EU legal order for instructions to be given to the CJEU or to the General Court regarding their judicial activities; and that the Union has an internal system of distributed competences between the Member States and the EU that must be taken into account.'

In my view the Commission acts precisely like a Member State in a EU infringement procedure. Of course, that is their prerogative. But it would have made much more of an impression, at least to the present author, if the Commission had acknowledged the correctness of the findings by the Aarhus Compliance Committee and would have started – a long time overdue – working on how to remedy the Aarhus compliance failures. The Committee itself made it quite clear (Open statement by the Aarhus Convention Compliance Committee regarding its findings on communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, 30 June 2017) that the EU is entirely free to decide how the EU can obtain compliance, whether to implement the ACC recommendations via CJEU case-law or by amending the Aarhus Regulation, or by taking any other measures it considers appropriate.

The Commission's position on how a party's Aarhus performance is to be assessed and taking into account the specific institutional framework of that party, is also in rather sharp contrast with how the Court of Justice is dealing with infringements of the Aarhus Convention (and its EU implementing measures) by its Member States. Let us take the *Slovak Bears II* case (case C-243/15). In that case a very peculiar provision of Slovak procedure was assessed on its compatibility with the Aarhus Convention et seq. Indeed, the provision was so peculiar that it took me days to understand it. At least, I think that I more or less understand what that rule entailed. But I am sure that I do not fully grasp its role and function in the Slovakian legal system. Anyway, the micro-assessment by the Court – and its subsequent condemnation – did not show any deference to national administrative procedural law and its special institutional framework. Clearly, the Court found the balance differently. Double standards?

Furthermore, this issue of REALaw contains a variety of interesting observations. Clara van Dam writes about the so-called 'guidance documents' of the European Commission and tries to trace the effects of those documents in the national legal order. We will hear more from this author, and on this topic, I am sure. Viola von Braun's article focuses on official language policies in Ger-

many and discusses this in the context fundamental rights protection. On fundamental rights Titia Loenen provides an eloquent article on the EU approach to headscarf bans. Luca De Lucia examines the connection that exists in a specific legal order between the regulation of locus standi and the confidence that the society and the institutions place in the role and authoritativeness of the public administration. Finally, this issue contains a case law analysis by Leo Neve (on *Berlioz*) and a book review by Fabio Longo.

J.H. Jans