



EU State aid decisions and access to justice

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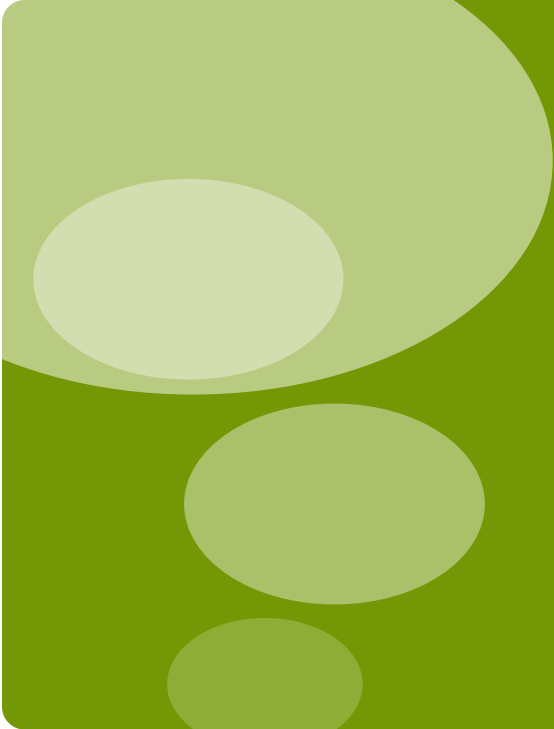
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Introduction



Four parts to the first presentation

- The Aarhus Convention and its compliance committee
- Case C128
- Implications of C128 findings
- Options for responding to them



The Convention on Access to Information, Public
Participation in Decision-making and Access to
Justice in Environmental Matters (“the Aarhus
Convention”)

and its compliance committee

What is the Aarhus Convention?



- International treaty binding virtually all European States and the EU
- three pillars which impose obligations in the field of the environment with respect to
 - freedom of information,
 - public participation and
 - access to justice.
- EU a party since 17 May 2005
- Part of a global family of instruments that relate to environmental democracy



The Compliance Committee



- Compliance Committee established under Article 15 of the Convention for the review of compliance by the Parties with their obligations under the Convention.
- Committee comprises internationally respected and fully independent legal experts
- Its functions include considering communications from the public relating to the compliance of particular Parties, which trigger cases
- Findings, once endorsed by the Aarhus Meeting of the Parties, *“...gain the status of official interpretation of the Aarhus Convention and [become] binding on the Parties of the Aarhus Convention and the Aarhus Convention bodies”*



Access to justice obligations: Article 9(3)



- Members of the public may enforce environmental law either in the courts or through administrative review procedures...
- ...by challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment
- Standing must be given to members of the public who meet the criteria (if any) provided for in national law

Access to justice obligations: Article 9(4)



Article 9(4): procedures provided for in Article 9(3) must

- provide for adequate and effective remedies
- be fair, equitable, timely and not prohibitively expensive

The background is a solid green color. On the left side, there are three overlapping circles of varying shades of green, creating a layered effect. The top circle is the lightest, the middle one is a medium shade, and the bottom one is the darkest.

Case C128



Implications of C128 findings

Implications



- Necessity for EU to recognise importance of environmental considerations in State aid decisions, and provide a means of enforcing CJEU jurisprudence, by implementing its legal obligations
- Repair the damage to its reputation as a champion of rule of law
- Reinforce its position as a global leader, particularly in environmental forums

State aid and environmental protection



Importance of access to justice to challenge state aid decisions that breach environmental law -

- the ambition of the Green Deal
- the sixth assessment cycle of the Intergovernmental Panel on Climate Change
- the energy price inflation caused by the Ukraine war

C-594/18 P Austria v. Commission



- State aid for an economic activity that is shown upon examination to contravene rules of EU law on the environment **cannot be declared compatible with the internal market**
- when the Commission checks whether State aid for an economic activity should be approved, it must **check that that activity does not infringe rules of EU law on the environment**. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.



Rule of law

Article 21 (TEU) –

The Union's action on the international scene shall be guided by ... respect for the principles of the United Nations Charter and international law.

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

... consolidate and support democracy, the rule of law, human rights and the principles of international law

President von der Leyen

There can be no compromise when it comes to defending our core values. Threats to the rule of law challenge the legal, political and economic basis of how our Union works.



Rule of law and Aarhus

In case C128 (and C32) the EU has

- undermined the findings of an independent and impartial Compliance Committee
- arbitrarily used its power in the Aarhus MOP to delay and/or deny access to justice to challenge the acts of EU institutions
- used its political influence to compromise and delay a legal process resulting in findings on compliance with an international treaty

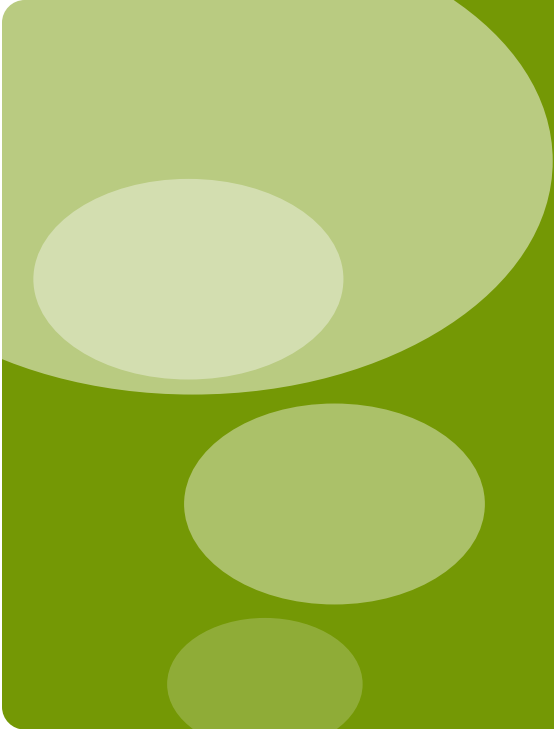




EU as a global leader ?

- EU as a global leader
 - *The Union is a global leader in the transition towards climate neutrality, and it is determined to help raise global ambition and to strengthen the global response to climate change, using all tools at its disposal, including climate diplomacy. (recital 16 of Climate Law)*
- But at Aarhus MOP 7
 - *International law is not to pick and choose - the EU and its Member States doing so is utter hypocrisy and undermines the EU's credibility on all fronts. It is further sending the very worrying signal to young people across Europe that, in the midst of a continued failure to adequately address the climate and biodiversity crisis, the EU is continuing to cut into the fundamental rule of law safety net that enables us to be heard. (Statement by Youth and Environment Europe)*





Options for
responding to
them

“Maintaining the status quo”



Clear signals that the Commission are considering doing nothing at all to implement the C128 findings

- They will come forward with proposals “as appropriate”
- Questionnaire (Qs 13 – 19) expressly raise the possibility of “maintaining the status quo”
- Q7 asks if there is **need** for **additional** means of challenging Commission State aid decisions

Risks attached to doing nothing

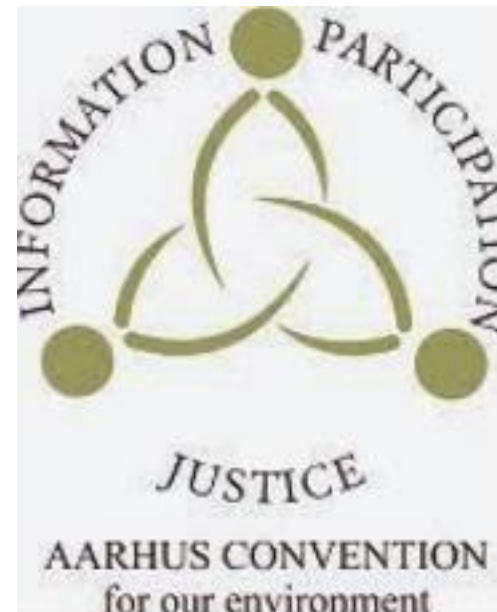


- Further reputational damage
- Would require continued blocking of endorsement of the C128 findings
- Should the EU block endorsement of C128 forever?
- Severe damage to Aarhus Convention and its Committee

Option 1 amendment of the Aarhus Regulation



- complies with Article 9(3) and (4) of the Aarhus Convention
- one of the alternatives expressly recommended by the ACCC in case C128;
- benefits from clarity of its contents (cf. Options 2 and 3)
- provides legal certainty and meets legitimate expectations of Member States, stakeholders and aid beneficiaries
 - applies clear and well known provisions of EU secondary legislation and the jurisprudence of the CJEU to Commission State aid decisions





Uncertainty of Options 2 and 3

Option 2: amendment of the State aid Best Practice Code



- Soft law: could not create any rights beyond those already established by the TFEU, the procedural and implementing Regulations, and their interpretation by the EU Court (para 8 of best practice code)
- May specify that only types of State aid decisions could be reviewed. But all State aid decisions must be subject to review
- Not clear that the EU Courts would consider admissible an action challenging an administrative review reply based on the Best Practice Code. (They probably would not.) In the absence of guaranteed review by the EU Courts, this Option would not comply with the Aarhus Convention.

Option 3 – amendment of the procedural Regulation



- Uncertainty (see above!)
- In particular, in the absence of specificity on standing, it cannot be clear to consultees whether Option 3 would meet the requirements of Article 9(3) of the Aarhus Convention in this regard.
- This Option might include only types of decisions - that would fail to meet the concerns expressed in the C128 findings, because **all** Commission Article 108(2) decisions that contravene EU law relating to the environment should be open to challenge, regardless of the justification given for the aid provided by the Member State
- In order to ensure compliance with the Aarhus Convention, It is necessary for the internal review procedure in the Aarhus Regulation to be supplemented by the possibility of an application to the EU Courts. The absence of any express provision in Option 3 for judicial review (compare with Option 1) is therefore a cause for concern.

Concluding remarks



- Controversy about A2J to challenge EU institutions for many years (C32 starts in 2008)
- What next?
 - Simple, well preceded route to compliance through amendment of Aarhus Regulation
 - Defying the ACCC, or
 - Something in between



Thanks for
listening

Any questions?

