ACCC/C/2017/150 – FOE NOTES FOR HEARING 14 SEPTEMBER 2022

INTRODUCTION

1. We are grateful to be able to address the Committee. We will respond formally to the PC's answers to the Committee's questions by 28 September 2022.
2. We address 3 overall questions here:
   (a) Did A8 apply here (to require effective public participation by the public authority responsible for preparing the UK's EU Withdrawal Bill (EUWB) at an appropriate stage, while options were still open)?
   (b) If so, did A8-compliant public participation in fact take place in relation to the EUWB?
   (c) Does the UK have in place A3-compliant mechanisms to ensure such a result?

QUESTION 1: DID A8 APPLY AND WHAT DID IT REQUIRE FOR THE EUWB?

Overall

3. A8 requires the promotion of effective public participation on draft rules that may have a significant effect on the environment.
4. We note the Committee's observation in ACCC/C/2014/120 #103 that the obligation in the first sentence of A8 is of a "somewhat "softer" nature than the obligations set out in articles 6 and 7", but we would also draw attention to the second sentence of A8 which goes on to specify the minimum to be achieved within that overall flexibility: "To this end, the following steps ***should be taken….***".
5. The 4 steps in question are ***at least*** what even UK law would require of a lawful "consultation" (see below). In other words, the obligation to strive to promote public participation requires *at least* public consultation (even as the UK court would understand it). As below, the key gap in the UK system is a requirement to undertake such consultation on draft legislation.

Primary legislation

6. The PC says that A8 only applies to secondary legislation [PC2018[1] #36-44]].
7. But there is no basis for that narrow reading (see [C2018[2] #4]). It has already been rejected by the Committee: ACCC/C/2014/120 #95-97. A8 clearly applies to the preparation of primary legislation including, here, the EUWB.

"May" have significant effect

8. The PC argues that that the EUWB turned existing EU legislation into domestic legislation so no significant effects arose [PC2018 #6(i)][PC–Q&A[3] #43ff]. This, says the PC, shows that the communication was "premature" [PC-Q&A #10] and should anyway fail.

9. But first, that ignores the "may" in A8 [C2018 #8][C-Q&A[4] p1]. Here, the EUWB made changes which allowed for (i.e. they "may have") future significant effects.

10. Secondly, the question of whether the EUWB "may" have such effects has to be considered by reference to the position ***at the time of the draft legislation***, not by reference to later events. That is clear from the Committee's decision in ACCC/C/2014/120 #109: the fact that the legislative provisions which had been consulted on were amended in the later parliamentary process did not mean there had not been A8 compliant consultation on the drafts; the reverse must also be true.
11. Accordingly, it does not matter here whether the significant effects in question have actually materialised. The Aarhus Convention is concerned with procedural rights – A8 is a procedural right. The communication was in no way premature (and the Committee correctly rejected that suggestion in its admissibility decision).

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[1] Party Concerned 2018 Observations on the Communication
[2] Communicant 2018 Reply to Observations
[3] Party Concerned 2022 Answers to Committee's Questions
[4] Communicant 2022 Answer to Committee Question

12. Thirdly the potential future effects as seen here ***at the relevant time*** included (see overall [C-Q&A pp1-5]):

    (a) Reducing the environmental protections previously secured by the EU Treaties [C-Q&A p4].

    (b) Potentially removing EU Commission's role [C-Q&A p4]

    (c) Potential departures from EU legislative schemes such as the EU ETS and CAP [C-Q&A p2].

    (d) Potentially facilitating regulations which would depart from the EU protections [C-Q&A p3, p5]

    (e) Potentially removing the EU role in relation to ACCC decisions [C-Q&A p5-6].

13. In response[5], the PC talks down what actually happened in relation to each of those areas. But:

    (a) As above, what matters is the position as seen at the time of the draft EUWB not what happened later; and

    (b) As it happens, in each of those areas, significant effects - or the potential for significant effects - remains:

        i. Obligations previously arising from the EU Treaty, most particularly its A191

           The PC relies on the (after the event) Environment Act 2021. But (as we will explain further in our formal replies to the Committee's questions) the "due regard" obligation in that Act is in no way comparable to the EU obligations being replaced [PC-Q&A #66].

        ii. Removing EU Commission's role.

           The PC relies on the later creation of the Office of Environmental Protection (OEP). But, apart from any other concern, the OEP is

[5] Party Concerned response to Communicant's Answer to the Committee's Questions

appointed directly by Government and subject to Government direction so is in no way comparable to the EU Commission which is independent of the organisations it oversees.

iii. Departures from EU legislative schemes such as the EU ETS and (agricultural) CAP.

As it happens, at least in the short term, the UK ETS has the potential to reduce GHG emissions to a *greater extent* than the current EU ETS – a *beneficial*, and significant, effect for the environment. The UK's replacement for the CAP is yet to be produced – it may, or may not, bring environmental enhancement – but it certainly won't be the same as before. Overall, there have been, or could be, significant environmental effects.

iv. Facilitating regulations which would depart from the EU protections

The PC suggests this issue has been declared inadmissible by the Committee. But that misses C's point: C is not inviting the Committee to comment on the content of the regulations, or the A8 compliance of the process for their adoption (which was the point declared inadmissible).

Rather, C is simply pointing to the fact that the draft EUWB made provision for processes which would make easier the making of regulations reducing environmental standards (and thus the potential – "may" – for a significant effect on the environment).

v. Removing the EU role in relation to ACCC decisions

The PC seems to think that C is asking the Committee to adjudicate on (for example) the UK court costs regime.

That seems an attempt to distract from the main point here. The point is that ***without the input of EU law***, the UK treats the Convention and the Committee's decisions as binding only in

international law, only be “taken into account by” the UK courts, and not necessarily followed [PC2018 #127, **Morgan** [2009] EWCA 107 Civ 22]. EU law (as it applied in the UK pre EUWB) in effect required compliance with the Convention and Committee decisions (by virtue of the EU’s membership of the AC). For example, only when the CJEU ruled on the requirements for “prohibitive expense” (A9(4)) did the UK introduce court rules to give effect to the Committee’s decision.

The EUWB removed, or at least had the potential to remove (which is what matters here) that latter effect.

14. Further, the PC also relies generally on the fact that the A391(1) TCA (The UK-EU Trade and Co-Operation Agreement), which applies post Brexit, commits the UK not to weaken environmental protections. But the TCA came long after the pre-legislative steps on the EUWB (and so is irrelevant here). And it only bites on changes which impact “in a manner affecting trade or investment”. Unless all environmental matters are to be treated as falling within that boundary (which seems unlikely), then A391(1) cannot help the PC here.

15. Overall, the simple point is that, as seen at the time of the draft EUWB (and even with the benefit of hindsight), the EUWB had the potential for significant effects on the environment.

Public authority

16. The PC notes that, by operation of A2, public authority “does not include bodies or institutions acting in a judicial or legislative capacity”. The PC argues that, in the UK, when preparing draft legislation, the public authority involved (i.e. the ‘executive’) is acting entirely in a legislative capacity (and so outside A8) [PC2018 #44] [PC-Q&A #31]). As below, the PC submission is entirely inconsistent with the Committee’s existing findings in ACCC/C/2014/120 (Slovakia).

17. The PC argues (without mention of that decision) on the basis that:

(a) The UK courts will treat the process of preparing legislation as non-justiciable and so (for example) will not entertain challenges to a lack of consultation or a breach of equality laws in relation to that process: [PC-Q&A #31-35].

(b) Members of the executive (Ministers etc) both prepare the draft legislation and present it through the parliamentary process in a "fused process" where no distinction can be drawn [PC-Q&A #37-40].

18. The fact that the UK courts treat that process as non-justiciable (see PC-Q&A #109]) does not mean that the executive is acting throughout in a "legislative capacity" (for A8/A2 purposes). The Convention has an autonomous meaning which must be applied to what in fact happens. That is not determined by the domestic law of a party, nor limited by the contemporary domestic court's approach. The Committee has already explained that a narrow and strict approach is to be taken to the concept of acting in a legislative capacity (including so as not to preclude executive bodies when involved in the preparation of draft legislation): ACCC/C/2014/120 #99ff.

19. In any case, in the UK cases referred to by the PC, the domestic courts were not considering the implications of an international treaty which had been implemented in our national law. The domestic application of the separation of powers doctrine cannot determine the Convention's answer; and it certainly does not bind the Committee or preclude the Committee from making relevant findings and recommendations in relation to the Convention and its application.

20. In fact, as explained by the PC [PC-Q&A #18(4)], UK Government departments commission draft UK legislation from 'parliamentary counsel' before (here at least [PC-Q&A #20]) securing Cabinet approval and then submitting it to Parliament. Accordingly, ***from a Convention point of view***, it is not difficult to see a distinction and identify a drafting process which is clearly separate from the later "legislative capacity" public authority action (per A2).

21. If it is not hard to identify (if it is necessary to do so) the most obvious point at which the handover takes place: That point is when the Parliamentary Business and Legislation Committee approves the introduction of a bill to Parliament. Prior to that point, the development and drafting of a bill is a matter of policy

making controlled exclusively by the executive: the government in power. It is not a process which involves contributions from opposition parties or MPs. After that point, the bill is introduced to Parliament and is subject to a legislative process which is governed by the Standing Orders of the Houses of Parliament. (We will provide more details with our formal answers to the Committee's questions.)

22. Overall, there is no reason why ***for the purposes of the Convention*** (which is what matters here) what happens before that point should not be considered to be outside the "acting in a legislative capacity" boundary in A2.

23. Nor does the engagement of A8 in that context cause any practical, legal or other difficulty in the real world:

    (a) It is not unusual for UK draft bills to be published in advance and, indeed, have full consultation undertaken (we will provide examples in our written response to the Committee's questions);

    (b) The House of Lords Select Committee on the Constitution itself made recommendations to that effect in 2017 (full text to be supplied):

    > "We identify a number of points in the policy development process at which the Government should actively seek to engage stakeholders in the policy development process. These include informal discussions with stakeholders during the process of formulating policy proposals; formal consultation by means of Green and White Papers; and additional consultation during the legislative drafting process."

    and

    (c) It is apparently the Government's policy intention to make that the norm [PC-Q&A #18(6)].

    So there is no practical or legal difficulty with the application and operation of A8 within the overall UK framework.

ISSUE 2: IF A8 APPLIED WERE ITS REQUIREMENTS SATISFIED HERE?

24. The PC claims that a combination of events before and after the laying of the EUWB in Parliament amount to compliance with A8 [PC2018 #6(ii)].
25. The starting point is that things which happened after the EUWB entered the legislative process cannot cure A8 defects prior to that stage (just as in ACCC/C/2014/120 later events could not undermine the earlier A8 compliance).
26. Let us nonetheless look at the items relied on by the PC.

The Brexit referendum [PC2018 #96] and general elections [PC2018 #98]

27. The Brexit referendum was the simplest form of question about the principle of UK's EU membership. It said nothing about the basis on which the UK would leave the EU (leaving entirely open the possibility that there would be no substantive change to any legal arrangements relating to the environment) [C2018 #15].
28. There was certainly no draft EUWB text (or anything similar) on what was proposed in relation to the matters which might impact on the environment.

The White Paper

29. The PC relies on the fact that a White Paper was published, and comment was possible [PC2018 #17, #99] [PC-Q&A #97].
30. But the White Paper did not include draft rules or anything remotely similar; nor ask any questions or invite any public response [C2018#14-15].
31. The fact that NGOs could and did comment on the White Paper does not remove that requirement. Anyway, there is no evidence that the NGO comments were actually taken into account by ***the public authority*** overall responsible for the drafting of the legislation (i.e. the executive member(s) involved):
    (a) It is no answer that civil servants might have looked at the responses – see [PC2018 #18-19]. What matters is the knowledge of the executive member(s). It cannot be assumed that they knew what civil servants knew.

(b) Moreover, it is standard UK Government practice where consultation has taken place to report on the outcome of that process including how responses have been considered – nothing of that kind happened here (which is why the PC cannot produce anything in response to the Committee's 5th question.)

The Parliamentary process

32. The first production of anything akin to a draft EUWB was within the parliamentary process [C2018 #17].
33. The PC relies on the process of parliamentary debate and the potential involvement of the public and NGOs via (for example) their representative MPs [PC2018 #100]; or via officials [PC2018 #110].
34. However, all of that was within the period when the executive was indeed acting in a legislative capacity, and so it cannot be part of the A8 compliance – it was too late.
35. Anyway, it did not have the requisite character for A8 (and certainly not A8 alongside A3). Members of Parliament are under no obligation even to consider representations from their constituents, let alone to pass those on into the discussion about a draft bill. They are in no way "representative consultative bodies" through which consultation is taking place.

The May 2018 consultation

36. The PC says that [PC-Q&A #90] the May 2018 consultation was "not… irrelevant" because the consultation opened six weeks before the legislative process concluded and it potentially informed public and parliamentary debate on the Bill.
37. But that too is irrelevant because it came too late for A8. Of course we make no complaint about ***additional*** (albeit later) public participation, but it cannot help with A8.
38. In any event, the May 2018 consultation closed on 2 August 2018, some six weeks *after* even the legislative process had concluded.

Overall

39. Nothing put forward by the PC amounts (alone or in combination) to compliance with the requirements of A8.

QUESTION 3: IS THERE AN A3 COMPLIANT FRAMEWORK TO SECURE A8?

Overall

40. Even if the combination of events which the PC relies on as showing A8 compliance did here show A8 compliance, then there is plainly no A3 compliant framework in place to secure that.

41. In particular, whatever the procedural contribution for A8 purposes of the referendum, general election, White Paper and parliamentary process (taken together, as the PC says they must be), the fact that they came together was pure happenstance here. And, of course, there is no requirement for a referendum on legislative proposals which may effect the environment; nor a general election; nor even a White Paper.

42. Although the parliamentary process is codified overall, that is (a) by definition too late for A8 purposes here, and (b) does not build in the requisite public participation (because, for example, there is nothing to require MPs to act as 'representative consultative bodies' so their involvement cannot assist with A3/A8 compliance).

The "common law"

43. The PC argues that the communication and/or (see [PC-Q&A #13 and #117(4)]) the Committee's questions amount to, or imply, an attack on the common law, or common law legal systems or (see [PC-Q&A #16) an attack on what was "done by an elected parliament". That is simply wrong.

44. As for "an attack on the common law", if the UK courts had developed clear and consistent common law rules around a requirement for pre-legislative public involvement (as required by A8) that could be compatible with A3 (i.e.

the common law ***could*** do the job). Here, that has not happened. But that does not in any way mean that this communication is an attack on the common law.

45. As it happens – see [PC2018] #124 - the UK courts have developed rules around the content of consultation, ***where it takes place*** (**Gunning, Coughlan, Moseley**, etc). But what is fundamentally missing from those common law rules is any requirement to trigger such consultation in relation to draft legislation. That is because, as above, the UK courts have treated the entire process as non-justiciable [C2018 #18].

46. Notably (and unsurprisingly in the circumstances) the PC has provided nothing of substance in response to Committee Question 7 which sought evidence that those involved in the drafting process in relation into environmental legislation are required to apply the consultation principles. There is no such evidence because there is no such requirement.

47. But, as above, none of those things would (a) preclude pre-legislative public consultation, or (b) preclude domestic rules which required such public consultation.

48. Put another way: just because the common law (i.e. judge-made law) has not provided an A8 compliant result here (in a way which could comply with A3) – see [C2018#19] – that does not mean that an A3 compliant framework could not be adopted by the UK or by a "common law system".

49. That conclusion is in no way an attack on the common law. Nor does it found any basis to suggest that A3/A8 is generally incompatible with "common law systems" as the PC submissions so dramatically and alarmingly claim.

50. Nor (contrary to the suggestion at [PC-Q&A #16]) is this an attack on decisions by parliament (including on the EUWB itself). This communication relates to what should have happened before parliament was involved. The point is that parliament's consideration of the EUWB would have been enhanced by, and should have been enhanced by, effective public involvement (as required by A8) though an ability to comment (and have taken into account the comments) on what was proposed in draft EUWB text. As recognised in recital 9 to the Convention, "*in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions.*"

Overall on A3

51. Pleasingly, as above, the PC has already stated an intention universally to publish draft bills. Providing (in a potentially A3 compliant way) for effective public participation in an A8 compliant way would plainly be possible.

52. It would be a modest but important step which would significantly improve the opportunities for meaningful public participation at the appropriate point – i.e. when draft legislation which may have a significant effect on the environment has been prepared but before parliament considers it. That would ensure that the drafters and members of the legislature were at least aware of and able to take into account public views on what is proposed. That would enhance the greater potential protection for the environment which comes from such participation, as the Convention overall contemplates.

SOME OVERALL OBSERVATIONS ON THE THE UK AND THE CONVENTION

53. In signing and ratifying the Aarhus Convention, the UK undertook to provide its citizens with very important procedural rights to further the objective of environmental justice. The UK has recently reaffirmed its commitment to the Convention[6].

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[6] See statement made by Victoria Prentis (then Parliamentary Under Secretary of State at Defra; now Minister of State at Defra) on 6 September 2021: "*The Government is committed to the continued effective implementation of our international obligations under the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters. The Government strongly supports the contribution the Convention makes to enhancing environmental protection and remains committed to its objectives*." At https://questions-statements.parliament.uk/written-questions/detail/2021-08-18/40934.

Also, on 3 November 2020, Rebecca Pow (then Parliamentary Under Secretary of State at Defra) said: "*I thank the hon. Gentleman for drawing the Committee's attention to the Aarhus convention, which is of course an international agreement. I do not deny its importance, so he and I agree on that. The UK ratified the convention in 2005, and we remain a party to it in our own right. Our exit from the EU does not change our commitment to respect, protect and fulfil the rights contained in this important international agreement. Implementation of the Aarhus convention is overseen by the Aarhus convention compliance committee, and the Department for Environment, Food and Rural Affairs co-ordinates the UK's ongoing engagement with the committee on our implementation and on findings pertaining to the UK on specific issues. The*

54. However, the general flavour of the UK's approach ***in this Communication*** is that the Convention should be interpreted in such a narrow way so as to effectively work around the UK's legal system and laws as they stand now, and that any finding of a breach would imply some sort of an "attack" on the UK's common law system.

55. That is putting things entirely the wrong way round. The UK is a signatory to and has ratified the Convention. It is for the UK to ensure that it is compliant with the Convention. There is nothing in the UK's common law system which precludes that.

56. The PC nonetheless complains in various ways about the Convention and about the Committee and its approach. All of that is regrettable.

57. It is particularly unfortunate that the PC has treated the Committee's questions as being somehow hostile or otherwise inappropriate. The questions to both parties properly sought to clarify aspects of our respective positions in an entirely properly way.

58. Nor is there anything in the PC's complaint about the time taken to process this communication in the first place. The challenge to admissibility meant that this matter would always be substantively considered after the EUWB had concluded. Once admissibility was established, the PC knew, or ought to have known, that the Committee would want a proper explanation of the process that had been followed including anything which might be claimed by the PC to amount to public involvement. The PC only has itself to blame if, for example, it cannot now locate some of the contemporaneous correspondence. The communicant does not accept that the PC has suffered prejudice. Any prejudice is to the Communicant.

59. Despite the passage of time, the communication remains important in ensuring that there should be no repeat of what went wrong here. In the context of the

committee has welcomed the willingness of the United Kingdom to discuss compliance issues in a constructive manner." See: https://hansard.parliament.uk/Commons/2020-11-03/debates/c1ef941e-1c11-4e5e-8d66-dd276f6d70e1/EnvironmentBill(NinthSitting)?highlight=aarhus#contribution-A8A4897C-4135-409C-B9B5-1112EFE66C52

climate and nature crises, it remains of continuing importance going forwards that the public do have a guaranteed right to participate in the preparation of draft legislation that may effect the environment.

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14 September 2022