

**Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the European Union (Withdrawal) Bill 2017 (ACCC/C/2017/150)**

**The seventy-sixth meeting of the Aarhus Convention Compliance Committee in Geneva**

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**NOTE OF THE ORAL PRESENTATION  
By James Maurici K.C. (leading Nick Grant)  
on behalf of  
THE GOVERNMENT OF THE UNITED KINGDOM**

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*Defined terms as set out in the June 2018 Observations, UK's August 2022 Answers ("the UK's August 2022 Answers") and the UK's response to the Communicant's August 2022 Answers (the "UK's September 2022 Response") are adopted herein.*

**Introduction**

1. The aspects of this Communication that were held admissible concern an alleged failure by the UK to comply with Articles 8 and 3(1) of the Convention in the preparation of the European Union (Withdrawal) Bill 2017, prior to its introduction to Parliament.<sup>1</sup>
2. Complaints regarding the preparation of subsequent legislation were found inadmissible by this Committee<sup>2</sup> and do not fall for consideration today.
3. It is important to be clear on this at the outset because the written submissions of the Communicant seem to continue to seek to pursue matters that were held inadmissible.

**The issues raised**

4. The Communicant alleges (i) the UK failed to comply with Article 8 in failing to hold a formal consultation on the contents of the Bill and did not take into account

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<sup>1</sup> See the Communication.

<sup>2</sup> See the Committee's determination of preliminary admissibility, 05.01.18. Though this has not prevented the Communicant from raising these issues again in, for example, the Communicant's August 2022 answers.

the general public's views and (ii) is in breach of Article 3(1) by failing to transpose a clear, transparent and consistent framework implementing Article 8.

5. The UK's response is, in summary

- (i) That Article 8 does not apply to the preparation of draft primary legislation. This is a legislative act which falls within the exemption provided in Article 2.
- (ii) To the extent that the Committee disagrees with that, the Bill itself nevertheless falls outside Article 8, because it was drafted to preserve existing EU law in the UK after exit day. It could not, therefore, have had a "*significant effect on the environment*".
- (iii) To the extent that the Committee disagrees with (i) and (ii), sufficient public participation has been undertaken and the objectives of Article 8 have been met.
- (iv) The complaint in relation to Article 3 lacks any merit.

#### **Article 8: Applicability**

6. For Article 8 to apply there are three requirements:

- (i) Preparation of an "*executive regulation or generally applicable legally binding rule*";
- (ii) "*by a public authority*";
- (iii) Which "*may have a significant effect on the environment*".

7. None are met in this case.

- (i) "*Executive regulation or generally applicable legally binding rule*"

8. We say draft primary legislation, such as the Bill in issue, does not fall within the meaning of "*Executive regulation or generally applicable legally binding rule.*"

9. First, we submit that primary legislation cannot be considered an "*executive regulation*":

- (i) It is clear, we say, just on the language used that “*executive regulation*” cannot include primary legislation made by a national legislature. Instead this is focussed on what can be called secondary legislation made by the executive.
- (ii) This is strongly supported by the Convention read as a whole, and the respect for the legislative process inherent in the carve out from Article 2 of those acting in a legislative capacity (discussed below).
- (iii) It also reflects the objective and purpose of the Convention (securing public participation<sup>3</sup>). A draft executive regulation (an *actual* regulation) might not appear as drafted in a public forum until it becomes law. The same, however, cannot be said of draft primary legislation – which is introduced, debated, and amended many, many times over until it becomes law in the national legislature. That legislative stage offers a multitude of opportunities for engagement by the public largely through their elected representatives.

10. Second, draft primary legislation cannot be considered an other “*generally applicable legally binding rule*”.

- (i) As a starting point, the broad nature of this concept must be to the same genus or class as “*executive regulations*”, in accordance with the *ejusdem generis* principle.<sup>4</sup> Draft primary legislation is of a wholly different class or genus.
- (ii) The broader references to norms or rules are intended to catch systems which use different nomenclature from “*executive regulations*”. But there is no indication that this is intended to go wider and apply to primary

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<sup>3</sup> Because it contributes to the right of every person to live in an environment adequate to his or health and wellbeing (Article 1).

<sup>4</sup> Applicable in modern treaty interpretation: see Aust *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> Ed 2013) p. 212, 221.

legislation. See in this regard, for example, the *Implementation Guide*<sup>5</sup> at p. 182.<sup>6</sup>

(iii) The points already made regarding the context, objective and purpose of executive regulations are equally applicable here.

(ii) *Public authority*

11. The definition of “*public authority*” provided by Article 2 specifically excludes “*bodies or institutions acting in a judicial or legislative capacity*”. Recital (11) makes clear that while legislative bodies are invited to implement the principles of the convention, this is not required. This was no accident. It was a deliberate choice based on the reluctance of negotiators to interfere with the domestic balance of powers.<sup>7</sup>

12. The issue is therefore, really, whether in preparing and drafting legislation a body is acting in a legislative capacity. We say it is, and this is particularly so in the UK.

13. If we may start with a preliminary point, this Committee cannot ignore the diversity of Parties that are signatories to the Convention, and the plurality of systems who have agreed to abide by it. These systems vary on fundamental matters up to and including what constitutes the legislative process. As we set out in the **UK’s August 2022 Answers**, in the UK the process of drafting primary legislation prior to its introduction to Parliament is considered, domestically, to be an intrinsic part of that legislative process.<sup>8</sup> There is no wording in this Convention to indicate that parties such as the UK were required to fundamentally alter the

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<sup>5</sup> *The Aarhus convention: An implementation Guide* (2<sup>nd</sup> Ed, 2014) <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

<sup>6</sup> “Because different legal systems may use different terminology for various forms of normative acts, the Convention uses wording to try to avoid any unnecessary narrowing of the concept of “executive regulations”. In some legal systems this term might be interpreted to cover only immediately executable rules. Therefore, to erase all doubt, Article 8 refers to other generally applicable legally binding rules as well. The title also helps to explain what is meant by such rules by using the term “normative instruments” in the same manner. Such generally applicable legally binding rules include decrees, regulations, ordinances, instructions, normative orders, norms and rules.” (p. 182)

<sup>7</sup> See the *Implementation Guide* p. 49 as extracted in the June 2018 Observations at paras. 37-38.

<sup>8</sup> **UK’s August 2022 Answers** para. 25ff.

nature of their legislative process and their constitution in this regard. In fact, respect for the legislative branch is inherent in the legislative carve out in Article 2.<sup>9</sup> So, the interpretation of the Convention must be one that accommodates this diversity.

14. With that in mind the only rational conclusion is that in drafting primary legislation a public body is acting in a legislative capacity.
15. First, the process of drafting legislation is part of the legislative process. If nothing is drafted, there is nothing to legislate – or, indeed, debate.
16. Second, the drafting of legislation such as the Bill in issue lies with members of the Government. But as well as being members of the executive they are also Members of Parliament.
17. Third, with respect, a finding that governments must consult on draft bills before presenting them to legislatures *risks* altering the balance of powers in democratic systems – something the *Guide* explains the Parties sought to avoid in drafting the Convention.
18. For those reasons, a body or person drafting primary legislation can only be said to be acting in a legislative capacity, and therefore falls outside the Article 2 definition of “*public authority*”.

(iii) *Significant effect on the Environment*

19. Even if the Committee is not with us on our first two points, it is nevertheless the case that the draft Bill was not a measure which “*may have a significant effect on the*

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<sup>9</sup> We understand, of course, that a party cannot rely on its own internal separation of powers as a reason not to comply with international law: ACCC/2005/11 Belgium, para. 41. For the avoidance of all doubt that is not the argument we make. We do not say that we cannot comply with Article 8 because of the internal divisions of power within our constitution. We say, instead, that the ambit of Article 8 must be understood by the fact that it was signed up to by Parties with a multiplicity of systems, that respect for the legislative prerogative in those systems is an inherent part of the Convention (hence Article 2), and that, therefore, it cannot be interpreted as containing an obligation which requires at least some of those parties to fundamentally re-write their constitution.

*environment*”.<sup>10</sup> Put shortly, the draft Bill provided, explicitly, that the Bill would convert the corpus of EU law – particularly EU environmental law – into domestic UK law: see clauses 2-6.<sup>11</sup> That was its intention, as set out both in the White Paper that came before the Bill, and the Explanatory Notes accompanying the Bill.<sup>12</sup>

20. The Communicant has been asked explicitly by this Committee to illustrate ways in which the Bill itself have a significant effect on the environment.<sup>13</sup> It has, with respect, failed to present any convincing case on this point. The points made (putting aside those found to be inadmissible)<sup>14</sup> are responded to in the **UK’s September 2022 Response**.

#### *Conclusion*

21. Overall, therefore, for the reasons set out in the UK’s written submissions, many of which I have just highlighted to this Committee, the UK submits it is clear that Article 8 does not apply.

#### **Article 8: compliance**

22. If the Committee is not with the UK on the above analysis, the UK submits that the requirements of Article 8 were complied with in the preparation of the draft Bill.

23. The obligations are, as is set out in the **June 2018 Observations** paras.88ff, inherently flexible. This is clear from the wording (the obligation to “*promote effective public participation*”), commentary (see the *Guide* at p. 181), and findings of this Committee (Communication ACCC/C/2010/53 (UK)). It is not (contrary to the implications of the Communicant) an obligation for formal consultation. The obligation is judged by efforts, not outcomes – as the *Guide* (p. 181) suggests.

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<sup>10</sup> This is covered in more detail in the **June 2018 Observations** at para. 47ff and the **UK’s August 22 Answers**.

<sup>11</sup> Communication Annex 2a.

<sup>12</sup> **June 2018 Observations** para. 49-60.

<sup>13</sup> **July 2022 Questions**.

<sup>14</sup> See the **UK’s September 2022 Response** at paras. 4, 5 and 22.

24. Of particular import here is that the drafting of the Bill was the beginning of, and itself part of, a legislative process. In that process a draft bill is published for engagement with, comment on, or amendment by the people's directly elected representatives. That context, of course, necessarily affects what is required by state Parties at the drafting phase in order to comply with Article 8, because the public will inevitably have other ways of engaging with legislation in order to protect their rights to live in a healthy environment.<sup>15</sup> So, by way of example, there is a real benefit in members of the public needing to see draft executive regulations because in many cases it is the only chance they have to comment on them. However, with regard to primary legislation that is not so, and what is of real benefit to the public, in advance of any drafting, is being able to engage with the 'big picture' policy questions that will be placed into the legislation.

25. In this case, the UK did promote effective public participation, and took that into account, prior to its introduction into Parliament. The Bill is the embodiment of the decision to withdraw from the EU. The principle of withdrawal was determined by a national public referendum, which followed an extensive period of campaigning. It is, with respect, hard to think of a more effective way of directly engaging public participation. Thereafter, during the period prior to the Bill's introduction into Parliament, the question of government policy was extensively debated in Parliament, in the UK media and in the public sphere. A White Paper was introduced in March 2017 which set out, clearly, the policy objectives that the main provisions of the Bill would seek to achieve, including what became clause 7.<sup>16</sup> The public was offered the opportunity to provide feedback.<sup>17</sup> Moreover, General Elections were held in June 2017 and December 2019 in which exiting the EU, and how that would be achieved, was directly in issue.<sup>18</sup> Concerns about the

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<sup>15</sup> The objective of the Convention: Article 1

<sup>16</sup> For example, the conversion of EU law into UK law and the power to make corrections to secondary legislation: see para 1.24.

<sup>17</sup> See e.g. the White Paper para. 1.26.

<sup>18</sup> **June 2018 Observations** para. 95ff and references therein.

effect of withdrawal on the environment and environmental law were very much ventilated in this process.<sup>19</sup>

26. The above steps show clear compliance with Article 8. Overall, it cannot be said that the UK did not “*strive to promote effective public participation*”. The evidence speaks for itself – there was clear and continuous public participation with regard to the key issues that underlay the introduction of the Bill and its main clauses.

27. Although the UK accepts that the draft text of the Bill was not published prior to its introduction into Parliament, the thrust of the overarching policy approach as well as an outline of the main things that the Bill would seek to do were. It is hard to see what additional benefit could have been achieved by publication of the Bill at this stage. The public was given the opportunity to engage throughout this process. It was one big exercise in public engagement.

28. That, of course, comes against the backdrop of the many, many further opportunities for engagement that occurred during the legislative process – as set out in the **June 2018 Observations** at paras. 100ff.

29. For those reasons, therefore: if the Committee considers that Article 8 does apply to the preparation of the draft Bill, it was complied with in this case.

### **Article 3(1)**

30. The Communicant’s complaint is an alleged failure to implement Article 8, which appears to arise from

- (i) Its suggestion that the Consultation Principles are not legally binding,<sup>20</sup> and further suggestion that the common law is an inadequate basis on which to implement the Convention;<sup>21</sup> and

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<sup>19</sup> UK’s August 2022 Answers para. 132.

<sup>20</sup> Complaint p. 1-2

<sup>21</sup> November 2018 Reply p. 6

(ii) That Consultation Principle B “*could be interpreted as actively discouraging consultation*”.

31. Neither has any merit. We do not intend to spend any time on the misinterpretation of Consultation Principle B. Frankly it is simply misread and we will say no more about that unless there are questions that the Committee have in due course.<sup>22</sup>

32. More fundamentally, we would like to address the role of the common law and Article 8.

33. As a starting point there is no common law obligation to consult on primary legislation.<sup>23</sup> As the UK does not consider there is any obligation under the Convention to consult on primary legislation, it follows there is no breach of Article 3(1).

34. As to the suggestion that the common law is not an adequate basis to implement the Convention requirements (which may become relevant to future complaints), that is strenuously denied by the UK.

35. The nature of the common law is set out in the **June 2018 Observations** at paras. 123ff. We do not repeat that here. Judgments are public. Precisely because of the nature of precedent they tend to be thoroughly reasoned, allowing impartial observers to understand the legal principles and how they have been applied. Again, due to the role of precedent they also tend to be consistent. Of course different cases will reach different outcomes on different facts, but it is rare to have cases offering diametrically opposite outcomes and – where they do – the matter is usually resolved by appeal. The framework of the common law, of itself, is clear, transparent, and consistent.

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<sup>22</sup> For a fuller response see the **June 2018 Observations** at para. 129ff

<sup>23</sup> **UK’s August 2022 Answers** paras. 25ff, 109-110.

36. Of course, that framework is sometimes supplemented, which only adds to the clarity, consistency, and transparency of the framework by which the Convention is implemented. Sometimes, parties will distil common law requirements into helpful and accessible guides – as the Government Legal Department has done with the *Judge Over Your Shoulder*. Sometimes, the common law principles are supplemented by decision makers issuing their own policy or guidance documents – as the Cabinet Office has done with the Consultation Principles. These, too, then may gain relevance as outlining policies with which government departments must comply.<sup>24</sup>
37. The Communicant has suggested that the common law is not appropriate to implement convention obligations because “*of the unpredictability inherent*” in “*judicial discretion operating after the event*”. That is strongly refuted for reasons set out in the **UK’s August 2022 Response** and **September 2022 Responses**.
38. So, again, to summarise: the common law (whether or not supplemented) is part of a clear, transparent, and consistent framework for the implementation of Article 8.
39. Importantly, Article 3(1) says that each Party shall take the “*necessary legislative, regulatory and other measures*” (emphasis added) to give effect to the Convention. This Committee has held that “*other measures*” can include mere instructions or published guiding principles to bodies performing public functions.<sup>25</sup> If this is a permissible way of giving effect to the Convention so *a fortiori* is the common law.
40. As to the substance of the common law, as we detail in the **UK’s August 2022 Response**, there are clear statements of principles when consultation is required (as set out in the *Plantagenet Alliance*<sup>26</sup> case) and clear statements of principle as

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<sup>24</sup> See the **UK’s August 2022 Answers** paras. 101-104.

<sup>25</sup> See the **June 2018 Observations** paras. 121 – 124.

<sup>26</sup> **August 2022 Answers** para. 105.

to what consultation requires (as set out in the *Coughlan*<sup>27</sup> case). The Convention is relevant to both of these questions, as is set out in the **June 2018 Observations** at para. 127. If there is any doubt about this, note the statement from Lord Carnwath JSC, sitting in the Supreme Court, stating that the decisions of this very Committee “*deserve respect on issues relation to standards of public participation*”.<sup>28</sup>

41. Overall, therefore, the Article 3(1) complaint must also fail.

### **Concluding remarks**

42. So, trying to bring this altogether, the UK submits the complaint should be dismissed.

43. The **Article 8 complaint** is manifestly flawed where:

- (i) Article 8 does not apply to the drafting of primary legislation in general, and specifically does not apply to the drafting of the Bill;
- (ii) If it does, the requirements of Article 8 were complied with in this context.

44. Finally, Communicant’s complaints regarding the common law and Article 3(1) are misconceived.

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**Wednesday 14 September 2022**

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<sup>27</sup> **June 2018 Observations** para. 124.

<sup>28</sup> *Walton v Scottish Ministers* [2013] PTSR 5 at para. 100.