B E F O R E:

THE AARHUS CONVENTION COMPLIANCE COMMITTEE

UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACCC/C/2017/150

(THE EUROPEAN UNION (WITHDRAWAL) BILL CASE)

COMMUNICANT POST-HEARING SUBMISSIONS

INTRODUCTION

1. At the hearing on 14 September, the Communicant and Party Concerned were invited to provide written submissions on:
   a. the Committee's approach to Article 8 and Article 2 of the Convention in *ACCC/C/2014/120 – Slovakia* (C-120); and
   b. the point at which the executive signs off on legislation for introduction to the legislature in the UK, and guiding principles on when this point arises.

2. This document (as read with the Communicant's speaking note for the hearing and submissions at the hearing) provides the Communicant's submissions on these issues.

THE COMMITTEE'S DECISION IN C-120

3. In C-120, the Committee concluded that Article 8 applies *"to the preparation of legislation by executive bodies to be adopted by national parliaments, and that public authorities, including Governments, do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation."*[1] That interpretation of the Convention is consistent with the Communicant's submissions throughout this communication. We submit that the Committee was correct for the reasons it gave and anyway.

[1] At §101

4. The Party Concerned, however, submits that the Committee erred in reaching that conclusion. In what follows, the Communicant addresses:
   a. What the Committee decided in *C-120*
   b. Why that conclusion was correct
   c. Why the Party Concerned's submissions on this point to date are wrong

What the Committee decided in C-120

Factual context

5. The factual context and nature of the complaint is set out in full in the Committee's decision. In short, the complaint related to representations made by the communicant in the preparation of draft amendments to Slovakian legislation relating to forests. The communicant alleged, *inter alia*, a failure by Slovakia to take into account representations he had made during the consultation phase on the draft amendments, as required by the final sentence of Article 8 of the Convention.

6. To determine the complaint, the Committee first had to consider whether Article 8 applies to the preparation of draft legislation. The Committee noted that Slovakia did not contest that Article 8 applied and its Constitutional Court had examined the communicant's complaint on the basis that Article 8 applied to the preparation of draft legislation. The Committee quoted from the Slovakian Constitutional Court at [93]:

> "The aim of the positive commitment of the State resulting from [article] 8 of the Aarhus Convention is to ensure, through the law of the State concerned, the protection of public participation in the preparation of generally binding legislation having a significant effect on the environment, i.e. the initial phase of the entire legislative process – in the preparation and discussion of a draft law before its submission to the National Council."

7. At [95] – [96], the Committee noted that the ordinary meaning of the phrase in the title of Article 8 *"executive regulations and other generally applicable legally binding normative instruments"* includes legislation. At [97] the Committee rejected the suggestion that the phrase was intended only to capture regulations by the executive branch, noting that such an interpretation rendered the inclusion of *"and other generally applicable legally binding normative instruments"* meaningless. It noted that this interpretation was also consistent with the approach in the Maastricht Recommendations.

8. At [98] – [99], the Committee then considered whether Article 2(2) had the effect of excluding executive bodies engaged in the preparation of draft legislation from the definition of "public authority". The Committee concluded that the term "legislative capacity", read in light of the French and Russian versions of Article 8 of the Convention and its preamble, had a precise meaning, referring only to the acts of the body with the capacity and power to adopt legislation when it uses its legislative power, but not when it carries out other functions. The Committee found that that was not simply the natural interpretation of the phrase, but it was also the interpretation that ensured a uniform application of the Convention by the parties, and avoided an outcome where extensive pre-legislative processes were shielded from transparency or the need for public participation.

9. On that basis, the Committee concluded that: *"article 8 of the Convention applies also to the preparation of legislation by executive bodies to be adopted by national parliaments, and that public authorities, including Governments, do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation."*

Why the Committee's decision is correct

10. The Committee's findings in C-120 are neither surprising nor contentious, and they do not create an 'absurd' result as submitted by the UK.

11. They reflect the interpretation of Article 8 that underpins this communication made by Friends of the Earth in 2017. In submitting that the Committee erred in C-120, the UK places significant weight on the fact that Slovakia did not contest the application of Article 8. But that merely emphasises the weakness of the UK's position. Slovakia did not contest the application of Article 8 to the preparation of legislation by executive bodies because, one assumes, it considered it clearly to apply. In any event, the Committee made clear that its' findings were not merely reflective of Slovakia's concession. The Committee agreed with the substance of the concession.

VCLT Art 31: the ordinary meaning of the terms of the treaty, in their context, and in light of its object and purpose

12. Article 31(1) of the Vienna Convention on the Law of Treaties requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Committee's decision in C-120 follows that approach.

13. Starting with the ordinary meaning, the Communicant submits that:
    a. The phrase *"executive regulations and other generally applicable legally binding normative instruments"* envisages something in addition to executive regulations. The UK's contention that it is limited to executive regulations is simply not arguable as it renders entirely meaningless the phrase *"and other generally applicable legally binding normative instruments"*
    b. The phrase *"generally applicable legally binding normative instruments"* and "*generally applicable legally binding rules"* is deliberately framed in inclusive terms with broad application. On its ordinary meaning, the phrase clearly includes legislation enacted by parliament. That is reinforced by the French version ("*règles juridiquement contraignantes d'application générale"*) and, the Committee noted, the Russian version.
    c. The phrase *"bodies or institutions acting in a… legislative capacity"* is, on its own, open to interpretation. But, as the Committee concludes at [99], when read together with the French (*"les organes ou institutions agissant dans l'exercice de pouvoirs… législatifs"*), it is clear that the exclusion is limited to bodies or institutions acting in a context where legislative powers are being exercised. That is why a parliament exercising permitting powers does not fall within the exclusion (see ACCC/C/2011/61 United Kingdom) and why the executive tabling legislation in parliament and commenting on legislation while the parliamentary legislative process is ongoing can fall within the exclusion (see *C-204/09 Flachglas Torgau v Germany*).

14. On the ordinary meaning of Article 8 of the Convention, therefore, it applies to the preparation of draft legislation prior to its introduction to Parliament. Further, on the ordinary meaning of Article 2 of the Convention, the executive is not, when preparing draft legislation prior to its introduction to Parliament, acting in a legislative capacity or exercising legislative powers such that it is not to be considered a public authority. The UK executive does not have the power or capacity to enact legislation and cannot therefore act in a

legislative capacity until the body that does have such capacity, namely Parliament, starts to exercise its powers to legislate. The legislative process therefore begins at Introduction. As such, the ordinary meaning of Article 8, and as confirmed by the ACCC is consistent with the constitutional arrangements found in the UK.

15. That ordinary meaning is reinforced when the text is considered in its context. In particular, the preamble to the Convention specifically addresses legislative bodies that fall within the Article 2 exclusion in *"[r]ecognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings."* That preambular paragraph is an acknowledgement that the Convention does not bind "legislative bodies" to comply with the relevant transparency and public participation requirements but invites them to do so anyway. But that invitation to "legislative bodies" reinforces the narrow scope of the Article 2(2) exclusion. The invitation is not directed to "all those bodies and institutions engaged in the preparation, policy and drafting of legislation that is to be enacted by parliament at some point in the future", which one might expect if the Article 2(2) exclusion is as wide as the UK contends.

16. Further, the ordinary meaning of the text is reinforced when read in light of the object and purpose of the treaty. That object and purpose is captured in Article 1 of the Convention and in the preamble and seeks to enhance access to information and public participation in decision making in matters relating to the environment. To suggest, as the UK Government does, that the Article 8 obligation does not apply to the executive at any stage of the development of legislation that may have significant effects on the environment is to deprive the Article – and the Convention – of its very purpose. As set out in our comments on the UK's answers to the Committee, on the UK's position the government could develop policy on a 'bonfire of environmental law' and draft legislation to repeal every piece of environmental regulation and, on account of the fact it would not be considered a public authority for the purposes of Article 2:
    a. It would not, at any stage, need to promote public participation in the development of that policy or draft legislation; and
    b. It would not be required to provide access to any of the information relating to the development of that policy or legislation.

17. That cannot have been the intention of the parties when they negotiated the Aarhus Convention and it does not reflect the object and purpose of the Convention.

Art 32 VCLT: the travaux preparatoires

18. Article 32 of the Vienna Convention on the Law of Treaties permits recourse to supplementary means of interpretation, including the travaux preparatoires, to confirm the meaning resulting from the approach in Article 31 VCLT. Whilst the Communicant maintains that the meaning of the provisions is clear, it submits that the travaux does confirm that meaning in any event.

19. In particular, it is clear from the record of the Working Group Report of the 8th session dated 17 December 1997 that the United Kingdom understood the *"preparation of binding rules of general application"* to include the preparation of legislation to be adopted by the legislature. For that reason, the UK proposed an amendment as follows:[2]

> *"Each Party shall strive to promote effective public participation at an appropriate stage, and whilst options are still open, during the preparation of binding rules of general application that may have a significant effect on the environment, except where those rules are being adopted by the legislature."*

20. At the time of the UK's proposed amendment, the draft text already included the draft Article 2(2) carve out, so it appears the UK's intention was to exclude the preparation of draft legislation by the executive prior to its introduction to Parliament. However, the proposed amendment was *not accepted* by the Parties and the text of Article 8 was agreed as it appears in the Convention. It appears the UK is now seeking to achieve, through this communication process, what it failed to achieve through negotiation.

Why the Party Concerned's submissions on this point are wrong

21. At the hearing on 14 September, the UK made a number of submissions to support its contention that C-120 was wrongly decided. Here, we respond to those submissions.

22. First, the UK contended that because Slovakia did not contest the application of Article 8, the Committee did not properly consider the counter arguments. With respect, that is clearly not correct. The Committee chose – of its own motion – to consider whether Article

[2] See paragraph 19

8 applied and considered the potential argument that it may not apply. Presumably, the Committee wished to ensure, quite properly and given its status as a non-confrontational, consultative body, that before making findings on whether an obligation under the Convention had been complied with, the said obligation was actually engaged in the first place. Moreover, it clearly considered a relevant case where this issue had been addressed by the Court of Justice of the European Union, *C-204/09 Flachglas Torgau v Germany*, and noted that the Committee's approach led to a different conclusion from the Court of Justice in that case[3] (see below at paras 27 and following our further submissions relating to *Flachglas*).

23. Secondly, the UK reiterated its erroneous claim that domestic case law has established that there is no valid distinction to be made between executive policy development and legislative drafting, and the parliamentary legislative process. That is wrong. As explained in our response to the UK's reply to questions, the case law establishes that some executive acts are presently non-justiciable by UK domestic courts if they constitute material steps in a process that leads to an Act of Parliament. That is because, (1) in the UK constitutional arrangements, the courts are not entitled to call into question any proceedings in Parliament or question the validity of Acts of Parliament, and (2) that has to date been interpreted as precluding consideration of the legality of pre-legislative steps such as those contemplated here. While pre-legislative executive acts do <u>not</u> constitute proceedings in Parliament or Acts of Parliament there are circumstances in which the UK courts have proceeded on the basis that they must still decline jurisdiction where those acts are challenged because:

    a. The remedy sought would have the effect of requiring, prohibiting or delaying the introduction of legislation to Parliament, which is properly a matter for Parliament and not the courts: see *Unison* at **[UKR2Q 29]**
    b. The remedy sought would have the effect of calling into question – explicitly or implicitly – the validity of the subsequent Act of Parliament: see *Adiatu* and *A, K, J, F, B* at **[UKR2Q 31-35]**

    The fact that the UK courts currently treat some pre-legislative acts as non-justiciable does not mean that the executive is acting throughout in a "legislative capacity". In addition:

[3] See footnote 92 of the decision. See also the discussion of this case later in the document.

- 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.
- Article 27 of the Vienna Convention on the Law of Treaties 1969 prevents the reliance on domestic law as a reason not to comply with international law obligations that have been entered into.

24. As it happens, the autonomous meaning confirmed by the Committee is in fact consistent with UK arrangements in so far as it correctly delineates between the executive and the legislature. Had the executive sought to incorporate Article 8 into UK law following the ratification of the Convention, as it should have done, it could have taken a range of measures to achieve that, as indicated at paragraphs 20 – 22 of our reply to the UK's response to questions, all of which would have been consistent with the UK constitution.

WHEN DOES THE EXECUTIVE SIGN OFF ON DRAFT LEGISLATION FOR INTRODUCTION TO THE LEGISLATURE?

25. The UK Government contends that it is not possible to identify a point at which the executive signs off on draft legislation for introduction to the legislature. As set out in the Communicant's comments on the Party Concerned's answers, that is clearly wrong. The relevant point is when the Parliamentary Business and Legislation Committee approves the introduction of a bill to Parliament.[4] Prior to that point, the development and drafting of a bill is a matter of policy-making controlled exclusively by the executive. 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.[5] In the case of the EUWB, it was introduced on 13 July 2017 to the House of Commons as Bill 005 of 2017-19.[6]

26. While it is true that the executive has a role to play in the legislative process, that role does not retroactively render 'legislative' all steps taken by the executive in relation to the bill

[4] Guide to Making Legislation (July 2017) at 21.6 et seq; and para.20 of the UK's Reply to Questions
[5] The authoritative description of the process is found in Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, available online at https://erskinemay.parliament.uk
[6] https://commonslibrary.parliament.uk/research-briefings/cbp-8328/

prior to introduction. It is notable that the *Guide to Making Legislation* 2022[7], which is published by the Cabinet Office (a department within the executive), clearly considers the legislative process to concern solely what takes place once a draft Bill has been introduced to Parliament. Notably, chapter 21 is on "Pre-legislative scrutiny". It states at para 21.1 that "*The Government is committed to publishing more of its bills in draft* ***before they are formally introduced to Parliament****, and to submitting them to a parliamentary committee for parliamentary pre-legislative scrutiny where possible*" (emphasis added). There is also a reference to "wider-pre-legislative scrutiny". From this, it follows that these pieces of scrutiny are not considered part of the legislative process, hence the phrase "*pre-legislative*". The Guide also includes a summary of the parliamentary stages, and records the first of these as "*First Reading – formal presentation of the bill (no debate).[8]"* This understanding of a cut-off point before the legislative process actually begins accords with the interpretation of the remit of Article 8 as set out in the Aarhus Implementation Guide.[9]

27. At this stage, it is worth addressing the judgment of the Court of Justice of the European Union in *C-204/09 Flachglas Torgau v Germany*. That is the case referred to in footnote 92 of the Committee's decision in C-120 where the Committee notes that the CJEU reached a different conclusion on the meaning of "public authority" and "legislative capacity". We address it here because it is a case the Curator will recall as she acted as Advocate-General. We also wish to forestall any suggestion that it supports the proposition that the executive can act in a legislative capacity before the introduction of a bill to Parliament.

28. In *Flachglas*, a glass manufacturer participating in greenhouse gas emissions trading asked the German Federal Ministry for the Environment for information in its possession concerning the legislative process leading to the adoption of a law making allocation decisions for emissions licences. The Ministry refused on account of the fact that, when engaging in the legislative process, it was not acting as a "public authority" for the purposes of Article 2(2) of Directive 2003/4 on public access to environmental information (the

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[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf

[8] Ibid at p19

[9] For example, the Aarhus Implementation Guide states in relation to Article 8: "*As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity"*(p150).

Directive). The Directive implements parts of the Convention in EU law and Article 2(2) reflects Article 2 of the Convention.[10]

29. The Court was asked to determine whether a government ministry that participated in the legislative process was, for the purposes of such participation, a "public authority" bound by the Directive. It concluded that "*a functional interpretation of the phrase 'bodies or institutions acting in a … legislative capacity'"* (as opposed to a structural interpretation[11]) led to the conclusion that ministries which participate in the legislative process through *"tabling draft laws, presenting them to Parliament and participating the legislative process by formulating opinions were not to be treated as public authorities for the purposes of Article 2(2) of the Directive because they were acting in a "legislative capacity"*.

30. Although the Committee in C-120 considered this conclusion to be different to the Committee's in that case, we respectfully doubt that is substantially the case. The Committee – together with Friends of the Earth – accepts that administrative authorities engaged in a legislative process in Parliament, post-introduction, can be acting in a legislative capacity and therefore fall within the exclusion of Article 2. The question is: when does that legislative process commence?

31. In *Flachglas*, the information sought was information held by the government ministry and generated at or after the tabling of the law before Parliament.[12] The information sought was <u>not</u> information generated by the ministry in preparing the bill in the weeks, months or years leading up to its tabling before Parliament. The question on which the Advocate-General was advising the Court is summarised at paragraph [56] of her opinion: *"whether agencies of the executive, when <u>submitting draft laws</u> to the legislature or <u>proffering their advice during the passage of legislation</u>, are intended to be subject to the same protection from untimely and unrestricted demands for information."* (emphasis added)

32. As such, *Flachglas* was not a case addressing the question of whether an executive agency engaged in weeks, months or years of policy development and legislative drafting prior to

[10] Article 2(2) provides, *inter alia*, that Member States may provide that the definition of public authority shall not include bodies or institutions when acting in a judicial or legislative capacity.
[11] See the Advocate-General's opinion at [45]
[12] See AG Sharpston's opinion at [48]: "it is the Ministry's involvement as initiator and adviser during the legislative process which falls to be assessed."

the introduction of legislation to Parliament is acting in a legislative capacity throughout that entire period. The Advocate-General's view was that the executive process merged with the legislative process at the point where a measure was tabled before Parliament. She said:

> *"60. As regards the first of those elements, in submitting a draft measure to the legislature, an agency of the executive branch of government – such as the Ministry in the present case -– is acting in fact at the interface between executive and legislative activity. On the one hand, it is an executive function to determine government policy and formulate that policy in the draft document; on the other hand, the actual submission of the draft is a function indistinguishable from that of an individual member of the legislature (or a group of such members) submitting a proposal for consideration, which cannot be categorised other than as legislative activity. Similar considerations apply with regard to consultation and advice during the course of the legislative process. Yet, although the two functions can clearly be seen, it is impossible to separate them, at least in the context and during the course of the legislative process proper, from submission of the draft measure to final enactment of the legislation. They are, in that context, two sides of the same coin."* (emphasis added)

33. That view is consistent with the position adopted by the Committee in C-120 and with the submissions of Friends of the Earth.

34. So, to summarise, and to respond to the Curator's request for an outline of when the policy / pre-legislative drafting process transforms into the legislative process / parliamentary tunnel, we say this:

    a. Legislation starts with a policy process, led by the executive, that can take place many years before the relevant Act of Parliament is passed, or the draft Bill is even introduced to Parliament. That policy process is clearly owned and controlled by the executive acting in its sole discretion.

    b. When a bill is drafted, the executive[13] is still acting in its sole discretion and without the compulsory scrutiny and involvement of other politicians or political actors as imposed by a legislature's rules. Those involved in drafting the bill are not acting in a

[13] The vast majority of bills are introduced to Parliament by the executive. However, there are some which are introduced by other entities e.g. private members bills, which are public bills introduced by MPs and Lords who are not government ministers. Only a minority of them become law. The drafting of these bills is similarly not part of the legislative process. https://www.parliament.uk/about/how/laws/bills/private-members/

legislative capacity but are acting at the instruction of and to serve the executive's policy decisions.

c. The crossover point is when the draft bill is submitted to and accepted by a legislature for consideration within its process and subject to its rules for making and enacting laws.

d. This process can involve the executive, but it will also involve other actors from different political parties or persuasion in this process.

e. It does not matter whether the executive and legislature are two entirely separate bodies, or whether members of the executive are also members of the legislature (the latter is the set-up in the UK system). Either way, the principle of the crossover remains the same.

f. From the point a draft bill is submitted / tabled / introduced to the legislature, all those involved in the process from that point are acting in a legislative capacity. At this point the process of the bill and it being made into law is not within the executive's sole discretion, but is subject to the compulsory rules of the legislature and involvement of other political actors within it.

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