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)

POST-HEARING SUBMISSIONS

Introduction

1. These submissions deal with matters arising at the hearing held by the Committee at its seventy-sixth meeting in Geneva. They principally address Decision ACCC/C/2014/120 Slovakia ("**C/120 Slovakia"**) on which the Committee specifically invited submissions. In addition they briefly touch on a further issue which the Committee sought further submissions on, namely the meaning of *"preparation"* in Article 8 of the Convention.

2. These submissions also briefly respond to matters submitted after the hearing by the Irish Environmental Network and WWF which have been sent to the UK Government by the Secretariat.

3. The UK will be writing separately on: (i) any further information on the Committee's July 2022 Question 1 and (ii) the issue around Cabinet Minutes and/or dates of Cabinet decisions.

C/120 Slovakia

4. It is, and remains, the UK's submission that Article 8 of the Convention does not apply to primary legislation.

5. The UK has already set out, at length, its submissions on why Article 8 does not apply to primary legislation. See the **July 2018 Observations** at paras. 35-46, the **UK's August 2022 Answers** at paras. 25-40, and the **UK's Opening Statement** paras. 6-18. We do not repeat those points here.

6. The Committee has invited submissions on the decision in C/120 Slovakia. This was not a matter that was raised in any of the parties' written submissions in advance of the hearing, nor in the questions asked of the parties by the Committee itself. The decision was, though, subject to extensive oral submissions during the hearing.

7. Following the hearing and in looking further at the arguments in relation to the decision in C/120 Slovakia, the UK has discovered that there is a CJEU case that is directly on point, namely ***Flachglas Torgau GmbH v Federal Republic of Germany*** ECLI:EU:C:2012:71, [2013] Q.B. 212 (attached at **Annex 1**). The Committee appears to have been aware of this when deciding C/120 Slovakia (see fn. 92) but there is no substantive discussion of it or its reasoning.

8. We note that two members of the Committee were involved in that case. So, (i) the Advocate-General in that case was Eleanor Sharpston; and (ii) the EU Commission was a party to that case and its advocate was Peter Oliver.

9. The decision of the CJEU and its analysis of the legal issues, as well as that of the Advocate-General, directly and entirely support the case that has been advanced to the Committee by the UK. Moreover, that case was also strongly supported in ***Flachglas Torgau*** by the submissions made by the Commission.

10. The decision in ***Flachglas Torgau*** is in complete opposition to the decision of this Committee in C/120 Slovakia.

11. This submission therefore:

(i) Outlines what was decided in ***Flachglas Torgau***, which is in full accordance with the UK's case; and

(ii) Outlines why the UK says the decision in C/120 Slovakia was wrongly decided.

(i) ***Flachglas Torgau***

12. The UK, as the Committee knows, submits that Article 8 does not apply to the making of legislation by a national legislature. The starting point, and what we say should be the starting point for this Committee, is Article 2 of the Convention. This provides that the definition of "*public authority*" does "*not include bodies or institutions acting in a … legislative capacity*". So, the definition of "*public authority*" provided by Article 2 limits the scope of application of Article 8, as Article 8 only applies to "*the preparation by public authorities*" of certain legal instruments. Article 8 does therefore not apply to "*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: see below. The Communicant accepts in its reply to the UK's observations that "*we do not dispute that Parliament is not subject to the Convention. As the UK correctly points out at para. 36 of its Response, Parliament is not a "public authority" for the purpose of Article 2. However, our point is clearly that the executive involved here is a public authority under Article 2, and it is the actions of the executive, notably the Department for Exiting the EU ("DEXU"), which concern us*."

13. So the issue is confined to whether the exclusion in Article 2 applies to the drafting of legislation prior to its formal introduction into Parliament. There is no dispute that at that point Article 8 is disapplied. The UK says the exclusion also applies before that point – to the drafting of the legislation itself.

14. The UK it turns out, is not alone in its interpretation. The matter was considered by the CJEU in ***Flachglas Torgau.*** The CJEU came to the same view as the UK in. That was also the view of the Advocate-General. It was a view that was supported in the submissions made to the CJEU by Germany and the EU Commission.

15. ***Flachglas Torgau*** concerned Council Directive 2003/4/EC of 28 January 2003 on Public Access to Environmental Information ("the Directive"), which was adopted by the EU in order to make EU law consistent with Convention requirements on *inter alia* access to environmental information: see [AG1-10].

16. Article 2 defined "public authority" as:

> "2. "Public authority" shall mean:
>
> (a) government or other public administration, including public advisory bodies, at national, regional or local level;
>
> …
>
> Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. …"

17. Article 3(1) of the Directive provided that:

> "1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest."

18. Article 4 then outlined a list of exceptions, including Article 4(2):

> "2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:
> (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; […]
> 4. Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested."

19. In transposing the requirements of the Directive, Germany excluded from its list of those required to provide information "*the highest federal authorities, when acting in the context of a legislative process of issuing regulatory instruments*": [AG17].

20. The Claimant, a glass manufacturer participating in an emissions trading scheme, sought information form the Federal Ministry for the Environment (the "ministry") relating to a law on the allocation of greenhouse gas emission licences. The information sought related both to the legislative process leading to the adoption of that law, and its implementation. The ministry refused the request, in part because information relating to its participation in the legislative process brought it within the exclusion in Article 2. Throughout the domestic court proceedings, the Claimant argued that EU law did not allow ministries to be excluded from the duty to provide information where they act in the context of the parliamentary legislative process: [AG23-27].

21. The Bundesverwaltungsgericht posed, *inter alia*, the following question to the CJEU [AG28]:

> "(a) Is the second sentence of article 2(2) of [the Directive] to be interpreted as meaning that only bodies and institutions for whom it is, under the law of the member state, to take the final (binding) decision in the legislative process act in a legislative capacity, or do bodies and institutions which have been given certain functions and rights of involvement in the legislative process by the law of the member state, in particular to table a draft law and to give opinions on draft laws, also act in a legislative capacity?"

22. The Advocate General noted that, given both the Convention and Directive were intended to promote transparency, the Directive should, in the event of ambiguity, be interpreted to favour transparency and access to information: [AG30-32].

23. Nevertheless, in the context of considering question 1(a) the Advocate General concluded that [AG63]:

> "executive bodies which, in the legal and constitutional context of their member state, perform a role in the legislative process which is limited to

submitting or commenting on legislative proposals may be excluded from the definition of public authority when they are performing such a role."

24. The entire process of reasoning from [AG45 to 65] needs to be read in full. The UK fully endorses and agrees with this reasoning. We highlight the following elements:

25. First, the exclusion of public authorities when acting in a legislative capacity was intended to import a "*contextual, functional definition…depending on the nature of the activity being carried out at a particular moment, rather than a structural definition in which the nature of the body in question assigns to one or other of Montesquieu's three branches of government*" [AG45]. As the Commission pointed out, "*only a functional interpretation allows the differing legislative systems in the member states to be taken into account in such a way as to provide a reasonable measure of uniformity*" (ibid.).

26. Second, although the Ministry was strictly a member of the executive branch it remained "*the prime initiator of legislation in the Federal Parliament. And, during the progress of a bill through the legislature, the ministry may be consulted and may proffer advice. In those regards, it clearly acts in the context of a legislative process*" [AG46]. The question was whether that entailed acting "*in a legislative capacity*" [AG48].

27. Third, some consideration was given to the legislative history at EU level [AG49-55]. The Advocate-General was prepared to accept that one of the reasons for exclusion was to avoid subjecting the legislative process to untimely and unrestricted demands for information [AG55-56]. The Advocate-General noted that "*[t]he basic point which the German Government makes has some merit as a hypothesis if we consider it, for the moment, as relating to the judiciary and to the legislature as such. The performance of both judicial and legislative functions could be impaired if information of all kinds concerning each and every stage of the process analysing the relevant issues and data, deriving conclusions from that analysis and formulating a final decision - could be demanded of right at all times by any member of the public*" [AG53]. This observation on the underlying objective of the exclusion being to avoid impairing or interfering with the legislative process - mirrors what is said

in the *Implementation Guide* - see para 37 of the UK's **July 2018 Observations** quoting from this "*Many of the Convention's governmental negotiators were reluctant to interfere with the balance of powers by prescribing requirements for the legislative process.*"

28. Fourth, the Claimant in ***Flachglas Torgau*** relied on extracts from the first *Implementation Guide*, in materially similar terms to the current edition on which the Communicant relies, see p. 49:

> "The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognised in article 8. As the activities of public authorities in drafting regulations, laws and normative acts [are] 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. Thus, executive branch authorities engaging in such activities are public authorities under the Convention."

29. However, the Advocate-General rejected this saying [AG57-58]:

> "… as the German Government and the commission point out, that document has no authoritative status as regards the interpretation of the Convention. Its authors specify that the views expressed do not necessarily reflect those of the UN/ECE or of any of the organisations which sponsored the guide; nor does it appear to have been specifically approved by the parties to the Convention. Moreover, the reference to article 8 of the Convention does not seem pertinent with regard to legislative procedures of the kind at issue in the present proceedings, where an executive proposal is subject to parliamentary scrutiny by the people's elected representatives. Article 8 appears to concern, rather, direct public participation when executive regulations are drawn up [9] . Thus, a plausible approach to the relationship between the concept of "legislative activity" in article 2(2) and that of "the preparation of executive regulations and/or generally applicable legally binding normative instruments" in article 8 would be that the exclusion in the former relates solely to primary legislation involving some form of parliamentary scrutiny and debate, whereas the latter concerns secondary, implementing measures adopted under an enabling provision, in the absence of any such democratic process. While not entirely valueless, therefore, the evidence derived from the Implementation Guide should not be viewed as in any way decisive.

30. Footnote 9 reads:

"As the commission points out, the use of the words "*and/or generally applicable legally binding normative instruments*" in the heading to the article appears to reflect a concern to avoid terminology which, in some states, might designate too narrow a category of regulatory instrument; the text of the article itself cannot readily be applied to parliamentary procedures in a representative democracy."

31. The points made here by the Advocate-General and the Commission all reflect and support the submissions of the UK in this case.

32. The Advocate-General continued [AG59-66]:

"59. More important, in my view, as elements to be taken into consideration are: the emphasis on a functional definition of "acting in a … legislative capacity"; the concern to ensure that the legislative process as such takes place without disruption; and the aim of both the Convention and the Directive to ensure transparency in environmental matters and the widest possible access to environmental information.

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 [10]. 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.

61. Consequently, it seems to me, the concern to ensure that the legislative process takes place without disruption must prevail in that context, or the very purpose of the exclusion would be frustrated. The conduct of the procedure would not be protected by an exclusion which applied to only one route of access to information (a request to the legislature itself) while another route (a request to the relevant part of the executive) remained open.

62. It is likely that, even though the involvement of the executive in the legislative process may follow broadly the same pattern in all member states, there will be differences of detail from one member state to another. Consequently, it will always be for the relevant national court to verify

whether, in the legal and constitutional context of its member state, the specific role performed by the executive *at the material moment* does indeed form part of the legislative process. Given that the exclusion constitutes an exception to the general aims of transparency and access to information promoted by the Convention and the Directive, the national court must be vigilant in carrying out this task.

63. I would therefore answer point (a) of the referring court's first question to the effect that, under the second sentence of article 2(2) of the Directive, executive bodies which, in the legal and constitutional context of their member state, perform a role in the legislative process which is limited to submitting or commenting on legislative proposals may be excluded from the definition of "public authority" when they are performing such a role."

33. Footnote 10 confirms:

"10. The German Government confirmed during the proceedings that individual members of the Bundestag also have a right to initiate legislation, and the same is probably true of most legislatures, even if the reality of government business may make it a rather uncommon procedure."

34. The CJEU agreed with the Advocate-General's approach. It acknowledged that, in adopting Directive 2003/04 the EU intended to ensure compatibility with the Convention: [31].

35. In considering question 1(a), the CJEU also deprecated reliance on the relevant portions of the *Implementation Guide*:

"35. In addition, Flachglas Torgau's argument based on the document published in 2000 by the United Nations Economic Commission for Europe, *The* Aarhus Convention *: An Implementation Guide* , must be rejected. Flachglas Torgau refers in that regard to the clarifications contained in that document, according to which:

> "As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by [article 8 of the Aarhus Convention], it is logical to conclude that the Convention does not consider these activities to be acting in a 'legislative capacity'. Thus, executive branch authorities engaging in such activities are public authorities under the Convention."

36. Apart from the fact that that document's interpretation of the Aarhus Convention is not binding, article 8 of the Convention, to which it refers, in any event does not expressly mention the participation of public authorities in

drafting "laws", so that an interpretation such as that adopted by that document cannot be derived from the wording of that article."

36. The CJEU continued:

"40. It is apparent from both the Aarhus Convention itself and Directive 2003/4 , the purpose of which is to implement the Convention in European Union law, that in referring to "public authorities" the authors intended to refer to administrative authorities, since within states it is those authorities which are usually required to hold environmental information in the exercise of their functions.

41. In addition, article 2(2) of the Aarhus Convention expressly provides that the expression "public authorities" which it employs "does not include bodies or institutions acting in a judicial or legislative capacity", without restriction.

42. In accordance with that provision, the first sentence of the second sub-paragraph of article 2(2) of Directive 2003/4 expressly authorises the member states to exclude from the scope of "public authorities" bodies or institutions acting in a judicial or legislative capacity.

43. The purpose of the first sentence of the second sub-paragraph of article 2(2) of Directive 2003/4 is to allow member states to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that, in the various member states, the provision of information to citizens is, usually, adequately ensured in the legislative process.

44. In that regard, it may also be noted that the European Union legislature takes into account the specific nature of the legislative and judicial organs of the member states….

49. Those considerations point therefore to a functional interpretation of the phrase "bodies or institutions acting in a … legislative capacity", according to which ministries which, pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process, in particular by formulating opinions, can be considered to fall within that definition, within the meaning of and for the application of Directive 2003/4 .

50. That functional approach is all the more justified because the legislative process is likely to differ significantly between member states and it is therefore necessary to adopt an interpretation which ensures a uniform application of Directive 2003/4 in those member states.

> 51. In the light of the foregoing, the answer to question 1(a) and (b) is therefore that the first sentence of the second sub-paragraph of article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to member states by that provision of not regarding "bodies or institutions acting in a … legislative capacity" as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and that option is not subject to the conditions set out in the second sentence of the second sub-paragraph of article 2(2) of that Directive."

37. ***Flachglas Torgau*** has since been considered in Case C-470/19 ***Friends of the Irish Environment Ltd v Commissioner for Environmental Information*** ECLI:EU:C:2021:271 (CJEU Judgment) and ECLI:EU:C:2020:986 (Advocate-General's Opinion) (both attached at **Annexes 2 and 3**). ***Friends of the Irish Environment*** considered when a public authority would be acting in a judicial capacity and so is only of tangential relevance to this case. It is provided in case the Committee finds it of assistance.

38. ***Flachglas Torgau*** concerned, of course, the first pillar of the Convention rather than the second (which is in issue here). That, however, is immaterial. The scope of the relevant Articles in both pillars is defined by reference to the meaning of "*public authorities*" and the exclusion of anyone acting in a "*legislative capacity*" from this definition. Moreover, the Advocate-General explicitly addressed whether anything in Article 8 of the Convention affected the exclusion, and concluded not.

39. The UK accepts, of course, that the CJEU is a different court with different jurisdiction and, like the UK is the court of one of the signatories to the Convention. However, the careful and detailed reasoning employed by the Advocate-General and the Grand Chamber of the CJEU do, the UK submits, provide substantial support in favour of its position. Moreover, the Advocate-General and the CJEU were directly addressing not just the Directive but the Convention and the *Implementation Guide*. The issue that was decided is the very same issue that arises in this case. It is unfortunate that there is a diversion in approach between the Committee and the CJEU.

C/120 Slovakia: the decision

40. C/120 Slovakia concerned an allegation that the state Party failed to comply with Articles 8 and 9(3) in preparing an amendment to forestry legislation and access to justice to enforce rules governing public participation in the preparation of that legislation: paras. 1, 2.

41. Crucially, the state Party did not dispute that Article 8 applied to the preparation of the legislation and did not assert that it acted in a legislative capacity during that preparation. This accorded with the finding of its constitutional court: paras. 93-94.

42. Although it was not disputed, the Committee nevertheless went on to give reasons for holding that Article 8 applies to this process. In material terms, it stated:

> "95. The Committee considers that there is nothing in the title or text of article 8 of the Convention to suggest that it does not include the preparation of legislation by executive bodies to be adopted by national parliaments. On the contrary, although the terms "legislation" and "laws" do not appear in the provision, the wording of article 8 and the ordinary meaning given to its terms nevertheless support the inclusion of legislation and other normative instruments of a similar character.[88]
>
> 96. First, article 8 refers to "generally applicable legally binding normative instruments", which is exactly what legislation is. The Committee understands this as a generic expression intended to cover different kinds of generally applicable legally binding normative instruments, which may be referred to in different ways in different jurisdictions. In addition to draft legislation prepared by executive bodies to be adopted by national parliaments, the provision also applies to the preparation by executive bodies of other generally applicable legally binding normative instruments to be adopted by local or regional assemblies, whether or not the outcome is referred to as "legislation".
>
> 97. Second, the term "generally applicable legally binding normative instruments" is included in addition to "executive regulations". If article 8 was only intended to apply to such regulations by the executive branch, then there would be no reason to add the reference to generally applicable legally binding normative instruments. In this context, the Committee recalls its findings on communication ACCC/C/2009/44 (Belarus), where it stressed that "the scope of obligations under article 8 relate to any normative acts that may have a

significant effect on the environment".[89] The Committee also notes that this view is supported by the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making on Environmental Matters*, which, on several occasions refer to "executive regulation or law" or similar expressions, where "law" is shorthand for "generally applicable legally binding normative instruments".[90] It is thus clear to the Committee that article 8 of the Convention applies also to the preparation of legislation by executive bodies to be adopted by national parliaments.

Bodies acting in a legislative capacity

98. While article 8 of the Convention is thus applicable to legislation, article 2 (2) sets out that the definition of "public authority" does not include bodies or institutions acting in a legislative capacity. The question then arises of what is covered by that provision. When do bodies or institutions of a Party act in a legislative capacity, and more specifically, when in the process starting with the preparation of legislation does a body or institution act in a legislative capacity? Although the Convention does not set out exactly when a body or institution – be it central, regional or local – acts in a legislative capacity, it is clear that the Convention only excludes the body or institution when it acts in this specific capacity. Accordingly, a parliament may act as a public authority under the Convention when it is not acting in its legislative capacity, for example when authorizing an activity or project.[91] The Committee thus understands the expression "legislative capacity" to have a rather precise meaning, referring to the acts of the body when it is indeed legislating, that is to say, when it uses its legislative power, but not when it carries out other functions.

99. The understanding of "acting in legislative capacity" as having a rather strict and precise meaning implies that it only covers activities by the body or institution with the capacity and power to adopt the legislation. This understanding is also supported by the French and Russian versions of the Convention (in French "dans l'exercice de pouvoirs … législatifs" and in Russian "действующие в .... законодательном качестве"). Taking into account that the legislative process is likely to differ between the Parties, the Committee also considers that this strict understanding ensures a uniform application of article 2 (2) of the Convention by the Parties.92 It also prevents the Parties from excluding the application of the Convention by expanding their preparatory processes so as to allow for comprehensive preparatory processes with several public authorities involved in the process without any transparency or public participation. While such comprehensive preparatory procedures are perfectly in line with the Convention, they must not be used to exclude opportunities for members of the public to request environmental information or to participate in the preparation by executive bodies of legislation to be adopted by national parliaments. Lastly, the understanding of the phrase "acting in legislative capacity" as not including executive bodies in

the preparatory proceedings when drafting legislation to be adopted by the national parliament is in line with the eleventh recital of the preamble of the Convention, whereby the Parties invite the "legislative bodies to implement the principles of this Convention in their proceedings".

100. The Committee thus concludes that the reference to bodies and institutions acting in their legislative capacity does not exclude public authorities, including the Government, when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation."

The UK's response to C/120 Slovakia

43. With the greatest of respect, C/120 is simply wrong:

(i) The matter was not contested by the state Party concerned and that has deprived the Committee of full (or indeed any) argument on this point.

(ii) While the Committee went on to give reasons, these are, again with the greatest of respect, not persuasive. The UK highlights a number of issues below.

(iii) Moreover, while ***Flachglas Torgau*** was considered by the Committee, it failed to meaningfully engage with the clear and cogent reasoning provided by the Advocate General and CJEU. The consideration is limited to a footnote simply indicated that the Committee notes it has taken a different view (fn 92). This is, with respect, not a sufficient basis on which to ignore the deliberations of a prestigious international court made up of highly qualified legal figures, particularly on an issue of interpretation.

44. First, the Committee's conclusion at para. 95 that there is "*nothing in the title or text of article 8*" to suggest it does not apply to the preparation of primary legislation is simply wrong. See the various submissions made by the UK on this already, and the reasoning of the CJEU and Advocate General Sharpston in ***Flachglas Torgau***.

45. Second, the nub of the Committee's reasoning to support that conclusion is set out in paras. 96-97. However, these do not with respect withstand any scrutiny.

46. As to para. 96:

(i) The Committee in para. 96 considers the meaning of "*generally applicable legally binding normative instruments*" without reference to the precursor phrase, "*executive regulations*". This wholly ignores the *ejusdum generis* principle which is applicable to the interpretation of treaties: see **UK's Opening** para. 8 and references set out therein.

(ii) Simply stating that the latter expression covers "*draft legislation prepared by executive bodies to be adopted by national parliaments"* is a statement of the conclusion, not in any way at all reasoning for it.

(iii) Continuing to suggest that it also covers "*other generally applicable legally binding normative instruments to be adopted by local or regional assemblies, whether or not the outcome is referred to as "legislation*" does not, with respect, go to the issue of whether it covers primary legislation. That explores *other* matters to which it may or may not apply.

47. Para. 97 then exacerbates these errors:

(i) The Committee suggests that "*generally applicable legally binding normative instruments*" is intended to expand the reach of Article 8 beyond executive regulations. To the extent that this is intended to cover other matters of a similar type to executive regulations, the UK does not disagree. It is clearly intended to avoid terminology in some states which might designate too narrow a category of regulatory instrument, as recognised both in the *Implementation Guide* p. 182 and the Advocate General's Opinion (footnote 9) in ***Flachglas Torgau***. What it does not indicate is an intention to expand the matter to primary legislation. With the greatest of respect, had that been the intention one would have expected much clearer words to be used. Primary legislation is of a higher order than executive regulations and other

legislation and is subject to different safeguards (including, always, public scrutiny). It would be most unusual to impose an obligation clearly on legislation of a lesser order (secondary legislation) and then pull in the higher order legislation using a more generic phrase that does not say so expressly.

(ii) The Committee refers to ACCC/C/2009/44 Belarus para 61. However, (a) that did not concern primary legislation and (b) Article 8 was not the main focus of the Committee's decision (as para. 61 makes clear).

(iii) The Committee then refers to the *Maastricht Recommendations*, suggesting they refer to "*executive regulation or law*" where "*law*" is to be taken as "*generally applicable legally binding normative instrument*". However:

(a) These are not a helpful aid to interpretation. They were not prepared by state Parties to the convention, but by a task force in response to a request of a Meeting of the Parties (p. 6). Nor are they intended to be an aid to interpretation – they make clear they are intended as a "*practical tool to improve the implementation*" of the Convention (p. 6).

(b) The *Maastricht Recommendations* do not confront or even refer to primary legislation anywhere. They are of no assistance to the issue being decided in C-120Slovakia.

(c) The fact that it refers to "*executive regulation/law*" or similar (e.g. at p.54-55) sheds no light on this issue. Executive regulations, or (in the UK) statutory instruments are still classified as law or laws. There is no indication, anywhere, that this is intended to encompass primary legislation.

48. Third, the Committee at para. 98 indicates that it considers the expression "*legislative capacity*" to "*have a rather strict and precise meaning, referring to the acts of the body when it…uses its legislative power*". The UK does not necessarily demur from

that, but the Committee then erroneously in para. 99 suggests that therefore this conclusion "*implies that it only covers activities by the body or institution with the capacity and power to adopt the legislation*". The Committee appears here to be adopting the structural, rather than functional approach to the question of when a body is acting in a legislative capacity. This is, with respect, a wholly erroneous approach, for the reasons neatly encapsulated in ***Flachglas Torgau*** at [AG45] [AG49] and [AG59-63].

49. Fourth, the Committee then indicates that taking this structural approach ensures a uniform application between the state Parties (para. 99). Again with respect that is wrong, it is an approach that wholly fails to take account of the intrinsic differences in the legislatives schemes between state Parties and so, in being inflexible, it will cut differently in different states. It may well be that this would have a limited effect in some states. In the UK, however, it would have constitutional implications, as set out orally. The structural/functional approach as set out by the CJEU and supported by the UK would have the effect of respecting and supporting those differences and ensuring that the Convention applies appropriately to each state Party. The CJEU, of course, also seeks to harmonise meanings across member states: ***Friends of the Irish Environment*** [29].

50. Fifth, the Committee indicates that it is then concerned with states parties "*expanding their preparatory processes*" to "*allow for comprehensive preparatory processes with several public authorities involved in the process without any transparency or public participation*". With respect, this:

    (i) Begs the question the Committee is actually required to answer – whether the Convention covers this process. The Committee is taking the view that the Convention *should* apply and suggesting that is a reason why it does. That is not an analytically sound approach;

    (ii) Appears to wholly ignore the substantive public participation that happens when legislation is then introduced into the legislative body; and

(iii) Is based on the suggestion that state Parties would, in bad faith, seek to avoid complying with the terms of the Convention they themselves have signed up to.

51. Sixth, the Committee then states its interpretation is in line with the eleventh recital of the preamble to the Convention. It is not. In fact, it flatly cuts against it. The preamble invites legislative bodies to implement the principles of the convention in their proceedings. If the Committee is right (a) to distinguish between the "pre-parliament" and "parliamentary" stage of the legislative process and (b) that public participation must take place at the pre-parliamentary stage, it is remarkably difficult to see what *further* consultation during the legislative process can add, over and above what the legislative process already requires.

52. Seventh, there is limited engagement in the decision in C/120 Slovakia with the practical results of its approach for state Parties:

(i) In adopting the "structural" approach, the Committee fails to deal with the drafting of legislation by MPs who are not part of the Government. This occurs in the UK (with, for example, Private Members Bills) and indeed other countries such as Germany (see fn 10 to the Advocate-General's Opinion). MPs not members of the government have no other function, and it is absurd to suggest they are, in drafting legislation, acting in anything other than a legislative capacity.

(ii) The Committee completely ignores the interaction between executive and legislature which is an intrinsic part of the legislative process – as encapsulated by Advocate-General Sharpston at [AG60-61].

(iii) It results in the bizarre approach where, far from respecting the legislative function of state Parties, the Committee imposes even stricter requirements

on it. For executive regulations and secondary legislation of that type, a state Party is able to point to the entire process of preparation to demonstrate Article 8 compliance. For primary legislation, it is limited to only pointing to the process prior to introduction into Parliament. This

(a) Makes little sense. It is remarkable to suggest that a state Party may be in breach of its international obligations because a bill, subject to 250 odd hours of legislative time with a record number of amendments, was not published in draft before that point. It also indicates that state Parties seeking to comply with their obligations should ignore the legislative process and the role of legislators, instead focusing on pre-legislative consultation which is (with respect) entirely in the hands of government.

(b) Departs from the ordinary meaning of the wording of the Convention. Article 8 applies to the "*preparation*" of regulations and rules. A rule is being "prepared" before it is finalised and adopted. So, for secondary legislation that might be said to include the whole process that leads up to its adoption. In the same way for primary legislation the natural meaning of the word would include the whole legislative process up to adoption of the law. But the Committee's approach, however, indicates that Article 8 can apply during part of the preparation, but not all of it. This makes no sense and only supports the view taken by the Advocate-general, the CJEU and the Commission in ***Flachglas Torgau*** that Article 8 does not apply here at all.

53. Eighth, the deliberations of the Committee are in private. However, the UK notes that during the oral hearing it was suggested by Committee Vice Chair Jendrośka that his memory of the negotiations leading up to the Convention was that the parties intended for Article 8 to apply to the preparation of primary legislation. M. Yves Lador of Earth Justice echoed those views. It is unclear what, if any, effect these views may have had on the outcome in C/120 Slovakia. However, the UK feels compelled to make clear:

(i) The recollections of negotiators are not an aid to construction. They are not recognised in the VCLT. Nor are they a sensible aid as, with the best will in the world: (a) memory is fallible and (b) the general hope is that treaties will endure long after their negotiators have retired from public life.

(ii) The UK has reviewed the *traveaux*[1] and cannot see any record of such a suggestion. In brief:-

(a) As initially drafted the convention included a definition of "Environmental Decision-making" which included an exclusion for bodies acting in a judicial capacity, alongside a lengthy Article (5) dealing with public participation.

(b) At the fourth session, the delegation from Russia expressed concern about the breadth of this definition and suggested a definition of "*public authority*" which provided the term did not include legislative bodies, and a definition of Environmental Decision-Making which excluded judicial and legislative or other normative acts of a general character.

(c) At the sixth session, the Working Group considered the ongoing draft text and included a definition of public authority which "*does not include bodies acting in a judicial or legislative capacity*".

(d) At the seventh session, a group of environmental NGOs proposed the inclusion of an article 7 (the pre-cursor to Article 8) for the application of public participation to "*general rules*". The new definition of "*general rules*" made clear that they included decisions of national legislatures with legislative effect, such as Acts of Parliament.

(e) At the eighth session, the UK substituted the NGOs article 7 with text which is now reflective of Article 8. This included removing the explicit application of the Article to primary legislation. It appears the parties explicitly understood it was therefore not to apply to primary

[1] https://unece.org/environment-policy/public-participation/aarhus-convention/reports-negotiations-convention

legislation. Para. 20 of the report of the eighth session records: "*The Environmental NGOs Coalition expressed concern at the recommendatory nature of article 7 and its non-applicability to legislative bodies*."

(f) At the ninth session, what is now Recital 11 to the preamble was adopted.

Conclusion

54. For all those reasons, with the greatest of respect, the decision in C/120 Slovakia is wrong, and the Committee should depart from it. The approach set out by the UK, and which found favour with the European Commission, Advocate-General Sharpston and Grand Chamber of the CJEU, should be preferred.

Irish Environmental Network' Submissions

55. The Irish Environmental Network (para. 1) suggests that the three requirements in Article 8 (after "*the following steps should be taken*") indicates that Article 8 applies to the process of drafting bills before they enter Parliament. This is wrong, for the many, many reasons we have outlined above. Those elements add nothing to the question – they are elements for what Article 8 requires once it "bites".

56. It is then suggested that engagement with MPs and general elections would fall outside the ambit of Article 3(9) (non-discrimination) read with Article 8 because they are not open to citizens from different jurisdictions and MPs may not share contrary views. This goes to compliance with Article 8 rather whether it applies to primary legislation. However:

(i) The points can still be put to MPs, as members of the legislature, regardless of a member of the public's location. They can contact MPs or members of the House of Lords by email, for example.

(ii) These are not the only examples of engagement on which the UK relies. Citizens of other countries could, for example, have provided comments in response to the White Paper.

57. Finally, support for the arguments put by FOE is expressed. The UK will not rehearse, here, its arguments against those.

WWF's submissions

58. We do understand these to add any substantive points beyond those already ventilated by FOE and responded to by the UK.

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