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)

RESPONSE TO COMMUNICANT'S COMMENT'S ON UK'S AUGUST 2022 ANSWERS AND FINAL RESPONSES TO OUTSTANDING INFORMATION

Introduction

1. During the hearing on this matter at the Committee's seventy-sixth meeting in Geneva, the UK indicated that it may wish to respond to matters raised by the Communicant in its comments on the UK's August 2022 Answers, as – had matters progressed according to a more usual timetable – the UK would have had the opportunity to so do at the hearing.

2. The Communicant's comments on the UK's August 2022 Answers (the "**Communicant's Comments"**) were provided on 28 September 2022. This is the UK's response. In accordance with the Committee's preference, this will be a short response on key points only. Where the UK does not respond to a particular point, it is not an indication that the UK accepts what has been said.

3. This Response also includes the UK's final responses to the requests for information sought by the Committee at the hearing on 14 September 2022.

4. The UK does not respond to the Communicant's submissions, also provided on 28 September 2022, on ***Flachglas Torgau*** and **C/120 (Slovakia)**. It does not agree with them, does not accept the characterisation of the Ministry's role in that case[1] but

[1] The Communicant relies on [AG48] "*it is the Ministry's involvement as initiator and adviser during the legislative process*" to suggest that the information sought had been "*generated at or after the tabling of the*

has set out its position at length in its own post-hearing submissions dated 28 September 2022.

Further information: Cabinet minutes/dates of decisions

5. The UK is unable to provide this information. The Cabinet system of government in the UK is based on the principle of Cabinet collective responsibility. The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front where decisions have been reached. This is captured in the Ministerial Code and Cabinet Manual and explicitly referred to as an exemption in the Freedom of Information Act 2000. It requires a safe and private space for those discussions, so the UK Government does not routinely disclose information about the proceedings of Cabinet and its Committees. This well-established principle is central to the operation of the UK Cabinet Government and has been repeatedly recognised by the courts of the UK.

6. Making public the date or frequency of Committee discussions subjects the collective decision-making processes of Government to undue early scrutiny which damages the policy making process as it can lead to perverse incentives and ultimately a lack of free and frank exchange of ideas. Ministers could be incentivised either to hold discussions, either in person or via correspondence, because they wish to be seen to do so, or will be concerned about calling too many meetings where they would be helpful to resolve wide deliberation.

7. Ministers will reach collective decisions more effectively if they are able to debate questions of policy freely and in confidence, and to organise themselves freely to be able to do so. The maintenance of this convention is fundamental to the

law before Parliament" such that the consideration of the AG and CJEU is solely focused on the submission of draft laws, and not their promulgation (para. 31 of the Communicant's submissions). This is not a safe inference to draw. In any case, to the extent the question is one of functionality and the extent to which national law indicates a task is part of the legislative process [AG-60], see below.

continued effectiveness of Cabinet government, and its continued existence is therefore manifestly in the public interest.

8. Therefore to support the convention of collective responsibility, under section 2.3 of the Ministerial code, which states that '*the internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed*', the UK is not able to reveal the date on which Cabinet considered this issue.

Further information: Correspondence

9. In the UK's August 2022's Answers, it outlined that it had not been possible to provide a response to Question 5 within the time frame set out by the Committee. This was because the department responsible for the Bill (DExEU) had been abolished, its staff moved, and systems closed. Further attempts have been made to obtain the requested information, but it has not been possible to do so, for the reasons explained above. Mindful of the suggestions made by the Chair at the oral hearing on 14th September 2022 that there does need to be a cut off point for the provision of information, the UK respectfully suggests it be assumed the further information is unlikely to be forthcoming.

Communicant's Response to UK's Reply to Question 1

10. At paragraph 5 the Communicant suggests consultation during the drafting phase of primary legislation is "*not unusual or rare*", and that there is "*nothing difficult or constitutionally challenging about enabling such public participation*". This submission is:
    (i) Not supported by its own evidence base. There were 334 Bills proceeding during the 2019-21 legislative session, and 302 in 2021-22.[2] See the attachments at **[Annex 1]**. The two examples cannot be said by any rational

[2] This includes private members bills. The Communicant however seems to wish to apply the same consultation requirements to those, given that it indicates in its Post-Hearing Submissions on C/120 (Slovakia) indicate drafting by MPs is not part of the legislative process (see fn13).

person to indicate such consultation is anything other than rare or exceptional.

(ii) Entirely divorced from the realities of what consultation in fact requires and the resources it demands. While, of course, the Committee may be unsympathetic to this argument coming from Government, it should not lose sight of the fact that the Communicant's argument extends consultation requirements to private members drafting private members bills – as they acknowledge. [3] To suggest that such consultation will not be "*difficult*" is simply wrong. It is noted that no suggestions are made as to how this would be undertaken.

(iii) To suggest it is not "*constitutionally challenging*" ignores the distinction between (a) a government choosing to consult, and (b) being compelled to so do. The UK accepts that the Government has previously indicated that consultation during the drafting phase may have benefits – it was the UK that cited the portion of the *Guide to Making Legislation* (2022) set out in para. 7 of the Communicant's Comments,[4] but this is not at present compulsory. Under the UK constitution, it never has been. The Communicant has provided no indication otherwise.

11. The Communicant suggests that the point at which the PBL Committee approves the introduction of a bill to Parliament is the point at which the executive has "*signed off*" the text of the draft Bill. As set out in the UK' August 2022 Answers it is not in fact possible to identify such a "*handover*" point, and it is notable that the Communicant has identified a point after which drafting changes may still be made to the Bill prior to its introduction into Parliament. See the *Guide to Making Legislation* (UK's 2022 Answers Annex 3) at para 21.14.

[3] This Post-Hearing Submissions on C/120 (Slovakia) fn13.
[4] UK's August 2022 Answers para. 18(6)

12. The Communicant's criticism of the UK's reliance on domestic case law (UK's August 2022 Answers paras 26ff; Communicant's Comments paras 10ff) is itself misplaced. The UK, of course acknowledges, that the issue here is about the interpretation of obligations under an international treaty (UK's August 2022 Answers para. 26). It does not in any way seek to rely on its domestic case law as a reason for non-compliance.[5] The point the UK makes is that much of the logic underlying that domestic case law would equally apply to the Convention. What lies at the heart of the domestic cases and is also reflected in the Convention itself (per the definition of Public Authority in Article 2), is a respect for the legislative process, and an intention not to trample thereon. It is wholly fallacious to draw a distinction between the pre-parliamentary and parliamentary process, for the reasons set out in **R (A,J,K,B,F)** (UK's August 2022 Answers at para. 33). The suggestion that such concerns therefore do not apply because the Committee "*has no role to play in the UK's constitutional separation of powers*" (Communicant's Comments para. 19) is simply wrong.

13. Further, the Communicant is plainly wrong to suggest that the domestic authorities do not indicate that the preparation of draft legislation is not a legislative Act. In the statutory context of the Public Sector Equality Duty, see the extract from **Adiatu** quoted in **R (A J K B F)** at [18] (in particular para. 237 of the **Adiatu** judgment) and [21(iii)].

14. The Communicant attempts to bolster its argument by outlining ways, it says, Article 8 compliance might be achieved while not overriding Article 9 of the Bill of Rights (Communicant's Comments para. 22). These suggestions, notably, invite the courts to begin opining on measures undertaken before legislation entered Parliament (para. 22(a)) or setting up an administrative process, *"so long as that arrangement complied with Article 9 in that it was ultimately subject to oversight by the courts"* (para. 22(b)). This is clearly not reconcilable with the suggestion that proceedings in Parliament ought not to be impeached or questioned in any Court

[5] Nor, contrary to the Communicant's suggestion Communicant's Comments para. 15, has the UK ever actually suggested this Committee is bound by the Bill of Rights 1689.

or tribunal, as that is exactly what the Communicant invites. The fallacy of suggesting a distinction between the pre-parliamentary, and parliamentary process has already been comprehensively dealt with by the Courts in the case-law referred to above. The suggestions then made at paras. 22(c) and (d) do not resolve matters, as neither would (of themselves) satisfy the Access to Justice provisions of Article 9(2) or (3) of the Convention - a point tacitly acknowledged by the Communicant in para. 23. It is difficult to see how these can be satisfied without undermining the Bill of Rights. The Communicant's Comments at para. 23-24 are therefore wrong.

15. The Communicant's suggestion at Communicant's Comments para. 26 that the UK's interpretation would "*denude the Article of its very purpose*" begs the question as to what the purpose of Article 8 is. The extreme example posited by the Communicant overlooks the fact that any such extreme piece of legislation would be subject to the full Parliamentary process.

16. As the UK outlined in previous oral and written submissions, very strange language has been chosen if Article 8 was indeed intended to apply to primary legislation. It is not accepted this is the object and purpose of the Convention, or reflected in the language of Article 8, or supported by any of the *travaux.* The implications for Article 4 (Communicant's Comments para. 27) were dealt with by the CJEU in ***Flachglas Torgau*** – the subject of detailed separate submissions.

Communicant's Response UK's Reply to Question 2

17. The UK contends that the Withdrawal Bill 2017 could not have had a significant effect on the environment because it specifically provides for the EU rule book, as at "*exit day*" to continue thereafter: see the UK's June 2018 Observations paras. 47-60, 80. It could not, therefore, have had a significant environmental effect. The Communicant misses the point with its suggestion (Communicant's Comments para. 31) that, when developing policy, the executive was engaged in the development of rules which had potentially significant effects on the environment.

The point is the Bill, as prepared before entry into Parliament, provided for the continuation of the EU's 'rule book'. That was the policy intent, which is what was drafted. The fact that a *different* policy intent might have been adopted cannot alter that position. The Committee must look at the issue of compliance as against what was done not what could have been done.

Communicant's Response to UK's Reply to Question 3

18. The UK's position regarding matters which occurred after the Withdrawal Bill was introduced to Parliament was clarified at the oral hearing. It would be a bizarre result if Article 8 applied at the pre-Parliament stage. The effect would be that all of the myriad opportunities for public engagement during the Parliamentary stage would have to be ignored in deciding whether public participation as required by Article 8 had been facilitated during the promulgation of the law.

19. To the extent the Committee were to look at the entirety of that process, clearly the May 2018 Consultation is relevant.

Communicant's Response to UK's Reply to Question 4

20. The UK accepts that the Withdrawal Bill 2017 was not published online prior to its submission to the House of Commons.[6] The relevance of publication throughout the legislative process was explained in the oral hearing.

21. The UK does not accept that opportunities for participation in the UK legislative process are "*opaque and unreliable*" (Communicant's Comments, para. 40). The view of one person given to a Select Committee, and even the views of the Select Committee itself, do not make it so. The fact remains that each person has a constituency MP then can speak to about matters of state, and there is a publicly available register of MPs and Lords with particular interests: UK's August 2022 Answers para. 97(3). That MPs are not required to pass on representations to

[6] It appears that, inadvertently, the Withdrawal Bill 2017 was published online roughly an hour before being submitted to Parliament. The UK does not rely on this.

Ministers is irrelevant – a any member of the public has a direct line to a member of the legislature participating in the legislative process. That MP can take their views into account.

22. The UK does not accept that public participation in the legislative process is not participation at a stage where "*options are genuinely open*" (Communicant's Comments para. 42). While the Government may have come to its view on policy decisions, Parliament may not. During the passage of the Withdrawal Bill, for example, it was Parliament who inserted (what became) s.16 Withdrawal Act 2018. Further evidence is taken during the parliamentary process by Committees.[7] So again the economic, social and environmental impacts of the draft Bill are far from settled.

Communicant's Response to UK's Reply to Question 5

23. The inferences suggested by the Communicant (Communicant's Comments para. 43) are without basis. Files get misplaced, particularly four years after the event. The severe delays in this case being heard are in no way the fault of the UK.

24. Moreover, while the UK Government does often publish a report on consultation exercises, it is not invariably its practice. In this case, in particular, the exigencies of needing to legislate, and legislate fast, militated against such an exercise.

Communicant's Response to UK's Reply to Question 7

25. The Communicant's criticisms at Communicant's Comments para. 44 are misplaced. The UK made clear in para. 101 of the August 2022 answers that the legal obligations on "*when and how to consult are set out below under question 8*".

Communicant's Response to UK's Reply to Question 8

[7] See the *Guide to Making Legislation* chapter 32.

26. It is helpful that the Communicant has clarified it is not seeking to attack the common law *per se* (a welcome departure from paras. 18-21 of the November 2018 Reply).

27. Para. 45 of the Communicant's comments is misconceived. The UK accepts that there is no requirement to consult before primary legislation is introduced to Parliament but says that this is also not required by the Convention.

28. With regard to secondary legislation or other generally applicable legal norms, the Communicant takes issue with *when* a consultation will be carried out as set out in the principles enumerated in **Plantagenet Alliance**. It is suggested **Plantagenet Alliance** does not show an obligation to consult arises in the circumstances required by the Convention (Communicant's Comments para. 48). That is unsurprising, as that case concerned a very different situation. On this point, the UK refers to its answers at paras. 105ff of the August 2022 Answers; in particular the **Greenpeace** case. The Communicant suggests that the Convention is not the *ratio* of the case (Communicant's Comments para. 49). However, it is central to Sullivan J's reasoning on the justiciability issue (paras. 48-51). What the Communicant has not done is provide any case law indicating that the Convention is not a basis on which consultation may be required for delegated legislation or other generally applicable legal norms.

Communicant's Response to UK's Reply to Questions 9, 10, 11, 13, 14

29. No substantive response is required.

Communicant's Response to UK's Reply to Question 12

30. The UK's position has been clarified at the oral hearing.

Communicant's Concluding comments

31. The UK accepts that it signed and ratified the Convention and reaffirmed its commitment to it. What it did not agree was the expansionist and wholly

unjustified reading now put before the Committee. This is a reading that is wholly at odds with CJEU case-law concerning the same provisions.

32. It is notable that it has taken decades for the suggestion to be made that Primary Legislation is subject to Article 8 to be made. The UK does not deny the importance of the climate and nature crises, but the state Parties agreed on a particular text which did not contain the wide ambit of Article 8 for which the Communicant now contends. The *travaux* also support the United Kingdom's case. The language used in the Convention, and agreed, by the state Parties should not be distorted to suit a particular cause – no matter how important.

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