**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)**

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**OBSERVATIONS ON BEHALF OF**
**THE GOVERNMENT OF THE UNITED KINGDOM**
**IN RESPONSE TO THE QUESTIONS POSED BY THE**
**COMMITTEE ON 1 JULY 2022**

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## Introduction

1. The procedural background to this claim is set out in paragraphs 1-4 of the Observations of the UK Government dated 28 June 2018 (the "**June 2018 Observations"**). The abbreviations set out therein are adopted here.

2. The Communicant provided a reply to the June 2018 Observations on 21 November 2018 (the "**November 2018 Reply"**).

3. Thereafter, the UK Government received no communication whatsoever from the Committee until 27 June 2022, some 3 years and 7 months later, inviting the UK Government and Communicant to participate in a hearing in Geneva on Wednesday, 14 September 2022.

4. On 01 July 2022, the Committee provided then provided a list of fourteen questions to the UK Government (and two to the Communicant), seeking a response within four weeks, by Friday 29 July 2022 (the "**July 2022 Questions"**). On 2 August 2022, the Committee agreed an extension to 31 August 2022.

5. This is the UK Government's Response to the July 2022 Questions. However, it wishes to make certain preliminary observations.

(1) Delay

6. First, some of the matters raised in the July 2022 Questions seek factual information regarding events which happened four years ago. In that time, the United Kingdom has:

   (1) Held a general election (on 12 December 2019);

   (2) Signed the UK-EU Withdrawal Agreement (23 January 2020);

   (3) Left the European Union (on 31 January 2020);

   (4) Abolished the Department for Exiting the European Union (**"DExEU"**) which was responsible for many of the matters on which clarification is now sought;

   (5) Entered and exited a transition period with the European Union (from 31 January 2020-31 December 2020); and

   (6) Entered into the UK-EU Trade and Cooperation Agreement (signed on 30 December 2020).

7. It is extraordinarily unsatisfactory that the Committee can delay matters for four years, during which the UK and UK Government has gone through substantial change, and then seek answers to specific factual questions (see, e.g. question 5) in the short initial time-frame of four weeks. Ministers have changed, Civil Service

staff have changed, entire departments have been abolished and merged, and various systems within those have been closed. The Committee's approach is neither reasonable nor realistic, and the UK Government objects in the strongest possible terms. While the UK Government is grateful to the ACCC for extending the deadline for response to 31 August, as the extended period falls over summer when many ministers and staff are away, it has still been challenging to obtain the answers to some questions.

8. The Convention itself under Article 9(4) provides that procedures in relation to environmental challenges must be "timely". Doubtless this Committee would take a negative view if domestic procedures included similar delays. In English common law there is a maxim that justice delayed is justice denied. Indeed the Magna Carta of 1215 – one of the UK's oldest constitutional documents - specifically provides that justice should not be delayed. The delays in this case are quite inexcusable. They have prejudiced, and continue to prejudice, the United Kingdom in its ability to respond to the Communication.

(2) <u>The nature of the complaint</u>

9. As set out in the UK Government's comments on Admissibility of 07 December 2017, and again in paras. 29-31 of the June 2018 Observations, admitting a complaint regarding a draft bill was premature. The Bill would change, and clauses would change and be amended. It would therefore be a waste of the Committee's valuable time to consider a draft bill.

10. In the event, the UK Government's comments have been borne out. Not only had the clauses in the draft Bill changed between the Communication and the Bill becoming the European Union (Withdrawal) Act 2018 (the "**WA 2018"**); but the WA 2018 has in turn been substantially amended by the European Union (Withdrawal Agreement) Act 2020 (the "**WAA 2020"**). A copy of the WA 2018 as amended is attached at [**Annex 1**].

11. In admitting a complaint about a draft Bill, the Committee therefore has not made use of its own valuable time and has increased the costs for the parties involved due to the entirely predictable additional layer of complexity which has now arisen. As set out in the June 2018 Observations a prematurity complaint is no longer maintained, but it is submitted that in future the Committee should reject any communication in similar circumstances.

12. In its November 2018 Reply the Communicant requests the Second Complaint be re-opened (paras. 10-13). In the four years since this has not been granted – to grant such a request now would be highly prejudicial to the United Kingdom.

(3) The Role of the Common law

13. As will be outlined more fully below, a number of points raised by the Communicant in its November 2018 Reply may tend to indicate that the operation of a common law legal system is incompatible with the Convention. One reading of certain questions from the Committee may also suggest an inclination toward this view. This is a matter of the utmost concern for the UK Government, as the common law lies at the heart of the UK legal and constitutional system – as indeed it does for a limited number of other signatories to the Convention (Ireland, Malta and Cyprus). Any suggestion that the operation of our common law legal system, or parts of it, are incompatible with the Convention and must be displaced in order to comply with the Convention would be strongly resisted. There is a real danger that unless this Committee recognises this that the Convention will become something to which only non-common law jurisdictions can be a party.

(4) Democratic issues

14. As is explained further below this Communication is directly concerned with the legislative processes in the UK Parliament. The Convention in its recitals recognises that the implementation of this Convention will contribute to

strengthening democracy in the region of the United Nations Economic Commission for Europe (UNECE). Lord Sumption (a former justice of the Supreme Court of the United Kingdom) has written in the context of Brexit that [**Annex 2**][1]:

> "The embodiment of Britain's traditional view of its national sovereignty is a Parliament with unlimited legislative powers, a Parliament that is central to British conceptions of themselves. The proceedings of the House of Commons are often disorderly and theatrical. MPs are often cursed by voters. But the House of Commons reflects conflicting national emotions more accurately, I believe, than any other European legislature. Its central role in our political culture is closely associated with another unspoken instinct of great emotional power. It is that democracy is essentially national and not international. In a democracy, people have to identify themselves with a representative legislature. They need to feel that it is there to speak for them ...
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> The procedures of the House of Commons are one of the most arcane parts of our constitution. But they are of critical importance. They determine in important respects the relationship between the government and the legislature. The British Parliament is unusual among democratic legislatures. It is not just a lawmaker and an external check on government. It is itself an instrument of government. Its main function is to support the government, or change it for another which it can support. This is reflected in the fact that in the Westminster model, unlike other legislative models, ministers actually sit in Parliament. Together with their parliamentary private secretaries, they currently comprise a fifth of the House of Commons. It is also reflected in the fact that the ministry is selected for its numbers in the House. And it is reflected in the House's rules. Standing Order 14 of the House provides that with limited exceptions 'government business shall have precedence in every sitting'. Since at least the beginning of the twentieth century, the parliamentary agenda has been set by the government. The Leader of the House, a government minister, puts forward business motions. The opposition cannot normally put forward its own business motions or amend the government's … Their whole basis and sole justification is the assumption that the government commands a sufficient majority in the House of Commons to get its business through …"

15. Moreover, in terms of democracy, not only was Brexit the subject of the 2016 referendum but it was then the central issue in the 2019 General Election. At that point the governing Conservative party's intentions were clear, as were Brexit's political and economic implications. The Conservative Party won a significant victory, re-conferring democratic legitimacy not just on the choice to leave but on the more detailed policy pursued by the government.

[1] See Lord Sumption "Law in a time of crisis" chapter 9 pp 173 and 177 and chapter 10 p 193

16. The drafters of the Convention were rightly wary of the Convention trespassing on the functions and role of legislative bodies that form an integral part of the democracies of the Parties, see Article 2. There are real dangers in an unelected International Committee questioning what has been done by an elected Parliament and in giving effect to a policy endorsed not just in a referendum but in a subsequent election.

17. Furthermore as explained further below, in any event, Article 8 – even if it applies – is deliberately flexible in how public authorities must use their best efforts to promote public participation (see also para. 90 of the June 2018 Observations).

**<u>Question 1 –</u> "Please explain how and when, under English law, the executive signs off on the text of a draft Bill that has been prepared for the government for submission to the legislature (i.e. to Parliament) for its consideration. Are such decisions taken by the individual minister responsible or by the Cabinet as a whole? How is that decision recorded and documented? Please indicate how and when that decision took place with respect to the Withdrawal Bill in the present case and provide any relevant documentation."**

18. The various stages involved in the preparation of a Bill are set out in the UK Government's published *Guide to Making Legislation*. The current online version has been updated in 2022.[2] A copy of the version in force in 2017 is attached at **[Annex 3]**. Particular attention is drawn to the summary of stages prior to introduction at paras. 3.4-3.23 (p. 11-15), and the more detailed section entitled "Preparing the Bill for Introduction" (p. 47-162). In particular, the UK Government notes that:

[2] https://www.gov.uk/government/publications/guide-to-making-legislation/guide-to-making-legislation-html#section-b-preparing-the-bill-for-introduction

(1) The Parliamentary Business and Legislation ("**PBL**") Committee is a Committee of the Cabinet, that is to say the executive body which sits at the head of the UK Government.[3] It consists of, among others, the Leaders of the House of Commons and Lords – who are government ministers. Its purpose is to manage the Government's legislative programme on behalf of the cabinet and hence the government (see paras 2.1-2.8).

(2) Departments of state that make up the government 'bid' for a slot in the legislative programme, usually following an invitation from the Leader of the House of Commons (para 3.4 and section 5.0). If accepted a Bill team is set up (para 3.6, Section 6).

(3) The relevant policy committee of the Cabinet must agree the policy content of the bill before drafting instructions can be sent to Parliamentary Counsel and agree any amendments that represent a significant change in policy (para 3.7, Section 7).

(4) Parliamentary Counsel drafts bills on the basis of instructions from departments, usually after collective agreement has been obtained (although occasionally before on a contingent basis). Parliamentary Counsel drafts clauses which are reviewed by the relevant department and commented upon. This continues until a final draft is agreed (para 3.8, Section 9).

(5) Thereafter there are a large number of documents to prepare (including the Explanatory Notes and various impact assessments) and issues to consider

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[3] The Cabinet is the team of 20 or so most senior ministers in the Government who are chosen by the Prime Minister to lead on specific policy areas such as Health, Transport, Foreign Affairs or Defence: see https://www.parliament.uk/site-information/glossary/cabinet/.
A list of cabinet committees is currently available at https://www.gov.uk/government/publications/the-cabinet-committees-system-and-list-of-cabinet-committees. The version available as at 18 March 2017 can be found at https://web.archive.org/web/20170318060035/https://www.gov.uk/government/publications/the-cabinet-committees-system-and-list-of-cabinet-committees

(such as the impact on Crown Dependencies or whether the Queen's consent is required) (paras 3.10-19).

(6) The Government is committed to publishing more bills in draft (para 3.20, Section 22).

(7) The policy is announced in the Queen's Speech (para 3.21, Section 21)).

(8) When a bill is ready for introduction it must be circulated to PBL Committee. The PBL Committee will usually meet to agree the bill's introduction (para 3.23, Section 21).

19. So, to be clear, there is no distinct stage where "the executive signs off" on a draft bill which is then "submitted" to the legislature (question 1). The input of various ministers and cabinet committees is sought at various different stages. This question also appears to be based on a false premise – that there is a clear divide between the executive and the legislature – which is addressed below.

20. As to the specific text of the draft Bill, as with all legislation, it was developed within a government department reporting to a minister. The department that developed this Bill was the DExEU (the Sponsoring Department). This can be seen from the Parliament website which tracked the progress of the Bill[4]. The Bill was then collectively agreed via Cabinet and/or Cabinet Committees. At the time in question, the EU Exit and Trade Committee was the Cabinet Committee which primarily dealt with the policy issues arising from the UK's departure from the EU and the PBL Committee was responsible for the legislative programme. The Bill was then introduced to Parliament, originating in the House of Commons, by the

[4] European Union (Withdrawal) Act 2018 - Parliamentary Bills - UK Parliament **[Annex 38].** This website was last updated on 28 August 2019 at 10:49.

Sponsoring Department. It had its first reading in the House of Commons on 13 July 2017[5].

21. In terms of documentation, for collective ministerial agreement of proposals, minutes are taken for each Cabinet and Cabinet committee meeting, forming part of the historic record of government. They record the main points made in discussion and the Cabinet or Cabinet committee conclusions as summed up by the chair. It is the responsibility of the Cabinet Secretariat to write and circulate the minutes to members of Cabinet or the relevant Cabinet committee. Proposals that require collective agreement do not always need to be considered at a meeting of the relevant Cabinet committee and can also be handled through correspondence to the committee. This is in contrast to the process for ministerial decision making within individual government departments, where decisions are usually recorded through the preparation by civil servants of written submissions, passed to the relevant minister for his or her approval.

22. With the greatest of respect, however, the UK Government is not able to supply these documents to the Committee due to the convention of Cabinet Collective Responsibility. This is fully explained in the UK Government publication *The Cabinet Manual* (2011)[6] Chapter 4 and Chapter 11 paras 11.18-11.20 a copy of which is annexed at **[Annex 4]**. As *Halsbury's Laws of England: Constitutional and Administrative Law (vol 20, (2014))* states at para. 213

> "The principle of collective responsibility, except where it is explicitly set aside, requires that ministers be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. Collective responsibility requires that the internal process through which a decision was made and the level of committee in which it was taken are not disclosed."

[5] Points of Order - Hansard - UK Parliament **[Annex 39]**
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

23. See too **Air Canada v Secretary of State for Trade** [1983] 2 AC 394 at 417H, 432E-H and 407B attached at [**Annex 5**], see e.g. 417H *"[v]irtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest"* and see also 433A.

24. In UK Law, Ministerial Communications are one of the categories of documents exempt from disclosure under the Freedom of Information Act 2000. This is qualified by a public interest test. See the attached guidance from the Information Commissioners Office at paras. 108-117, in particular para. 114. The position is thus that "*Cabinet minutes will engage collective responsibility. For Cabinet minutes in particular, the public interest in preserving collective responsibility is always substantial, and disclosure of Cabinet minutes has rarely been ordered*."

25. However, it appears that what underlies this question is a suggestion that, as per paras. 2-7 of the November 2018 Reply, there is a distinction between the executive drafting legislation and then the legislative process once the Bill is introduced into the Houses of Parliament.

26. Such a suggestion is completely at odds with the UK constitution and has been repeatedly examined and rejected by the Courts of the UK – including in the specific context of a suggestion that consultation should have been undertaken when primary legislation is being prepared (dealt with below in more detail at question 8). While, of course, this case concerns the interpretation of an international treaty, the absence of a distinction in domestic law between the executive drafting legislation and then the legislative process once the Bill is introduced into the Houses of Parliament, and the reasons for that, are important, as much of the logic would apply to the Convention.

27. Article 9 of the 1689 Bill of Rights (attached at **[Annex 6]**) provides:

> "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament"

28. From this, it has been taken that (per **R (A, J, K, B, F) v SSHD** [2022] EWHC 360 (Admin), [9]):

> "the principles on which the law of Parliamentary privilege is based involve "the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts"; one of the principles on which the law of Parliamentary privilege is based is "the principle of the separation of powers, which in our Constitution … requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature"; "the courts exercise a self-denying ordinance in relation to interfering with the proceedings of Parliament"; and "it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so".

29. Thus, the Courts will not compel a bill to be introduced to parliament, nor forbid a member of parliament from introducing a bill (though, in both cases, this takes place at the 'pre-parliamentary' stage based on the Communicant's suggestion). Thus by way of example in **R (Unison) v Secretary of State for Health** [2010] EWHC 2655 (Admin), [2011] A.C.D. 10 (attached at [**Annex 7**]) the claimant trade union applied for judicial review of the decision of the secretary of state not to consult it and others on the principle of proposed changes to the National Health Service ("**NHS**") which would have had a significant impact on the union's members. The challenge was dismissed. The High Court (Mitting J) said:

> "8. Unison disavows any intention to delay the presentation of the Bill to Parliament. But if its challenge succeeds, that would now be the unavoidable, or at least highly likely, consequence. Because its challenge has the potential to encroach upon the as yet unannounced timetable for introduction of a Bill to Parliament, it is necessary to consider at the outset what, if any, limits there may be on the scope of judicial review in relation to Parliamentary proceedings.
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> 9. The ground rules are not controversial. The courts cannot question the legitimacy of an Act of Parliament or the means by which its enactment was procured: see *British Railways Board v Pickin [1974] AC 765* , and as to proceedings in Parliament, Article 9 of the Bill of Rights). Nor may they require a bill to be laid before Parliament: see *Wheeler v Office of the Prime Minister and others [2008] EWHC 1409 Admin* , paragraph 49:

> "In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. *Prebble* (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament."

10. The converse must also be true. The courts cannot forbid a Member of Parliament from introducing a Bill. To do so would be just as much an interference with Parliamentary proceedings as to require the introduction of a Bill.

11. The Unison challenge is not so blunt, but if successful it would require the Secretary of State to defer or delay introducing the Health Bill until he had consulted on its principle. Any court ordered prohibition would be conditional, but it would nevertheless be a prohibition. I consider that it would go against the restraint exercised by the judiciary in relation to Parliamentary functions, for the reasons explained by Sir John Donaldson MR in *Her Majesty's Treasury v Smedley [1985] QB 657* at 666C to E. For that reason alone, I would decline to make a prohibitory or mandatory order which in any way inhibited the Secretary of State from introducing legislation to Parliament at a time and of a nature of his choosing."

30. So, the Court in Unison summarised the position at [17]:

> "17. In the case of the Immigration Rules and secondary legislation, primary legislation lays down the procedure for scrutinising and "consulting on" proposed changes, orders and regulations. No statute provides for any method of scrutinising or consulting on primarily legislation. This is unsurprising. <u>It is the standing orders of Parliament which provide the means of doing so. It is just as illegitimate to attempt to superimpose on Parliamentary standing orders judge-made requirements for external or prior consultation</u>, as it is to impose such requirements when Immigration Rules or secondary legislation are to be considered by Parliament. This formed the starting point for Sedley LJ's consideration of the position in relation to Immigration Rules in BAPIO . At paragraph 34, having cited Megarry J's observations in *Bates v Lord Hailsham [1972] 1 WLR 1373* , he said this:
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> > "What he says about primary legislation of course holds true: the <u>preparation of Bills and the enactment of statutes carry no justiciable</u>

> obligations of fairness to those affected or to the public at large. The controls are administrative and political." (Emphasis added).

31. Nor, therefore, will the courts consider the procedure leading up to the introduction of primary legislation into either House of Parliament. That is, in the UK constitution, a legislative act. In **R (Adiatu) v HM Treasury** [2020] EWHC 1554 (Admin), [2020] PTSR 2198, the Divisional Court considered whether a duty known as the "public sector equality duty"[7] (sometimes referred to as "the PSED") would have required – at bill preparation stage - the government to consider amending primary legislation. The court held not:

> "230. In our judgment, the position is different where the challenge is to a decision to invite Parliament to amend primary legislation. The making of primary legislation is the quintessential Parliamentary function. In our, view it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful. The consequence of this would be that the legislation itself would be *ultra vires* and void (even though the Claimants in this stage seek declaratory relief only). The court has no power to declare primary legislation void on a basis such as this.
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> […]
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> 235. The starting point, therefore, is that the courts cannot question the legitimacy of an Act of Parliament (or an amendment to an Act of Parliament). It is against this background that the scope of s149 must be examined.
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> 236. In our judgment, it is clear that the "functions" of a public authority, referred to in s149(1) , do not include the preparation and promotion of an Act of Parliament or an amendment to an Act of Parliament. The making of primary legislation is a matter for Parliament and not the Executive. The passage from the Court of Appeal judgment in the *C* case, set out at paragraph insert above, makes clear that there is a difference between delegated or secondary legislation, on the one hand, and primary legislation, on the other, in terms of the scope for challenge. Whilst the actions of a Government Department leading up to the making of delegated legislation are separate from the proceedings of Parliament itself, and so may be the subject of a challenge on procedural impropriety grounds, the same does not apply to the actions of a Government Department leading up

[7] It is in short, a duty on public authorities to have regard to various aims, such as eliminating discrimination, in undertaking any of their actions. It is imposed by s. 149 Equality Act 2010.

> to an amendment to primary legislation: the responsibility for the primary legislation rests with Parliament itself, and so any procedural impropriety in the lead-up to the amendment does not render ultra vires or invalidate the amended legislation." (Emphasis added).

32. In **R (A, J, K, B, F)** a challenge was brought against the Secretary of State's consultation on a new plan for immigration. This was to inform primary legislation. A claim was brought on the basis that the consultation was discriminatory, in breach of the public sector equality duty under the Equality Act 2010 and breached the four requirements for a fair consultation set out at para. 124 of the June 2018 Observations (sometimes known as the "Sedley" principles or the **Gunning** principles).[8] The High Court dismissed the challenge.

33. It outlined, first, some basics which indicate the fallacy of attempting to draw a distinction between the 'pre-legislative' and legislative process:

> "(1) Generally speaking, the substantive decision of a public authority will involve a process by which that substantive decision is arrived at. Sometimes, the relevant action of a public authority in judicial review proceedings will be the failure to make a substantive decision, in which case there may also be a failure to have any process by which any decision would have been arrived at. […] (5) The design and implementation of the process is, moreover, likely to be intimately linked to the public authority decision-maker's thinking about the substantive decision. There is a link between decision-making process and reasoning process. The link between process and substantive thinking is exemplified in the following: cases concerned with the nature of the "sufficiency of the enquiry" undertaken by a decision-maker; cases about the substantive decision-maker eliciting informed representations; cases about legally adequate consultation; cases about ensuring that all (but only) "relevant considerations" are taken into account; cases about the need for a legally adequate evidential basis for conclusions; and cases about whether statutory duties of regard (or – as in the case of the PSED – due regard) are discharged. […] (7) Legal standards relating to process, and decisions about process, are linked to the public authority's thinking about the substantive decision and to the substantive outcome itself."

[8] The principles were first articulated in **R v Brent LBC ex p. Gunning** (1985) 84 LGR 168 (hence "**Gunning**" principles) but were formulated by counsel for one of the parties, Stephen Sedley QC (hence the "Sedley" principles).

34. It cited from the passage in **Adiatu** quoted above (see [18]). Counsel for the Claimant, however, suggested that "*the procedure that led to legislation being enacted*" meant the parliamentary procedure, and not the procedure leading up to the introduction of legislation. The High Court dismissed such an approach at [21], stating:

> "iii) What the Court clearly meant by "the procedure that led to legislation being enacted" – and in *Adiatu* the procedure that led to amending primary legislation not being enacted – was the prior decision-making procedure, culminating in a substantive decision relating to substantive design of amendments to legislation. That prior decision-making procedure is also clearly what the Court was describing as "the actions of a Government Department leading up to an amendment to primary legislation" (see §236). It was that decision-making procedure that could involve what the Court called "procedural impropriety in the lead-up to the amendment" (see §236), but "any procedural impropriety" of that nature would be part of the responsibility of Parliament (see §136).
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> iv) Moreover, it is noteworthy that the Court wove into its analysis its citation from the *Unison* case, in which passage Mitting J was addressing an issue concerning prior consultation. Consultation was, as Mr Buttler QC accepted, what Mitting J was describing as "the means by which… enactment was procured". So, *Unison* was a case about a prior process, of consultation, addressed in a passage which the Court in *Adiatu* was therefore specifically applying (see §234) in considering the applicability of the PSED to the "procedure" and "actions of a Government Department leading to" legislation being enacted or amended (or in the case of *Adiatu* not enacted or amended).
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> v) It follows that the Divisional Court reached the conclusion that the PSED was not an applicable standard in relation to the "procedure" of decision-making regarding the design of primary legislation; and the Divisional Court reached that conclusion because it reached the prior conclusion that Parliamentary privilege and the constitutional separation of powers did not permit the Court to hold to have been unlawful the "procedure" of decision-making regarding the design of primary legislation (or put another way, the "actions of a Government Department leading up to" primary legislation, including any "procedural impropriety")."

35. So, again, the Court was clear that the procedure leading up to the introduction of legislation – including the procedure of gaining information and drafting legislation, was <u>not</u> amenable to judicial review because it was part of the legislative function.

36. The High Court concluded, therefore, that the application of the **Gunning** principles (i.e. those set out at para. 124 of the June 2018 Observations) do not apply to a consultation which purpose is concerned with delivering legislative change and which culminating substantive decision entails the design of a Bill of primary legislation: see [24]. In so doing, it rejected a suggestion that a decision on the design of the consultation process could be amenable to judicial review. Its reasoning is, the UK Government submits, important for the Committee to bear in mind in considering the Complainants suggestion that the process of designing primary legislation is separate from the legislative process:

> "25. It is not possible, in my judgment, to treat the *Gunning* standards as being legally applicable to "process decisions" about 'the design of the decision-making process', in a manner which is distinct from and insulated from the substantive decision-making as to the design of the Bill. Consultation is really about "participation in" a "decision-making" process. That is how Lord Reed put it in *Moseley* at §§38-39. To see the point, one need only look at *Gunning (iv),* by which the judicial review Court polices the standard of legally adequate consultation which requires that:
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> > the product of the consultation must be conscientiously taken into account when the ultimate decision is taken.
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> The Court could not do this, without accepting that the supervisory jurisdiction extends to scrutinising the "ultimate decision" and the way in which it has been approached. Turning the point around, once it is accepted that it could not be appropriate for the judicial review Court to scrutinise the reasoning and thinking behind the "ultimate decision" – here, as to the design of a Bill of primary legislation to be introduced into Parliament – it must follow that *Gunning (iv)* is not a legal standard which can properly be enforced by the judicial review Court. In my judgment, it is wholly unconvincing then to seek to rescue other aspects of the *Gunning* principles, so as to disconnect those from their legal logic, consequence and effect, so as to leave a "freestanding" issue for the supervisory jurisdiction of the judicial review Court which asks an "isolated', and "insulated" question, as to the clarity of proposals in a consultation document (*Gunning (ii*)).
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> 26. A declaration that an applicable legal standard was breached, in the consultation and engagement process culminating in the operative decisions as to the design of the Bill to introduce into Parliament, would, in my judgment, clearly constitute a breach of Parliamentary privilege and the constitutional separation of powers, as these are clearly described by the Divisional Court in

the *Adiatu* case. A declaration from a judicial review Court, declaring that the consultation which preceded the Bill and informed its design was unlawful would – even if the Court bent over backwards to make very clear that that was the scope and extent of its judgment and its declaration – clearly raise questions about whether some step ought to be taken in light of that conclusion of law by the Court. There are two points to make about this:

> i) First, Ms Clement convincingly submits that a responsible Government would be likely to respond to such a finding of breach of an applicable public law duty by needing to "do something about it". She emphasises that this is not a "practical impossibility" scenario as in *LH*. She submits that if Government did indeed respond to such a finding by reference to "doing something about it", that would stand to disrupt the Parliamentary timetable. These points echo what Heather Williams J said in *PSA* at §214 (see §22 above) about granting a declaration. They link to *Wheeler* at §49, cited in *Adiatu* at §243 (see §18 above).
>
> ii) Secondly, there is this. Let it be assumed that the Court's conclusion did not involve any "step" being taken by Government. Suppose instead that the Court's judgment instead cast a legal "shadow" over the product of the consultation. That shadow would, in my judgment, itself stand – in the circumstances of the present case – as an interference in the Parliamentary process. The Court would, unmistakeably, have concluded that the "product" of the consultation was legally "tainted". The Court would have held that the product had been arrived at in breach of a relevant, material and applicable legal standard. In the present case, the Claimants' pleaded grounds for judicial review, in my judgment, demonstrate this "shadow" point very clearly when they address the purpose of a freestanding declaration (§§6, 17 above). The very consequence for which the Claimants hope, and which they intend, through the bringing of this claim for judicial review and the seeking of a declaration of breach would, in a real sense, be seeking to "influence the course of the Bill" (to echo the phrase in *PSA* at §214). Otherwise, how could the judgment be affecting the thinking of "Parliament" (as it is put), or thinking of those involved in the Parliamentary process?

27. In conclusion, it is not – in my judgment – arguable, with a realistic prospect of success, that the *Gunning* standards are legal standards engaging the supervisory jurisdiction of the judicial review Court in these following circumstances: where Government has chosen to undertake a "consultation and engagement process", for the purposes of "delivering effective legislative change", where the outcome would necessarily be substantive decisions as to the design of a Bill to be introduced into Parliament. That is this case." (Emphasis added).

37. For those reasons, it is important to note that, particularly in the context of the United Kingdom with its fused legislature and executive, one cannot draw an effective distinction between some 'pre-legislative' process and the legislative process once a bill is introduced to either House of Parliament. It simply does not work, and would invariably involve a court - or, in this case, the Committee – making judgments about the legislative process.

38. Moreover, and importantly, respect for the legislative process is, as already pointed out, clearly embedded in Art 2(2) of the Convention – as even the Communicant recognises (para. 2 of the November 2018 Reply). The *Implementation Guide* page 32 notes:

> "Many of the Convention's governmental negotiators were reluctant to interfere with the balance of powers by prescribing requirements for the legislative process. The definition of public authority in article 2, paragraph 2, of the Convention thus expressly excludes bodies or institutions acting in a legislative capacity."

39. See, too, page 49.[9] Against that background the points made in paras. 2-7 of the November 2018 Reply can and should be dismissed. Far from it being the UK Government which is "*significantly restrict[ing] and undermining*" the operation of the Convention (para. 4 November 2018 Reply), it is the Communicant which is trying to extend the ambit of Article 8 into territory which the parties have explicitly agreed it should not venture.

40. In this context in paras 2–3 and 14-16 of the November 2018 Reply the Communicant fails to reflect the Constitutional position. There is no moment of passing a draft bill over from the Government to the legislature, it remains at all times part of a single process.

[9] The ACCC *Guide* refers to a situation where the executive branch collaborates with the legislative branch. This is not such a case.

**<u>Question 2 – "</u>Paragraph 80 of the Party concerned's response to the communication (the Response) states: "It is accepted that there are no rights in Article 191 [TFEU] itself that will be saved by clause 4(1) of the Bill". Does the Party concerned thereby accept that Article 191 TFEU is excised from domestic law and ceases to have any effect thereunder? If so, on what basis does the Party concerned nevertheless submit that that does not produce a "significant effect on the environment" for the purposes of article 8 of the Convention? If not, what precisely is the Party concerned's submission as to the continuing status – if any – of Article 191 TFEU within domestic law?**

41. The Committee is correct to ask questions focussed only on Article 191 in this regard, as despite the contents of paras 8 – 9 of the November 2018 Reply it is clear that in all other regards the effect of the WA 2018 was to fully retain EU law as it was pre-exit, and thus it cannot be asserted in any other regard across the generality of EU environmental law that the WA 2018 itself risked any possible significant likely effect on the environment. An Act which retains the law as it was cannot be said to give rise to significant effects.

42. The UK Government accepts that Article 191 TFEU is no longer part of UK domestic law. It does not follow, however, that it, or more importantly the principles to which it gives effect, ceases to have any effect thereunder. As set out in paragraph 80(1) of the June 2018 Observations, Article 191(2) TFEU does not itself ground any actionable rights for individuals. Instead, it lays down general environmental objectives for EU policy. These general objectives will continue to have an impact in UK law. A number of ways this is achieved are set out in paragraph 80(2)-(4) of the June 2018 Observations. Those paragraphs are not repeated here. However, the Committee is invited to note the following additional points:

    (1) The retention of EU-derived legislation and regulations, as interpreted by the CJEU, in domestic law;

(2) The effect of the UK-EU Trade and Cooperation Agreement;

(3) Legislative Provision made for Environmental Principles in the Environment Act 2021;

(4) The creation of the Office for Environmental Protection; and

(5) The introduction of any legislation which would seek to or have the effect of lower the standards of environmental protection, below those as they are at the end of the UK-EU transition period, must be made extremely clear to parliament.

(i) Continuing effect in UK Law

43. First, the general approach of the WA 2018 remains the same, as previously outlined in the June 2018 Observations, i.e. to

> "provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes."[10]

44. So any EU-derived domestic legislation[11] (such as, for example, the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (SI 810 of 2015), or the Conservation of Habitats and Species Regulations (SI 1012 of 2017) (both referred to in the June 2018 Observations)), as it is in force on "IP Completion Day" (31 December 2020), continues in force of legislation of the same type after that day: s. 2, 7(1) WA 2018.

[10] Explanatory Notes to the Withdrawal Act para. 10. Attachment 4 to the June 2018 Observations.
[11] Defined in s. 1B(7) of the WA 2018 (as amended)

45. Any directly applicable EU regulation, decision or tertiary regulation, as it had effect in EU law immediately before IP Completion Day continues to form part of domestic law on or after IP Completion Day (s. 3 WA 2018) and there are limits to how that can be amended (s. 7 WA 2018).

46. Moreover, it goes beyond this as under s. 4 WA 2018 any rights arising under an EU directive itself and "recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)" continue to have effect.

47. S. 5(2) provides that the principle of supremacy of EU law continues to apply on or after IP Completion Day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP Completion Day.

48. S. 6 WA 2018 outlines how any retained EU law is to be interpreted. It provides, in material part (amends made by the WAA 2020 are shown in square brackets):

> "(1) A court or tribunal—
>
> (a) is not bound by any principles laid down, or any decisions made, on or after [IP completion day] by the European Court, and
>
> (b) cannot refer any matter to the European Court on or after [IP completion day] .
>
> (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after [IP completion day] by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.
>
> (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after [IP completion day] and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, and
>
> (b) having regard (among other things) to the limits, immediately before [IP completion day] , of EU competences.

(4) But—

(a) the Supreme Court is not bound by any retained EU case law,

(b) the High Court of Justiciary is not bound by any retained EU case law when—

(i) sitting as a court of appeal otherwise than in relation to a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995) or a devolution issue (within the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998), or

(ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995 , [...]

[

(ba) a relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations under subsection (5A), and

]

(c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

(5) In deciding whether to depart from any retained EU case law [by virtue of subsection (4)(a) or (b)] , the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.

[

(5A) A Minister of the Crown may by regulations provide for—

(a) a court or tribunal to be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section,

(b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law,

(c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law, or

(d) considerations which are to be relevant to—

(i) the Supreme Court or the High Court of Justiciary in applying the test mentioned in subsection (5), or

(ii) a relevant court or relevant tribunal in applying any test provided for by virtue of paragraph (c) above.

[…]

(6) Subsection (3) does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after [IP completion

day] from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.

(7) In this Act—

"*retained case law" means*—

(a) retained domestic case law, and

(b) retained EU case law;

"*retained domestic case law*" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before [IP completion day]1 and so far as they—

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

"*retained EU case law*" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before [IP completion day] and so far as they—

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

"*retained EU law*" means anything which, on or after [IP completion day] , continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);

"*retained general principles of EU law*" means the general principles of EU law, as they have effect in EU law immediately before [IP completion day] and so far as they—

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles are modified by or under this Act or by other domestic law from time to time)."

49. By way of further comment on the above:

(1) Notwithstanding s. 6(1) providing that domestic courts are not bound by rulings or principles laid down after IP Completion Day, judgments on references made by the UK prior to withdrawal remain binding: s. 7A WA 2018 and **Revenue and Customs Commissioners v Perfect** [2022] 1 WLR 3180 [16] (attached at [**Annex 8**]). This includes many decisions of the CJEU on the interpretation of EU legislation, for example, the CJEU has held in the **Waddenzee**[12] case that the precautionary principle has been integrated into Article 6(3) of the Habitats Directive. Article 6(3) was transposed into English law by regulation 63 of the Habitats Regulations and now remains retained EU law. Any interpretation issue that arose post Brexit under the Habitats Regulations would thus need to take this case-law into account.

(2) In relation to s. 6(5), the test for the Supreme Court in deciding whether to depart from its own case law is whether it "appears right to do so": *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. This is a high bar. It is not enough that a later generation of judges would have resolved the issue or stated the principle differently from their predecessor's: **Horton v Sadler** [2007] 1 AC 307, per Lord Bingham at [29].

(3) In relation to s. 6(5A) the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 1525 of 2020) have been promulgated specifying certain courts and tribunals, including the courts of appeal for the various UK jurisdictions. Material extracts attached at [**Annex 9**].

50. Extensive general guidance was given by the Court of Appeal as to how to apply retained EU law in **Lipton v BA City Flyer** [2021] 1 WLR 2545, [54]-[69] (attached at [**Annex 10**]). In broad terms, however, the general effect of s. 6 WA 2018 is that English Courts must interpret retained EU law in accordance with the principles

[12] **Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02)** EU:C:2004:482, [2005] 2 CMLR 31

laid down and the decisions made by the CJEU up to the end of the transition period (i.e. IP Completion Day). In **R (Wyatt) v Fareham Borough Council** [2021] EWHC 1434 (Admin) concerned an issue arising from the Habitats Regulations, which are retained EU law and which transposed the Habitats Directive, Jay J recorded at [23] that none of the parties had suggested that decisions of the ECJ and CJEU were no longer relevant. The matter has continued to the Court of Appeal and CJEU case law remained part of the jurisprudence summarised and applied by the Court of Appeal: [2022] EWCA Civ 983, [9]. Both cases attached at [**Annexes 11 and 12**].

51. By way of additional point, para. 68(6) of the June 2018 Observations identified that s. 8 of the WA 2018 (formerly clause 7) enabled amendments to statutory instruments arising only from "*deficiencies*" but could not be used to make a change in policy. The Communicant suggests, somewhat dramatically (and without engaging with the substance of what the UK Government actually said) that "*clause 7 of the draft Bill provides ministers with the power to amend or delete EU derived environmental law if they consider this appropriate in order to address any perceived "deficiency" arising from Withdrawal*." (para. 9 November 2018 Reply). Such dire predictions have not been borne out. S. 8 has not been used to effect any change in policy. An example of how this has been used in practice is the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (SI 579 of 2019) (attached at [**Annex 13**]). The intention was, as set out in the Explanatory Memorandum (attached at [**Annex 14**]) para 2.4:

> "to ensure habitat and species protection and standards as set out under the Nature Directives are implemented in the same way or an equivalent way when the UK exits the EU. There is no change to policy". (Emphasis added).

Instead, the changes are, broadly, threefold: nationalising terminology (for example, changing the Natura 2000 network to "national site network"); transferring functions previously belonging to the European Commission to the Secretary of State; and retaining substantive site management obligations

(formerly in the directive) through adding additional regulations (in this case Reg. 16A).

52. So, overall, the statute book as provided for by the EU largely remains, and insofar as that has been promulgated to meet the objectives set out in Art 191(2) TFEU, and insofar as the CJEU has – before the end of IP Completion Day - interpreted the various Directives and Regulations in order to achieve the policy goals set out in Art 191(2) TFEU, then Art 191(2) TFEU continues to have effect in UK domestic law.

53. Moreover, at the heart of Article 191 is the precautionary principle and it has been held by the General Court that this principle is also part of the general principles of EU law and so remains applicable in the UK in this way also: see **Case T-74/00 Artegodan v Commission of the European Communities** EU:T:2002:283 at [183] – [186] attached at [**Annex 15**].

(ii) Effect of the UK-EU Trade and Cooperation Agreement

54. Second, Title XI of the UK-EU Trade and Co-Operation Agreement is set to establish a level playing field between the UK and EU for open and fair competition. Extracts are at [**Annex 16**].

55. Article 356 states:

> **"Right to regulate, precautionary approach and scientific and technical information**
>
> …
>
> 2. The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage.

3. When preparing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, each Party shall take into account relevant and available scientific and technical information, international standards, guidelines and recommendations."

56. Chapter 7 concerns the environment and climate. Article 391(2) provides:

"2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection."

57. Article 393 concerns Environmental and Climate principles:

"1. Taking into account the fact that the Union and the United Kingdom share a common biosphere in respect of cross-border pollution, each Party commits to respecting the internationally recognised environmental principles to which it has committed, such as in the Rio Declaration on Environment and Development, adopted at Rio de Janeiro on 14 June 1992 (the "1992 Rio Declaration on Environment and Development") and in multilateral environmental agreements, including in the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 ("UNFCCC") and the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992 (the "Convention on Biological Diversity"), in particular:

(a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments;

(b) the principle of preventative action to avert environmental damage;

(c) the precautionary approach referred to in Article 356(2);

(d) the principle that environmental damage should as a priority be rectified at source; and

(e) the polluter pays principle

2. The Parties reaffirm their respective commitments to procedures for evaluating the likely impact of a proposed activity on the environment, and where specified projects, plans and programmes are likely to have significant environmental, including health, effects, this includes an environmental impact assessment or a strategic environmental assessment, as appropriate.

3. These procedures shall comprise, where appropriate and in accordance with a Party's laws, the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations

and the taking into account of the environmental report and the results of the public participation and consultations in the consented project, or adopted plan or programme."

58. Article 394 then provides:

> "1. For the purposes of enforcement as referred to in Article 391, each Party shall, in accordance with its law, ensure that:
>
> (a) domestic authorities competent to enforce the relevant law with regard to environment and climate give due consideration to alleged violations of such law that come to their attention; those authorities shall have adequate and effective remedies available to them, including injunctive relief as well as proportionate and dissuasive sanctions, if appropriate; and
>
> (b) national administrative or judicial proceedings are available to natural and legal persons with a sufficient interest to bring actions against violations of such law and to seek effective remedies, including injunctive relief, and that the proceedings are not prohibitively costly and are conducted in a fair, equitable and transparent way."

(iii) Environmental Principles in UK Law under the Environment Act 2021

59. Third, the UK Government has passed the Environment Act 2021 ("**EA 2021"**). A copy is attached at [**Annex 17**].

60. Ss. 17-19 requires the Secretary of State to prepare a policy statement on environmental principles. "Environmental Principles" as defined in s. 17(5), are:

> "(a) the principle that environmental protection should be integrated into the making of policies,
>
> (b) the principle of preventative action to avert environmental damage,
>
> (c) the precautionary principle, so far as relating to the environment,
>
> (d) the principle that environmental damage should as a priority be rectified at source, and
>
> (e) the polluter pays principle."

61. The Committee will note that the environmental principles set out in s. 17(5)(b)-(e) are the same as those set out in Art 191(2) TFEU:

> "[Union policy] shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

62. The policy statement on environmental principles is, per s. 17(2)-(3)

> "(2) A "*policy statement on environmental principles" is* a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.
>
> (3) It may also explain how Ministers of the Crown, when interpreting and applying the environmental principles, should take into account other considerations relevant to their policy."

63. In promulgating this, s. 17(4) provides that:

> "(4) The Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to—
>
> (a) the improvement of environmental protection, and
>
> (b) sustainable development."
>
> (Emphasis added)

64. "Environmental protection" is in turn defined in s. 45:

> "(a) protection of the natural environment from the effects of human activity;
>
> (b) protection of people from the effects of human activity on the natural environment;
>
> (c) maintenance, restoration or enhancement of the natural environment;

(d) monitoring, assessing, considering, advising or reporting on anything in paragraphs (a) to (c)."

65. The process of promulgation is set out in s. 18. A draft must be prepared and consulted upon. That draft must be laid before each House of Parliament and produce a response to any resolution made by either House of Parliament or any recommendation made by a Parliamentary committee. He must then produce the final statement.

66. Once made, s. 19 provides that:

"(1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect."

(emphasis added)

67. The requirement to "have due regard" is commonly used in UK legislation. For example, s. 149 Equality Act 2010 imposes a duty on a public authority to have "due regard" in exercising its functions to the need to, *inter alia*, advance equality of opportunity between persons who share protected characteristics and those that do not. Such a duty is continuing, non-delegable, and one which must be exercised "in substance, with rigour, and with an open mind": **Bracking v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345, [25]. Copies of the Equality Act 2010 s. 149 and **Bracking** are attached at [**Annexes 18 and 19**].

68. There is a proviso in s. 19(2), in circumstances where doing something (or not doing it) would have no significant environmental benefit or would be disproportionate to the environmental benefit.

69. The UK Government launched its consultation on the environmental principles on 10 March 2021, closing on 02 June 2021.[13] A total of 216 responses were received[14]

[13] https://consult.defra.gov.uk/environmental-principles/draft-policy-statement/
[14] https://www.gov.uk/government/consultations/environmental-principles-draft-policy-statement

following which the UK Government published its response on 12 May 2022.[15] Copies are attached at [**Annexes 20 and 21**]

70. A post-consultation draft of the environmental principles policy statement (the "**Draft Statement"**) and an accompanying explanatory memorandum were laid before Parliament for a 21 day sitting period of scrutiny on 11 May 2022.[16] A copy of the draft statement and memorandum are attached at [**Annexes 22 and 23**].

71. Feedback has been received from committees in both the House of Lords and House of Commons, which the UK Government is currently considering. The UK Government anticipates publishing the final statement in the autumn of 2022.

72. So, for present purposes, it is important to note that there is therefore a legislative requirement for the statement to be produced, outlining the same principles as provided for in Art. 191(2) TFEU, and that regard must then be had to that in promulgating government policy.

73. The Committee may wish to note that for present purposes this sub-heading is focused on the position in England.

(iv) Additional protections for the law 'as is'

74. Fourth is the creation of the Office for Environmental Protection ("**OEP"**) (see Part 1, Chapter 2). This is intended to replace the scrutiny and enforcement functions previously fulfilled by the European Commission (Explanatory Notes to the Environment Act 2021, para. 59). This deals fully with the points raised in the November 2018 Reply ay paras. 17 a and b.

75. The principal objective of the OEP is to, per s. 23(1)

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[15] https://www.gov.uk/government/consultations/environmental-principles-draft-policy-statement/outcome/summary-of-responses-and-government-response

[16] https://www.gov.uk/government/publications/environmental-principles-policy-statement

"(1) The principal objective of the OEP in exercising its functions is to contribute to—

(a) environmental protection, and

(b) the improvement of the natural environment."

76. It has, broadly, two functions: scrutiny and advice functions (s. 28-30) and enforcement functions (s. 31-41). Its enforcement functions arise where there has been a failure of public authorities to "comply with environmental law" (s. 31(1)). Key terms are defined in the remainder of s. 32:

"(2) For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority—

(a) unlawfully failing to take proper account of environmental law when exercising its functions;

(b) unlawfully exercising, or failing to exercise, any function it has under environmental law.

(3) In this Part "*public authority" means* a person carrying out any function of a public nature that is not a devolved function, a parliamentary function or a function of any of the following persons—

(a) the OEP;

(b) a court or tribunal;

(c) either House of Parliament;

(d) a devolved legislature;

(e) the Scottish Ministers, the Welsh Ministers, a Northern Ireland department or a Minister within the meaning of the Northern Ireland Act 1998."

77. "Environmental Law" in this case is defined in s. 46:

"(1) In this Part "*environmental law" means* any legislative provision to the extent that it—

(a) is mainly concerned with environmental protection, and

(b) is not concerned with an excluded matter."

78. Save for certain exceptions outlined in s. 46(2)-(4).

79. The OEP may receive complaints, investigate (whether triggered by a complaint or of its own initiative), take the relevant public authority to court pursuant to an Environmental Review, or, in urgent cases, apply for a Judicial review.

80. In short, therefore: insofar as the principles contained in Art 191(2) TFEU continue to have legal effect in domestic law, pursuant to the WA 2018, the OEP can continue to enforce them.

81. Fifth s. 20 EA 2021 requires that where a Bill includes a provision which, if enacted, would be environmental law, the Minister must, before the Second Reading of the Bill in the House of Parliament to which it is introduced, make either that (per s. 20(3)-(4)):

> "(3) A statement under this subsection is a statement to the effect that in the Minister's view the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.
>
> (4) A statement under this subsection is a statement to the effect that—
> (a) the Minister is unable to make a statement under subsection (3), but
>
> (b) Her Majesty's Government nevertheless wishes the House to proceed with the Bill."

82. S. 20(6) and (8) provides:

> "(6) For the purposes of this section—
> (a) references to environmental protection provided for by any existing environmental law includes any protection which could be provided for under powers conferred by the existing environmental law, and

(b) in considering the effect of a Bill, any powers conferred by the Bill to provide for any environmental protection may be taken into account.

…

(8) "*Existing environmental law*", in relation to a statement under this section, means environmental law existing at the time that the Bill to which the statement relates is introduced into the House in question, whether or not the environmental law is in force."

83. Thus, insofar as the principles in Art 191(2) TFEU continue to have effect in domestic law (as set out above), these are part of the baseline for environmental protection against which any future Bill will have to be measured; with the Minister responsible having to be entirely clear with parliament whether any new Bill will strengthen or weaken environmental protection.

(v) Conclusion

84. Overall, therefore, the UK Government submits:

(1) As set out in the June 2018 Observations, the purpose and the effect of the WA 2018 is to leave the UK with a functioning statute book, by copying across EU law into domestic law.

(2) Pre-exit case-law also remains applicable.

(3) The environmental principles set out in Art 191 TFEU will continue to have effect in UK law insofar as they underlie the EU policies which led to the various environmental directives transposed into UK law, and insofar as they affect the interpretation of those EU instruments. The creation of the OEP has provided a specialist body to enforce those laws against public authorities – replicating the role of the EU Commission.

(4) Insofar as the UK Government then wishes to change that base level of protection (including the impact of Art. 191(2) TFEU), it will have to do so by separate instruments and legislation. It cannot do so under the auspices of the WA 2018. In so doing any decrease in the level of environmental protection will have to be made clear to the House of Commons or House of Lords (depending on where the relevant bill was introduced).

(5) In any case, in setting the UK's future policy trajectory, the self-same environmental principles set out in Art. 191 TFEU will also be the subject of a statement on environmental principles, to which "*due regard*" must be had by any minister of the Crown in exercising his or her policy making functions. This is further supported by the non-regression provisions of the UK-EU Trade and Cooperation Agreement.

85. Thus, the environmental principles outlined in Art. 191(2) TFEU will continue to have effect in UK law. Further, the above points demonstrate that – in addition to the points made in the June 2018 Observations and contrary to para. 8 of the November 2018 Reply – the UK Government is right to submit that the draft Bill did not have a significant effect on the environment.

**<u>Question 3</u> – "At paragraphs 81–83 of its Response, the Party concerned refers to the "Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment" launched on May 2018 ("the May 2018 consultation"). Please explain the relevance, if any, of the May 2018 consultation procedure to the Party concerned's submission that, should the Committee take the view that the Withdrawal Bill falls "within the parameters of article 8 of the Convention, the UK's position is that sufficient public participation has been provided and the objectives of article 8 of the Convention have been met" (see para. 6 (2) of the Response). Please also indicate whether it is the Party concerned's submission that the May 2018 consultation and the "public participation there has been in relation to the Bill and exiting the EU generally" (set out at paras. 95 to 116 of the Response)**

**are alternative and equally valid methods of complying with the requirements of article 8 of the Convention."**

86. Question 3 is in two parts.

87. As to the first part:-

88. At para. 74 of the June 2018 Observations, the UK Government identified that the Communicant had focused on trying to demonstrate a failure of public participation, without first establishing in clear terms why it says Art. 8 is engaged at all. The UK Government therefore sought to identify the basis of the Communicant's case and noted that it appeared to be based on (i) the inadmissible Second Complaint, and (ii) the suggestion that withdrawal from the EU would undermine the general principles of EU environmental law (see paras. 78-79).

89. At paras. 78-86 of the June 2018 Observations, the UK Government then outlined why the second suggestion was not made out: i.e. why the general environmental principles would not, in fact, be undermined. This included identifying that the Department for Environment, Food and Rural Affairs had consulted on how best to include environmental principles (including those referred to in Art. 191(2) TFEU) in the UK legal system – whether in primary legislation, or statutory policy. S. 16 WA 2018 (prior to amendment)[17] then placed an obligation, in primary legislation, on the Secretary of State to publish a draft bill consisting of *inter alia* (1) a set of environmental principles (which must consist of those found in Art 191 TFEU) (2) an obligation to publish a policy statement on those principles and (3) a provision requiring that Ministers of the Crown have regard to that statement. This was, in the event, enacted in the EA 2021, as discussed above. Paras. 81-83 and contents thereof explain, therefore, why the general environmental principles

[17] S. 16 was repealed by the WAA 2020 s. 36, on the basis that the duty had, by that point, been complied with. See para. 328 of the Explanatory Notes to the WAA 2018 at **[Annex 40]**.

would not be undermined, which in turn demonstrates that the second reason for the Communicant to suggest Article 8 is engaged at all is not made out.

90. The UK Government's explanation that, if the bill falls within the parameters of Article 8, there has nevertheless been sufficient public participation (para. 6(2) of the June 2018 Observations) is then set out in detail at paras. 88-116 of the June 2018 Observations. However, it does not follow that the May 2018 Consultation is irrelevant to whether there has been compliance with Article 8. As set out in paras. 88-116 of the June 2018 Observations, Article 8 requires the promotion of effective participation, using best efforts but ultimately leaving the parties with some discretion as to the specificities of how public participation should be organised (see in particular para. 90 of the June 2018 Observations). The May 2018 Consultation opened on 10 May 2018, closing on 02 August 2018. After it opened the remaining stages in the Parliamentary process that the Bill had to pass through were:

(1) Third Reading in the House of Lords (16 May 2018);

(2) House of Commons consideration of the amendments made by the House of Lords (12 June 2018);

(3) Programme Motion (12 June 2018);

(4) House of Lords' consideration of House of Commons amendments (18 June 2018);

(5) House of Commons consideration of the House of Lords amendments (20 June 2018);

(6) House of Lords Consideration of the House of Commons amendments (20 June 2018); and

(7) Royal assent (26 June 2018).

91. The consultation paper therefore was available to inform the public and parliamentary debate at a time when the Bill was still very much in flux, and the public engagement outlined in paras. 97-113 of the June 2018 Observations was ongoing.

92. By the second part the Committee asks if the UK Government considers the May 2018 consultation steps outlined in paras. 95-116 of the June 2018 Observations are "alternative and equally valid methods of complying with" Article 8.

93. This is not understood. The nature of the obligations required by Article 8 are set out in paras. 88-94 of the June 2018 Observations. It is the UK Government's case that the steps taken in paras. 95-116 of the June 2018 Observations satisfy those obligations.

94. If the question is whether each of the eleven points made are alternatives to one another, the UK Government submits the Committee would be wrong to try and split out and assess each element. The steps outlined are all important and demonstrate the type of multifactorial process grounded in debate and public participation that is fully compliant with Article 8.

95. If the question is whether each of the eleven points made are "alternative and equally valid methods" compared to some *other* type of participation (e.g. a referendum), the UK Government submits that there is no indication in Article 8 of any type of "preferred" method of public participation, such that suggesting the eleven points outlined are alternatives is starting from a fundamentally wrong premise.

**<u>Question 4 –</u> "Paragraph 100 of the Response states: "it is important to note that the Bill, in draft, was made publicly available on Parliament's website, and, within**

**clear time-frames, that the ongoing participation of the public and of representative consultative bodies is guaranteed by their directly elected Members of Parliament'.**
**(a) Please specify the "clear time-frames" there referred to and indicate when those timeframes ended. In particular, did they end (i) before the draft Withdrawal Bill was approved by the executive for submission to Parliament (see question 2 above); or (ii) before the Bill was introduced before the House of Commons for its first reading (according to paragraph 19 of the Response, on 13 July 2017); or (iii) at some later date, and, if so, when?**
**(b) How was the public informed of (i) its opportunities to comment on the draft Withdrawal Bill whilst under preparation and (ii) the timeframes for doing so?"**

96. As to question 4(a), the point made by the UK Government at para. 100 of the June 2018 Observations is that, throughout the whole of the legislative process, the ongoing participation of the public and representative consultative bodies is guaranteed. The "clear timeframes" referred to indicates that each stage of a Bill's progress is published online, alongside clear dates for the next parliamentary stage.[18]

97. As to question 4(b): prior to the Bill's introduction to the House of Commons the public was given the opportunity to comment via the White Paper (see paras. 16-17 of the June 2018 Observations) and via the stakeholder bulletins (see para. 109 of the June 2018 observations). Once the Bill was introduced, the public was given the same opportunity to comment on the draft Bill and the timeframes for doing so as with all legislation. Indeed, given the controversy such opportunities and timeframes were likely even better publicised than normal. So:

(1) As outlined above, the draft Bill in its various forms, the Parliamentary stages it would progress through, and the dates thereof were all published online at

[18] This can currently be found at https://bills.parliament.uk/bills/2045/stages. The website was 'revamped' around 2019/2020 – a screenshot of the old website which was active at the time is attached at [**Annex 41**]

[**Annex 24**] in a readily accessible manner. The Bill took an extraordinary amount of parliamentary time: overall Parliament spent more than 272 hours debating the draft bill.[19]

(2) The matter was covered extensively in all sections of the UK media. One could not escape from noting the Bill's passage through parliament (even if one wanted to).

(3) As to engagement, every member of the public has a constituency MP, the vast majority of whom hold surgeries on a weekly basis to allow their constituents access and the ability to present their causes or grievances. Any member of the public could have commented on the draft Bill to their MP. MPs can also be a source of information to the public, if required. This is well known and accepted practice within the UK. Moreover, interest groups regularly engaged with MPs, and again would have been aware of their ability to so do in accordance with long-standing convention. In addition, members of the House of Lords (many of whom will have had a particular interest in this area) are also contactable by members of the public.

**<u>Question 5 – "</u>Paragraph 112 of the Response states that "in 2017 DExEU [the Department for Exiting the European Union] received over 90 pieces of correspondence regarding the Bill and has received 32 letters thus far in 2018 either sent directly to ministers or forwarded across from other Parliamentarians or stakeholders". (a) Please indicate how many of those communications specifically raised issues relating to environmental law, as distinct from other areas of law and / or general issues; and, of those communications, how many were from (i) environmental NGOs and (ii) other members of the public. (b) Please also provide the relevant parts of the documentation in which the communications referred to in subparagraph (a) above were taken into account"**

[19] https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-act accessed 25.07.2022

98. At the time of writing, it has not been possible to ascertain this information for the reasons set out in seeking an extension of time and at the start of these Observations. In particular, in the years that have passed since the UK Government provided its November 2018 Reply and last heard from the Committee, the department responsible for the Bill (DExEU) was abolished. As a result, its staff were moved and its systems closed. Efforts have been made to seek records of DExEU's correspondence in order to answer the above question. However, it has not been possible to obtain the information necessary to answer the question within the relatively short time frames imposed.

**<u>Question 6 –</u> "Please provide the text of the Consultation Principles as in force at the time of the government's preparation of the Withdrawal Bill."**

99. A history of the Consultation Principles is set out online.[20] Relevant versions of the Consultation Principles are those published on 14 January 2016 (attached at [**Annex 25**]) and 19 March 2018 (attached at [**Annex 26**]).

100. The status of these Principles is considered below.

**<u>Question 7 –</u> "Please provide evidence (e.g. from relevant legislation, administrative instructions/guidance or court caselaw) to demonstrate that government ministries/agencies engaged in the preparation of draft legislation that may have a significant effect on the environment are required to apply the Consultation Principles when doing so (see paragraph 120 (2) et seq. of the Response and see, for example, Principle K of the Consultation Principles 2018: 'This document does not have the force of law and is subject to statutory and other legal requirements".)"**

[20] https://old.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/inquiries/parliament-2015/government-consultation-principles-and-practice/

101. The legal obligations on when and how to consult are set out below under question 8. It is perhaps worth reading the response to that question first.

102. The UK Government frequently refers to the consultation principles in its guidance or requirements to other public authorities. So, for example:

(1) They are referred to in para 22.31 of the *Guide to Making Legislation* (2017).

(2) The Secretary of State's Licence to Highways England (now National Highways)[21] (attached at [**Annex 27**]) defines consultation as:

> "consultation or engagement proportionate to the circumstances in accordance with government guidance on consultation principles"

And then imposes a number of obligations of consultation on Highways England (see e.g. para 6.9, 6.39-6. 41).

(3) The UK Government's statutory guidance on *Opening and Closing maintained schools: Statutory guidance for proposers and decision-makers* (November 2019)[22] refers to the consultation principles (see **R (WC) v Somerset County Council** [2021] EWHC 2936 (Admin), [21]-[22]) (guidance and case included at [**Annexes 28 and 29**]).

(4) Moreover, when the UK Government undertakes consultation, it will ordinarily have regard to the consultation principles. See, e.g. **ECMA v SSE** [2019] EWHC 2813 (Admin) at [47] (included at [**Annex 30**]).

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[21] /https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431389/strategic-highways-licence.pdf

[22] This is statutory guidance to which a local authority is required to have regard pursuant to s. 15(4) and 16(3) Education and Inspections Act 2006

103. The Courts have noted what the consultation principles state in considering the question of, for example, the amount of time for which a consultation period should run: **ECMA v SSE** [150], [171]-[174].

104. One of the leading textbooks on Judicial Review[23] states

> "Finally, the importance of an appropriate consultation procedure has been given greater emphasis by the government in recent years. The Cabinet Office Consultation Principles indicate, inter alia, that consultation should be clear and concise, have a purpose, be informative, last for a proportionate amount of time, and be targeted, and responses should be published in a timely fashion. Though the principles do not have legal force, and cannot prevail over statutory or mandatory external requirements, they should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure from them."
>
> (Internal footnotes removed)

**Question 8 – "Paragraph 124 of the Response states that "the Courts have developed principles concerning lawful consultation both as to when it is required and, when it is required, what it must involve". Please provide any relevant caselaw over and beyond Ex p. Coughlan (referred to in footnote 63 to the Response) and identify relevant passages therein to demonstrate that the courts require the principles listed in paragraph 124 of the Response to be applied during the preparation of draft legislation on behalf of the government."**

Overall

105. There is no general common law duty on decision makers to consult before they take any and all actions/decisions. However, a requirement to consult may arise in a variety of ways under the common law, such as where there is a legitimate expectation that such consultation will be undertaken: **R (Moseley) v**

[23] *De Smith's Judicial Review* (8th ed) para. 7-058 attached at [**Annex 42**].

**Haringey LBC** [2014] 1 WLR 3947, per Lord Wilson [23]-[25], per Lord Reed [35] (attached at [**Annex 31**]). A particularly helpful summary is contained in **R (Plantagenet Alliance Ltd) v Secretary of State for Justice** [2014] EWHC 1662 (QB), [83]-[98] (attached at [**Annex 32**]).

106. By way of example, in **R (Greenpeace Ltd) v Secretary of State for Trade and Industry**, [2007] EWHC 311 (Admin) [47]-[54] the High Court held that a promise in a white paper to conduct the "fullest possible consultation" before deciding to proceed whether more nuclear power plants should be built in the UK, was enough to establish an obligation to consult – in part because the Aarhus convention means that

> "49. Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive."

(see attached at [**Annex 33**]).

107. Where a duty to consult arises, or where a body decides voluntarily to consult, however, the requirements are as outlined in para. 120 of the June 2018 Observations. I.e., as the Supreme Court said in **Moseley** at [25]:

> "25. In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:
>
> > "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."
>
> Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed

improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker [1995] 1 All ER 73* , cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213* , para 108. In *Ex p Coughlan*, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria. They are, as the *Court of Appeal said in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134* , para 9, "a prescription for fairness".

108. The UK Government is specifically asked about the preparation of draft legislation. It is appropriate to differentiate primary from secondary legislation.

*(i) Primary Legislation*

109. It is well established that primary legislation, introduced as a bill in Parliament, and the decision to introduce it, cannot be impugned on the ground that it is vitiated by legally inadequate consultation: see above. In English law, the process of preparing primary legislation – even if undertaken by the Government– is <u>legislative</u> in nature. Much of the reasoning behind this, and the key cases on it, have been explored above in the answer to **Question 1.**

110. In summary, therefore: the courts cannot question the legitimacy of primary legislation based on the way it is procured: **<u>Unison</u>** [9], **<u>Adiatu</u>** [230]. The controls on the preparation of bills and enactment of statutes carry no justiciable obligations of fairness to the public, the controls are administrative and political (**<u>Unison</u>** [17]). So, the Court will not compel or prohibit the introduction of a bill into parliament

(**Unison** [9]-[10]); nor entertain a judicial review which would have the effect of disrupting the parliamentary timetable (**Unison** [11]); nor add judge-made requirements such as those for prior consultation before a bill is introduced (**Unison** [17]), or obligations under the Equality Act 2010 (**Adiatu** [236]). In short, the responsibility for primary legislation rests with parliament itself, (**Adiatu** [236]) – the courts cannot question the prior decision-making procedure that leads to a substantive decision whether to introduce, not introduce, or redesign legislation: **R (A, J, K, B, F)** [21]. Thus, there is no requirement to consult before creating primary legislation, for to impose one would be to trample on the legislature's territory and notion of separation of powers.

(*ii) Secondary Legislation*

111. Secondary legislation, unlike primary legislation, can in theory be impugned on the basis that, and the decision to make it, is vitiated by legally inadequate consultation: **R (A,J,K,B,F)** [7] attached at [**Annex 34**]. This Communication as admitted is limited to primary legislation – but we consider secondary legislation for completeness.

112. The starting point, as ever, that there is no common-law requirement to consult. In particular, a requirement to consult will not arise every time there is a change to secondary legislation, particularly where there is a parliamentary procedure in place. In **BAPIO Action Ltd v SSHD** [2007] EWCA Civ 1139[24] (included at [**Annex 35**]), s 3 of the Immigration Act 1971 provided a means by which the statutory instrument Immigration Rules could be changed but must be subject to scrutiny and approval by laying them before parliament. The claimant complained about an absence of consultation prior to that occurring. The entire Court of Appeal dismissed the suggestion there was a duty to consult. Maurice Kay LJ said, at [58]:

[24] The matter was appealed to the House of Lords but not on the consultation point: [2008] 1 A.C. 1003 [27]

> 58. […] For my part, however, I would not so readily reject one of the alternative submissions made by Ms Laing on behalf of the Home Secretary. Whilst I do agree with Sedley LJ that the Rules are susceptible to judicial review on grounds such as *ultra vires* or irrationality, I doubt that, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which requires the intended rules to be laid before Parliament and subjected to the negative resolution procedure. I tend to the view that, in these circumstances, primary legislation has prescribed a well-worn, albeit often criticised, procedure and I attach some significance to the fact that it has not provided an express duty of prior consultation, as it has on many other occasions. The negative resolution procedure enables interested parties to press their case through Parliament, although I acknowledge that their prospects of success are historically and realistically low. They also retain the possibility of challenge by way of judicial review on the sorts of substantive ground to which I have referred. For these additional reasons I would be minded to reject the appeal to procedural fairness as the basis of a legal duty of consultation. […]as a matter of principle, I consider that where Parliament has conferred a rule-making power on a Minister of the Crown, without including an express duty to consult, but subject to a Parliamentary control mechanism such as the negative resolution procedure, it is not generally for the courts to superimpose additional procedural safeguards. In one sense, this view gains support from the reasoning by reference to which Sedley LJ would dismiss the appeal. The lack of specificity and the absence of a clear principle of limitation which exist in the present case would, in my view, be present in most cases in which an unexpressed duty to consult might be postulated.

113. And Rimer LJ at [65] agreed:

> "I respectfully prefer and agree with the views expressed by Maurice Kay LJ. The practical difficulties that have led Sedley LJ, on his own approach, to reject any duty of consultation in the present case provide in my judgment a compelling inference that the real explanation as to why appellants are not entitled to succeed on the consultation issue is that it is simply no part of the scheme of section 3 that there should be any consultation; and if that is the legislature's scheme, it is not for the courts to re-write it. I regard that view as supported by the fact that, as was cogently illustrated to us, the legislature is well able when it chooses to do so to identify whether any and, if so, what consultation process should precede any legislative changes, yet in the case of section 3 it chose to remain silent on the topic."

114. However, in the ordinary way, a requirement may arise where, for example, there is a statutory obligation to do so or where there has been a clear promise to

consult, or an established practice of consulting, or where failure to consult would result in conspicuous unfairness (**Plantagenet Alliance Ltd** [98]).

115. There is a suggestion in paras. 18-21 of the November 2018 Reply that the safeguards provided by the common law are in some way not enough to comply with Article 3 of the Convention because they "do not assist with *when* exactly consultation must take place in matters subject to the Convention", do not mirror or "clearly transpose" convention requirements, and cannot constitute a "consistent framework" because that cannot be achieved through *inter alia* judicial discretion operating after the event.

116. As a starting point, it should be noted that in practice the requirements of the Convention have generally adequately been protected by the common law, in regard to consultation. So, for example, the Convention may well support common law consultation requirements (as in **Greenpeace** above). Alternatively, there are cases where the common law requirements are enough to overturn a consultation, such that relying on the Convention is unnecessary: see e.g. **R (Stephenson) v SHCLG** [2019] PTSR 2209[41]-[42], [58]).

117. More fundamentally, however:

(1) There is a clear misunderstanding of the common law and its role. Pronouncements by the courts elucidate the limits and requirements of the law, which public authorities must take into account in undertaking their actions (hence, JOYS as discussed at **Question 9**). Clear principles can be found in **Plantagenet Alliance**, above.

(2) No issue arises from the fact that court cases arise "*after the event":* the law as elucidated applies at all stages, it does not come into existence after the breach complained of. The source may be different to civil law countries (judicial pronouncement rather than a code), but the existence of the legal requirement at the time decisions are taken is not.

(3) The common law is a system of customary law that is the composite accumulation of experience going back centuries and shared by few other European countries, albeit it has been exported to many countries beyond Europe. Lord Sumption (see above) has written[25]:

> "Like any system of customary law dependent mainly on precedent, it is based on judicial decisions about the legal implications of a large number of tiny human stories. One could, of course, view these stories in the abstract, as if they were intellectual exercises written for a moot or a professional examination. But that would deprive them of much of their interest as well as of their poetry and their humanity. They are legal cautionary tales. But they are also fragments of English history. As sources of law, they are completely different from the written codes that provide the basis of judicial decision-making in civil law countries. The French civil code originated in a deliberate attempt by Napoleon's jurists to efface the social values of the pre-revolutionary past. The result was, and is, a document that achieves an almost total degree of intellectual abstraction. It could be the law of almost any country on earth. Indeed, it is the law of quite a lot of countries on earth, having been adopted with minor variants in many places that have few cultural or historic connections with France. By comparison, the sources of English law could not have originated anywhere but England. They reflect the intense humanity of English law …"

(4) The common law is, therefore, part of a "clear, transparent and consistent framework" within the meaning of Art. 3(1). Any finding by the Committee that it was not would mean that common law systems could not compatibly be Parties to the Convention.

118. The fact that the common law did not require consultation on the preparation of the draft Bill does not indicate it is deficient – simply that the Communicant's case is wrong and is not in line with the provisions of the Convention.

**<u>Question 9 – "</u>At paragraphs 125-126 of the Response, the Party concerned cites pages 12 and 41 of "Judge Over Your Shoulder: A guide to good decision making"**

[25] See chapter 1 of *Law in a time of crisis* at [**Annex 2**].

**(JOYS). Please provide evidence (e.g. from relevant legislation, administrative instructions/guidance or court caselaw) that government ministries/agencies engaged in the preparation of draft legislation that may have a significant effect on the environment are required to apply pages 12 and 41 of JOYS when doing so"**

119. JOYS is a guide issued to civil servants to ensure good decision making. Its history is set out in *De Smith's Judicial Review* at 1-055 attached at [**Annex 36**]:

> "During the 1980s, central government became increasingly concerned at the number of successful judicial review challenges and that departments seemed ill-equipped to respond effectively to actual or potential judicial reviews. Writing in 1983, the Treasury Solicitor drew attention to the fact that "senior administrators show a surprising ignorance of elementary legal principles" and "a lack of appreciation of the impact of legal considerations on administrative problems involving either considerable financial loss or embarrassment to Ministers". A Cabinet committee endorsed this view and a strategy was formulated to deal with these problems. One aspect of the response was for the Treasury Solicitor's department and the Cabinet Office to distribute over 35,000 copies of a pamphlet called The Judge Over Your Shoulder to civil servants in 1987. This set out some basic information about the judicial review process and some of the precautions which administrators could take to avoid the risk of challenge."

120. The most recent version is produced by the Government Legal Department and was issued in late July 2022. [26]

121. It is, in short, a guide to the Government's legal responsibilities. It is not an additional source of law but is there to ensure they take their obligations arising under *inter alia* the common law into account. The common law position on the preparation of legislation has been set out above.

**<u>Question 10</u> – "Is participation in the Delegated Powers and Regulatory Reform Committee, referred to at paragraph 113 of the Response, limited to members of parliament and government officials or may certain members of the public attend**

[26] https://www.gov.uk/government/publications/the-judge-over-your-shoulder.

**and speak at its meetings at their request? If the latter, which members of the public may do so and what are the requirements for them to attend and speak?"**

122. The Delegated Powers and Regulatory Reform Committee scrutinises proposals in bills to delegate legislative power from Parliament to another body and also examines Legislative Reform Orders.[27] Members of the public who are concerned about issues in this context can write to members of the Committee asking them to raise these issues. The Committee, being a Select Committee, has the power to call people to give oral evidence before it.[28]

**Question 11 – "Please indicate whether the full text of clause 7 of the draft Withdrawal Bill is contained in the White Paper and, if so, on what page. If it is not to be found there, please indicate precisely when and how the draft text of clause 7 was first made available to the public."**

123. The full text of clause 7 draft Bill (eventually s.8 of the WA 2018) is not set out in full in the White Paper. The full text of clause 7 would have been first made available to the public when the bill was introduced to parliament.

**Question 12 – "Please indicate whether it is the Party concerned's submission that a member of parliament is to be considered a "representative consultative body" for the purposes of subparagraph (c) of article 8 of the Convention and, if so, set out the arguments on which it relies in support of that submission."**

124. If the Committee embraces the artificial distinction drawn by the Communicant (and rejected in UK law) between the Government when it prepares legislation prior introducing a bill to parliament and the legislative process once a bill is within parliament, it is the UK Government's case that parliament itself is the representative consultative body.

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[27] https://committees.parliament.uk/committee/173/delegated-powers-and-regulatory-reform-committee.

[28] https://committees.parliament.uk/publications/8225/documents/84262/default/.

125. The *Implementation Guide* at p. 184 states that the term representative consultative body:

> "includes several important ideas. The first is that such bodies are not established in order to give expert assistance on their own, but only insofar as they are representative of interested or concerned segments of the public or of the public at large. Of course authorities can ask for the assistance of particular experts or expert bodies, but the participation of such experts is no substitute for the participation of the general public. Secondly, these bodies must be "consultative". That is, they must employ a process of consultation that indicates a degree of transparency, openness and impartiality. Analogy may be drawn here with the "clear, transparent and consistent framework" required under article 3, paragraph 1, of the Convention. It is in the interests of the authorities to monitor and to assess the degree to which the representative bodies meet these requirements, in order to ensure that the process provides for effective public participation in practice."

126. In the case of Parliament:

(1) The House of Commons is comprised of elected MPs, each of whom is not only representative of the public at large, but (as outlined above) undertakes frequent consultative surgeries at their constituencies. Such procedures are both transparent and open, being advertised on MPs websites and available to members of the public.

(2) Various MPs, or indeed members of the House of Lords, will often also have areas in which they are particularly focused or interested, and will regularly therefore liaise with particular segments of the public interested in that area. Again such processes are transparent and open – contact details for MPs and members of the House of Lords are available online,[29] and one can even filter Lords members by policy interest.[30]

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[29] We attach, for example, at [**Annex 43**] a webpage with the contact details of Lord Woolf: https://members.parliament.uk/member/1773/contact [accessed 24.7.2022]

[30] We attach, at **[Annex 44]** search results of filtering Lords members by Policy Interest: Energy and environment

(3) It is possible for particular Committees within both houses of parliament to undertake pre-legislative scrutiny of draft bills. See the attached extract from Erskine May[31] at paragraph 26.17 [**Annex 37**] and para. 22.16 and following of the *Guide to Making Legislation* (2017). This is of course in addition to the general discussions and politicking that happens in any representative democratic system.

127. Accordingly, therefore, it is Parliament itself which is a representative body – indeed it is one of the highest order – rather than individual MPs.

**Question 13 - "Please indicate whether it is the Party concerned's submission that it is sufficient for the purposes of subparagraph (c) of article 8 of the Convention that some, selected, members of the public are able to participate in the preparation of draft legislation that may have a significant effect on the environment through representative consultative bodies (e.g. in the case of the Withdrawal Bill, the communicant through Greenlink), notwithstanding that the general public may not have such opportunities. If so, please set out the arguments on which the Party concerned relies in support of that submission."**

128. The UK Government disputes the premise of this question. It is not the case that

> "some, selected, members of the public are able to participate in the preparation of draft legislation that may have a significant effect on the environment through representative consultative bodies (e.g. in the case of the Withdrawal Bill, the communicant through Greenlink), notwithstanding that the general public may not have such opportunities."

https://members.parliament.uk/members/Lords?SearchText=&PartyId=&Gender=Any&MembershipStatus=0&PolicyInterestId=11&Experience=&ShowAdvanced=true

[31] Often referred to as the "Bible of parliamentary procedure". See the attached introductory pages at [**Annex 45**].

129. Instead, every person can access their MP, or indeed write to a member of the House of Lords with particular policy interests – as outlined above.

**Question 14 – "Please comment on the communicant's reply to question 1 of the Committee's questions to the communicant below"**

130. This will follow in a later submission once the Communicant's reply is received.

**Further responses to the November 2018 Reply**

131. Most of the UK Government's responses to the November 2018 Reply are woven into the questions above where they are relevant. However, dealing with some small points:-

132. It is suggested at paras. 14-15 that there was insufficient public participation before the draft Bill was introduced to parliament, and that the Referendum Campaign, and White Paper were insufficient. This is addressed in more detail in the June 2018 Observations, but it is not right to say these do not indicate "effective" public participation. The Referendum Campaign was one of the biggest campaigns of public engagement in recent times and, contrary to the suggestion at para. 15 of the November 2018 Reply, it did deal with the potentially significant effects on the environment (see para. 13 of the June 2018 Observations). Moreover, each formed a backdrop against which any member of the public could engage with their MP or a member of the House of Lords and ask them to undertake pre-legislative scrutiny (see above answer **Question 12)**.

133. It is suggested at para. 16 of the November 2018 Reply that the clear statement in the White Paper that

> "The Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law. This will provide businesses and stakeholders with maximum certainty as we leave the EU. We will then have the opportunity, over time, to ensure our legislative framework is outcome driven and delivers on our overall commitment to

> improve the environment within a generation. The Government recognises the need to consult on future changes to the regulatory frameworks, including through parliamentary scrutiny."[32]

is not sufficient because it was not published alongside a draft Bill. This again is wholly wrong – any member of the public would be clear what the Government's intentions were and would be able to engage with that.

134. At para. 17 of the November 2018 Reply the Communicant suggests the draft Bill "did not have the benefit of the public's input prior to submission" and that it "might have been markedly different" had consultation at the alleged pre-legislative stage been undertaken. However:

(1) Fundamentally, the Bill then went through a legislative process. The suggestion that in the 270 odd hours of debate a topic was not covered which would have been if the UK Government had consulted on the draft Bill prior to its introduction into Parliament is plainly wrong. A clear example is provided in fact by the example at para. 17(a) and (b) of the November 2018 Reply: the Environmental Governance mechanism referred to is now the OEP, discussed above. Its insertion into (what became) the Environment Act 2021 was required by s. 16(d) WA 2018 (prior to its amendment). This is a clear example of the legislative process doing its job – there is no negative consequence of the alleged breach. Concerns now raised about its funding in the context of budget budget cuts to public services would never have led to a change in the contents of the draft Bill. It is far too detailed a consideration that would have been – and indeed was - picked up elsewhere.

(2) It is not accepted there is any type of transposition gap arising under s. 4(2)(b) WA 2018. The example posited of the Energy Efficiency Directive (2012/27/EU) is not understood:

[32] Para 2.17 Example 2

(i) Large portions of the Energy Efficiency Directive have been transposed by way of legislative instrument in the UK Regulations (Energy Efficiency (Building Renovation and Reporting) Regulations 2014 (SI 952 of 2014) and the Energy Efficiency (Encouragement, Assessment and Information) Regulations 2014 (SI 1403 of 2014). Those continue to have effect.

(ii) The only aspect of the Energy Efficiency Directive highlighted by the Communicant is obligations relating to central government purchasing. It is accepted that this has been transposed by Procurement Policy Notes ("**PPNs"**).[33] The Communicant (1) has not, contrary to its suggestion, shown that this element of the Energy Efficiency Directive creates directly effective rights and (2) has not challenged this method of transposition in the eight years since it was adopted. There is no legal basis on which it could do so. In any case, the PPNs concerned remain in effect.

**JAMES MAURICI QC**

**NICK GRANT**

**Wednesday, 31 August 2022**

[33] Procurement Policy Note – Implementing Article 6 of the Energy Efficiency Directive (June 2014) https://www.gov.uk/government/publications/procurement-policy-note-0714-implementing-energy-efficiency-directive-article-6 and Procurement Policy Note - Implementing Article 6 of the Energy Efficiency Directive: Further Information (January 2015) https://www.gov.uk/government/publications/procurement-policy-note-0115-implementing-energy-efficiency-directive-article-6-further-information

List of attachments to these observations

1. Withdrawal Act 2018 as amended by the Withdrawal Act 2020
2. Law in a time of Crisis
3. A Guide to Making Legislation (2017)
4. The Cabinet Manual
5. Air Canada v Secretary of State for Trade [1983] 2 AC 394
6. Article 9 1689 Bill of Rights
7. R (Unison) v Secretary of State for Health [2010] EWHC 2655 (Admin)
8. Revenue and Customs Commissioners v Perfect [2022] 1 WLR 3180
9. European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 1525 of 2020) regulation 3
10. Lipton v BA City Flyer [2021] 1 WLR 2545
11. R (on the application of Wyatt) v Fareham Borough Council [2021] EWHC 1434
12. In R (on the application of Wyatt) v Fareham Borough Council [2022] EWCA Civ 983
13. Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (SI 579 of 2019)
14. Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (SI 579 of 2019) Explanatory Memorandum
15. Case T-74/00 Artegodan v Commission of the European Communities EU:T:2002:283
16. Extracts from the UK-EU Trade and Co-Operation Agreement
17. Environment Act 2021
18. Equality Act 2010 s149
19. Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345
20. UK Government Consultation on Environmental Principles
21. UK Government Response to the consultation on Environmental Principles
22. UK Draft Policy Statement on Environmental Principles
23. UK Draft Policy Statement on Environmental Principles Explanatory Memorandum
24. Website where the Bill was Published
25. 2016 version of the Consultation Principles
26. 2018 version of the Consultation Principles
27. The Secretary of State's Licence to Highways England (now National Highways)
28. Opening and Closing maintained schools: Statutory guidance for proposers and decision-makers
29. R (WC) v Somerset County Council [2021] EWHC 2936 (Admin),
30. ECMA v SSE [2019] EWHC 2813 (Admin)
31. R (Moseley) v Haringey LBC [2014] 1 WLR 3947
32. R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (QB)

33. R (Greenpeace Ltd) v Secretary of State for Trade and Industry, [2007] EWHC 311 (Admin)
34. R (A, J, K, B, F) v SSHD [2022] EWHC 360 (Admin)
35. BAPIO Action Ltd v SSHD [2007] EWCA Civ 1139
36. Extracts from De Smith's Judicial Review (8th Ed) 1-055
37. Extract from Erskine May introduction and para 26.17
38. UK Parliament webpage for the European Union (Withdrawal) Act 2018
39. Extract from Hansard on Point of Order
40. European Withdrawal Act 2018 Explanatory Notes
41. Screenshot of the old website on which the bill was published
42. Extract from De Smith's Judicial Review (8th Ed) 7-058
43. Webpage with the contact details of Lord Woolf
44. Search results of filtering Lords members by Policy Interest: Energy and environment
45. Erskine May Introductory Page