IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-619/19

Land Baden-Württemberg

-and-

D.R.

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

The United Kingdom is represented by Simon Brandon of the Government Legal Department, acting as Agent, and by Christopher Knight, Barrister.

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INTRODUCTION & SUMMARY

1. Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, the United Kingdom submits the following written observations on the question referred for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") by the Bundesverwaltungsgericht ("the Referring Court") in its Order lodged on 19 August 2019 ("the Order for Reference").

2. The Referring Court's questions concern the application of Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EC ("the Directive"), and the interpretation of the exception from the right of access to environmental information provided for in Article 4(1)(e) where the "*request concerns internal communications, taking into account the public interest served by disclosure*".

3. In summary, the United Kingdom submits that:

   (1) The term "*internal communications*" in Article 4(1)(e) of the Directive is to be interpreted in a fact and context sensitive manner, which secures the application of the exception to information which forms part of the space for deliberation of the public authority and which respects the differences of approach to public administration in the Member States.

   (2) Article 4(1)(e) of the Directive is not to be interpreted as being temporally limited, but rather the progression of any decision or policy-making to which the requested information relates will be a material factor in the balance of the public interests the public authority is required to assess.

THE PROVISIONS OF THE DIRECTIVE AND RELATED LEGISLATION

4. The Directive contains the legislative scheme governing access to, and dissemination of, environmental information held by the public authorities of the Member States. It is intended to give effect to, and be consistent with, the provisions of the UN/ECE Convention on Access to Information, Public

Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"): see recital (5). The European Community acceded to the Aarhus Convention in its own right by signing it on 25 June 1998 and subsequently approved that access by Decision 2005/370. The Aarhus Convention accordingly forms an integral part of the Union legal order: Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (EU:C:2011:125), paragraph 30. Account is to be taken of the wording and aim of the Aarhus Convention when interpreting the Directive: Case C-279/12 *Fish Legal v Information Commissioner* (EU:C:2013:853), paragraph 37.

5. The objectives of the Directive are set out in Article 1:

"*The objectives of this Directive are:*

(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."

6. Article 3(1) creates the obligation on a public authority of a Member State to make available environmental information held by or for them to any applicant upon request. The obligation to make the information available is expressly subject to Article 4: Article 3(2).

7. Article 4 of the Directive is headed "*Exceptions*". It is convenient to set out the provision in full:

"*1. Member States may provide for a request for environmental information to be refused if:*

(a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware

that the information is held by or for another public authority, it shall, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;

(b) the request is manifestly unreasonable;

(c) the request is formulated in too general a manner, taking into account Article 3(3);

(d) the request concerns material in the course of completion or unfinished documents or data;

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

(b) international relations, public security or national defence;

(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

(e) intellectual property rights;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put

under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

(h) the protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

Within this framework, and for the purposes of the application of subparagraph (f), Member States shall ensure that the requirements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with.

3. Where a Member State provides for exceptions, it may draw up a publicly accessible list of criteria on the basis of which the authority concerned may decide how to handle requests.

4. Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.

5. A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3(2)(a) or, as the case may be, (b). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6."

8. Recital (16) provides:

"*The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive.*"

9. These provisions of the Directive materially replicate those of the Aarhus Convention itself. In particular, Article 4 of the Aarhus Convention materially provides:

"*3. A request for environmental information may be refused if:*

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

…

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested."

10. It will be apparent that Article 4(1)(e) of the Directive has a direct textual basis in Article 4(3)(c) of the Aarhus Convention. However, the second ident of Article 4(2) of the Directive goes beyond the terms of Article 4(4) of the Aarhus Convention in applying the restrictive interpretation principle to the exceptions in Article 4(1) as well as Article 4(2) of the Directive.

11. The UN/ECE publishes 'The Aarhus Convention: An Implementation Guide' (2nd edition, June 2014) ("the Implementation Guide"). The established approach of this Court is that the Implementation Guide is to be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Aarhus Convention, but that the observations in the Implementation Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention: see, e.g., Case C-182/10 *Solvay v Region Wallonne* (EU:C:2012:82), paragraph 27 and *Fish Legal*, paragraph 38.

12. The extent of the assistance provided by the Guide on the "*internal communications*" exception is at p.85, which states:

"*The second part of this exception concerns "internal communications". Again, Parties may wish to clearly define "internal communications" in their national law. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form. Opinions or statements expressed by public authorities acting as statutory consultees*

during a decision-making process cannot be considered as "internal communications". Neither can studies commissioned by public authorities from related, but independent, entities. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication"."

13. The Directive is implemented in the United Kingdom, in materially the same terms, by the Environmental Information Regulations 2004 (SI 2004/3391) and the Environmental Information (Scotland) Regulations (SI 2004/520). There has developed an extensive body of domestic case law in the United Kingdom on the meaning and application of those Regulations and the Directive, through the regulatory oversight decisions of the Information Commissioner and Scottish Information Commissioner, and the right of appeal from those decisions to specialist tribunals.

14. Some analogous assistance may be provided by the other information access regime created by Union law: that which applies to information held by the Union institutions themselves. Regulation (EC) 1049/2001 creates, in Article 4(3), a detailed exception for internal documents:

"*3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

15. Regulation 1049/2001 was not enacted to give effect to the Aarhus Convention, and it is not restricted to environmental information. However, where a request for environmental information is made to a Union institution, Article 6(1) of Regulation (EC) 1367/2006 requires that Article 4(3) be "*interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*".

THE PRINCIPLES ESTABLISHED BY THE CASE LAW OF THE COURT

16. Certain principles applicable to the interpretation and application of the Directive are well-established in the jurisprudence of this Court:

(1) The right of access applies only to the extent guaranteed by the Directive, having regard to the various definitions, limitations and exceptions within it: *Fish Legal*, paragraph 39 and Case C-316/01 *Glawischnig v Bundesminister fur soziale Sicherheit and Generationen* (EU:C:2003:343).

(2) The scope of the derogations and exceptions laid down by the Directive must be determined in the light of the aims pursued by the Directive: Case C-204/09 *Flachglas Torgau GmbH v Bundesrepublik Deutschland* (EU:C:2012:71), paragraph 38.

(3) The aims of the Directive may be primarily derived from Article 1, but they must be read by reference to the Directive as a whole, including its derogations and exceptions: *Flachglas Torgau*.

(4) The scope of the exceptions serves the aims pursued where they are construed in a restrictive way, and taking into account the public interest balancing test: recital (16), Article 4(2).

(5) When weighing the public interest served by disclosure against the public interest served by the application of exceptions, the public authority may evaluate cumulatively the grounds for refusal to disclose, given that the interests may sometimes overlap in the same situation or the same circumstances: Case C-71/10 *Office of Communications v Information Commissioner* (EU:C:2011:525), paragraphs 28 and 30.

(6) The balancing of the respective public interests must always involve a specific examination of each individual case: Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van*

gewasbeschermingsmiddelen en biociden (EU:C:2010:779), paragraphs 57-58.

(7) The right of access crystallises only at the point when the public authority makes a decision in relation to the request. It is at that point that the assessment must be made as to whether any exception applies, and what the balance of the public interests favours: *Stichting Natuur*, paragraph 34.

17. The United Kingdom makes its submissions in the light of these principles.

THE FIRST QUESTION REFERRED

18. The Referring Court asks in its First Question whether Article 4(1)(e) of the Directive is to be interpreted as covering all communications which do not leave the internal sphere of a public authority to which the Directive applies.

19. It is not clear to the United Kingdom from the Order for Reference how the First Question arises on the facts of the case before the Referring Court. Paragraph 2 of the Order for Reference explains the information in issue as being information held by the executive committee of the public authority relating to a committee of inquiry, and memoranda of the authority relating to a conciliation procedure. There is no suggestion that any of the information, or the documents containing the information, have been provided to any person external to the public authority to whom the request was made. Rather, paragraph 3 of the Order for Reference indicates that Article 4(1)(e) was held not to apply because of a temporal limitation – the subject of the Second and Third Questions, addressed below.

20. The Referring Court raises certain issues concerning scope of Article 4(1)(e) in paragraphs 13-14: whether a communication which has not at the time of the request left the internal sphere of the authority but is intended to do so is covered, and whether there must be a certain quality to the information to be a "*communication*". It is not explained in the Order for Reference how these questions relate to the particular facts of the case. In any event, the first of these issues is plainly wrong. If at the time the public authority responds to the

request the information remains 'internal' then the exception applies. To apply a possible future status over that of the relevant point in time would be contrary to *Stichting Natuur* (above).

21. The purpose of the exception for "*internal communications*", in both the Aarhus Convention and the Directive, is to provide a measure of protection to public authorities for the full range of information created and processed in modern government. That range will cover policy formulation, decision-making, operational steps, expressions of opinion by employees, collation of input provided by third parties and a variety of other contexts. The very broad array of public authorities who hold environmental information across an infinite number of contexts, structured and operated in different ways in the different Member States (and Parties to the Convention, including the Union), is indicative of the intended breadth of the exception.

22. As the Court accepted in the context of the analogous Article 4(3) of Regulation 1049/2001 in Case C-57/16 P, *ClientEarth v Commission* (EU:C:2018:660) at paragraph 109, the public authority "*must be able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted*".

23. It is imperative that Article 4(1)(e) be interpreted and applied in a manner which respects and reflects the vast array of different ways in which public authorities across the Member States – and within Member States – carry out their public functions. There is a close analogy to the functional interpretation of Article 2(2) adopted by the Court in *Flachglas Torgau* at paragraphs 49-50 in relation to the legislative process. There the Court recognised that the legislative process "*is likely to differ significantly between Member States*"; *a fortiori* the administrative functions of public authorities.

24. In this context, a functional interpretation would respect the fact that different public authorities in different contexts may be reliant on the assistance of external expert input, particularly in the formulation and development of policy. The question should be whether the exception is required to protect the

deliberative space provided for public authorities. The application of that test will be inherently fact and context specific, to be determined by the public authority and then by whichever court or tribunal the State provides access to as required by Article 6 of the Directive.

25. There are limits to the scope of Article 4(1)(e). The Implementation Guide is correct when it suggests that a response provided by a public authority to a statutory consultation – i.e. provided to another body – would not be covered by the exception; it is no longer internal in a relevant sense. Similarly, there must be some element of provision as between individuals within the public authority for the information to be contained within a "*communication*", although this may be in a wide variety of forms (e.g. file notes, memoranda, reports, emails).

26. The Implementation Guide should not, however, be followed in its entirety. The Court has repeatedly recognised (e.g. *Flachglas Torgau*, paragraph 36) that the Guide is not binding and has not accepted its approach. That caution is all the more justified where the Guide itself expressly recognises that the term "*internal communications*" is undefined, and could be the subject of definition by Parties to the Aarhus Convention. There is, accordingly, a margin of discretion afforded as to precisely how to approach the exception. It should be recalled that in the Aarhus Convention this exception is not subject to the requirement to interpret it in a restrictive way: it applies only to those set out in Article 4(4).

27. The United Kingdom's fact and context specific approach to Article 4(1)(e) – including as adopted in its extensive domestic case law – accepts, for example, that the exception can apply to communications between a public authority and an external advisor, assisting the authority at the authority's request. In principle, where those communications form part of the deliberative space they should be protected (subject always to the public interest balance). Whether the exception will extend to an external advisor may depend on factors such as the terms of any agreement with the authority, where the advisor works and the extent to which staff of the authority assist the advisor. In essence, where an external party is embedded in the internal deliberative space, the exception can and should remain applicable. An artificial ring-fence drawn (as the

Implementation Guide seeks to do) around the email servers and filing cabinets of a public authority would fail to reflect the multiplicity of ways in which public authorities carry out their functions, and seek to draw on the expertise of others to achieve the best outcome for the public they serve.

28. To take a practical example, many public authorities share resources to achieve efficiencies and financial savings. These may be IT systems, human resources support, legal services or physical premises. In some cases, the use of shared resources will be in part to achieve a reduction in adverse environmental impact, such as by reducing the carbon or emissions footprint of the public sector. It cannot have been the contemplation of the Parties to the Aarhus Convention, or the Union legislature, that in the case of (say) a shared IT system subject to appropriate permissions and access controls none of the information can be said to be internal communications. Yet that would be the outcome of an approach to interpretation which emphasises a restrictive interpretation of the exception over a recognition of how government and public administration practically functions.

29. An overly narrow interpretation will undermine the recognition in the Preamble to the Aarhus Convention of the importance of the roles of "*non-governmental organisations and the private sector*" in environmental protection. The use and consultation of such advisors, in order to assist informed and expert deliberation, improves environmental decision and policy-making by public authorities and serves the aims of the legislation. The inability to protect that deliberative space in appropriate cases will reduce the likelihood of public authorities gaining the assistance and advice integral to that deliberation. The approach of the Implementation Guide would undermine the purpose of the Aarhus Convention and the Directive in prescribing necessary limits to the scope of the right of access to environmental information. That is entirely proper and unsurprising. No information access regime of which the United Kingdom is

aware provides an absolute right without a variety of exceptions. The exceptions are as intrinsic a part of the legislative scheme as the right.[1]

30. Moreover, any reliance on Article 4(1)(e) is subject to a very significant, fact-sensitive, control mechanism: the application of the public interest balance. The public authority would always be obliged to balance the public interest in applying the exception against the public interest in disclosure, having regard to the specific concerns relied on to justify refusing to disclose and taking into account all relevant factors. In *ClientEarth*, at paragraph 111, the Court emphasised that the application of an exception would always require careful consideration of the concerns advanced by the public authority depending "*on factors such as the state of completion of the document in question and the precise stage of the decision-making process in question at the time when access to that document is refused, the specific context in which that process takes place, and the issues still to be discussed internally by the [authority] concerned*". It is also subject to the duty in Article 4(4) to separate out information which can be disclosed from that which cannot.

31. The United Kingdom submits that the term "*internal communications*" in Article 4(1)(e) of the Directive is to be interpreted in a fact and context sensitive manner, which secures the application of the exception to information which forms part of the space for deliberation of the public authority and which respects the differences of approach to public administration in the Member States.

THE SECOND AND THIRD QUESTIONS REFERRED

32. The Referring Court asks in its Second Question whether the temporal scope of the exception in Article 4(1)(e) of the Directive is unlimited. If it is not unlimited, it asks in the Third Question, in effect, whether the exception in Article 4(1)(e) ceases to apply when the public authority has taken a decision or completed any other administrative process.

[1] In some cases, they ensure the protection of more fundamental rights, such as the right to the protection of personal data: see the third sub-paragraph of Article 4(2) of the Directive.

33. The United Kingdom submits that the answer to the Second Question is that Article 4(1)(e) is not temporally limited. Rather, the stage reached in the decision-making process will be a material factor in the public interest balance. Accordingly, the Third Question does not fall to be answered.

34. The ordinary meaning of the language used by the Union legislator in Article 4(1)(e) imports no temporal limitation so long as the "*communications*" requested remain "*internal*" to the public authority at the time of the request. Had it been intended that the exception cease to be available at any particular point in time, the legislation could have specified such an approach.

35. None of the exceptions in Article 4(1) or 4(2) are directly temporally limited. For most of the exceptions, it is rather the case that the pre-conditions for their application may cease to exist such that a further request could not rely upon the exception. There are, accordingly, likely to be many instances in which a later request for the same information will be made at a time when the confidentiality of the proceedings no longer applies (Article 4(2)(a)), or the information is no longer commercially confidential (Article 4(2)(d)), or a trial process has concluded so that its fairness could not be adversely affected (Article 4(2)(c)), or the document containing the information has been finished (Article 4(1)(d)). None of these are temporal limitations. In the same way, the pre-condition for the application of Article 4(1)(e) will not be met once a public authority's communication is no longer internal in the sense discussed under the First Question. An appropriately rigorous approach to the pre-conditions set out in the legislative language secures the obligation in Article 4(2) to apply a restrictive interpretation.

36. Were the exception to be interpreted as applicable only to a limited period of time, it would be incumbent on the Court in order to secure legal certainty, to set out with absolute clarity what the limitation is. None can be derived from the text of the Directive. The identification of such a limit is extremely difficult. As the Referring Court notes in its observations on the Third Question, not all "*internal communications*" will concern a decision or policy-making process which comes to an end. Nor is it the case that such processes always have a definite

endpoint; even after a policy has been formulated, it be may returned to, or there may be deliberations as to the subsequent stages of how to implement and operate the policy. The way government operates will differ across Member States, and between public authorities within each State. It is not practically possible to construct a limitation test which will apply across the full range of information to which the exception applies. That is a very strong indication that no such limitation is appropriate.

37. In a similar manner, Article 5(1)(e) of Regulation 2016/679/EU (the General Data Protection Regulation) does not purport to set an absolute period of storage limitation which would apply to all processing of personal data. Such a blanket rule would be ineffective and inappropriate.

38. The absence of any intention on the part of the Union legislator to impose a temporal limitation is further indicated by the express refusal to do in Article 4(3) of Regulation 1049/2001, even after the decision to which the "*deliberations and preliminary consultations*" relates has been taken. It will also be noted that the scope of Article 4(3) of the Regulation is different to Article 4(1)(e) of the Directive: the terms of the exception are directly focussed on the Union institution's decision-making process. No such limitation applies in the Directive, to which a temporal limitation would be even harder to frame.

39. At no point in time is reliance on Article 4(1)(e) absolute. As set out above, the public authority would always be obliged to balance the public interest in applying the exception against the public interest in disclosure, having regard to the specific concerns relied on to justify refusing to disclose. The passage of time, and the extent to which a decision has been taken, will be highly material factors: both as to the degree to which disclosure would give rise to specific concerns, and as to the importance of public access to the information in question.[2] See too: *ClientEarth*, paragraph 111. The public interest balance is the ever-present control mechanism. It secures compliance with effective proportionality.

[2] This is the nuanced and fact-sensitive approach which has been adopted in the United Kingdom: see, e.g., *Amin v Information Commissioner & Department for Energy and Climate Change* [2015] UKUT 527 (AAC).

40. In contrast, were an absolute temporal limit to be imposed it would have the effect of precluding reliance on an exception. That might oblige the public authority to disclose information which has no public interest whatsoever, or which in no way serves the aims of the Directive, or which was positively and clearly contrary to the public interest. The balancing exercise would be unavailable.

41. The United Kingdom notes that a different approach was adopted by the Court in *Flachglas Torgau*. That case concerned the scope of the ability afforded to Member States in Article 2(2) of the Directive to provide for a further absolute derogation from the right to request information for authorities acting in a legislative capacity. The Court held at paragraphs 55-56 that the derogation could not extend beyond the end of the legislative process, noting that the exceptions in Article 4 would still be available: paragraph 57. That context does not warrant the imposition of a temporal limit on Article 4(1)(e). The context of this Order for Reference does not involve an absolute derogation, does not involve an absence of legislative language and does involve the application of the public interest test.

42. No material assistance is provided by the Aarhus Convention itself, or the Implementation Guide. That Articles 4(1)(d) and (e) of the Directive are contained in the single Article 4(3)(c) of the Convention is merely a drafting preference. Article 4(3)(c) of the Aarhus Convention does not apply to a request which "*concerns material in the course of completion or concerns internal communications in the course of a decision-making process*"; it simply refers to "*material in the course of completion*" and separately "*internal communications*". No linguistic or logical limit can be read from one to the other.

43. Contrary to the suggestion in paragraph 27 of the Order for Reference, it is not the case that an unlimited scope given to Article 4(1)(e) would cut across the application of Article 4(2)(a). They apply in different circumstances, even if they may both be applicable to the same information in some cases. The confidentiality required for Article 4(2)(a) must be provided for by law, and will clearly not extend to many contexts of internal communications. There must be

also be an adverse effect on the confidentiality of the proceedings if disclosure occurs. Similarly, public authorities may share information between each other outside of the deliberative space, such that the communications are not internal, on a confidential basis such that Article 4(2)(a) is engaged when Article 4(1)(e) is not. In contrast, Article 4(1)(e) applies to internal communications: the focus is on the public authorities' deliberative space, rather than on the more technical question of confidentiality. An adverse effect as a result of disclosure is not required; the class of the information is sufficient to engage the exception and the degree of harm caused by disclosure is addressed in the public interest balance. To the extent that there is overlap between the two, this was envisaged and accepted by the Court in *Ofcom*.

44. The United Kingdom submits that the temporal application of Article 4(1)(e) of the Directive is unlimited, but that the progression of any decision or policy-making to which the requested information relates, along with the age of the information and other relevant contextual matters, will be material to the balance of the public interests the public authority is required to assess.

THE UNITED KINGDOM'S PROPOSED ANSWERS TO THE QUESTIONS

45. The United Kingdom accordingly suggests the following answers to the questions posed by the Order for Reference:

Question 1

The term "*internal communications*" in Article 4(1)(e) of Directive 2003/4/EC is to be interpreted in a fact and context sensitive manner, which secures the application of the exception to information which forms part of the space for deliberation of the public authority and which respects the differences of approach to public administration in the Member States.

Question 2

Article 4(1)(e) of Directive 2003/4/EC is not to be interpreted as being temporally limited, but rather the progression of any decision or policy-making to

which the requested information relates, along with the age of the information and other relevant contextual matters, will be material to the balance of the public interests the public authority is required to assess.

Question 3

This question does not arise.

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28 November 2019