Reply to the Observations made by the United Kingdom on Communication ACCC/C/2017/150 by the Communicant Friends of the Earth

Introductory Comments

Following the filing of UK's government's observations dated 28 June 2018 (the "Response") to the above Communication, we respectfully request the opportunity to make further submissions for the consideration of the Committee. We provide below important points of clarification and corrections to errors made in the UK Observations, to assist the Committee in its deliberations and adjudication, in accordance with paragraph 25c) of the annex to decision I/7, which provides that "*to assist the performance of its functions, the Committee may… c) Consider any relevant information submitted to it*".

In essence, the UK Response disputes that Article 8 of the Aarhus Convention was engaged by the executive's preparation of the European Union (Withdrawal) Bill (the "Bill"), alleges that our Communication was premature, and disputes that Articles 8 and 3 have been breached. We address each of these points below.

In our view, the UK's Response mischaracterises the nature of our Communication, owing to a failure to understand it.

Engagement of Article 8

1. As we set out in our Communication, our view is that the preparation of the Bill by the executive engaged Article 8. The UK noted at para. 27 of their Response, that engaging Article 8 required the satisfaction of three elements:
    - a public authority for the purpose of the Convention;
    - preparing an executive regulation or other generally applicable legally binding rule;
    - which may have a significant effect on the environment.

    <u>The Public Authority</u>

2. The UK has asserted that Article 8 was not engaged, because the draft Bill is primary legislation, made by Parliament, and Parliament is not subject to the Convention. For the avoidance of doubt, we do not dispute that Parliament is not subject to the Convention. As the UK correctly points out at para. 36 of its Response, Parliament is not a "public authority" for the purpose of Article 2. However, our point is clearly that the executive involved here <u>is</u> a public authority under Article 2, and it is the actions of the executive, notably the Department for Exiting the EU ("DEXU"), which concern us.

3. Once the draft Bill was passed to Parliament by the DEXU (i.e. on introduction by the executive), Article 8 no longer applied, but before that point, it did. The executive should

have consulted the public about the draft Bill before introducing it to Parliament. It did not do this. Our interpretation of Article 8 is supported by The Aarhus Convention An Implementation Guide (the "Guide") which states that the obligation under Article 8 "*includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature*" (p181; emphasis added). We note the quotation from the Guide included in the Response at para. 43, which in our view, completely undermines the UK's position: "*As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article [Article 8], it is logical to conclude that the Convention does not consider these activities to be in acting in a legislative capacity. Thus, executive branches engaging in such activities are public authorities under the Convention*" (emphasis added).

Preparation of an executive regulation/ other generally applicable legally binding rule

4. The Response also seeks to limit Article 8 to the preparation of secondary legislation only, and to exclude primary legislation, and in so doing argue in that way that Article 8 is not engaged. However, there is no basis for this restrictive interpretation, which flatly contradicts the plain wording of the Convention, and conflicts with the Guide. The scope of Article 8 is wide: it applies to "*executive regulations and other generally applicable legally binding rules*". The Guide states that "*the term "rules" is here used in its broadest sense, and may include decrees, regulations, ordinances, instructions, normative orders, norms and rules"* (p49; emphasis added). There is nothing in the wording of the Convention to suggest that Article 8 applies only to secondary legislation. If the UK were correct then it would significantly restrict and undermine the operation of Article 8 and the Convention.

5. It is untenable for the UK to argue, as they do at para. 44 of their Response, that the executive is not bound by Article 2 in respect of primary legislation, in addition because members of the executive are also members of the legislature. The Committee's decision in ACCC/C/2011/61(UK) concerning the process for the Hybrid Bill for the construction of a high-frequency railway across London, which the UK refers to at para. 40 does not assist their position. The Committee held there that as Parliament was not acting in a legislative capacity, its actions fell within the scope of Article 6. This decision clearly demonstrates the purposive interpretation that the Committee has applied previously to matters of public participation. It follows that when the executive was preparing the draft Bill to introduce to Parliament, it was not acting in a legislative capacity – it was acting as a public authority. It was only on the introduction of the draft Bill to Parliament that the legislative process began. At that point, any relevant members of the executive (and it is a very small minority of members) were acting in a legislative capacity.

6. Overall, the UK's restrictive interpretation of Article 8 would unjustifiably subvert and undermine the spirit and objectives of the Convention. In this regard, we note (in particular) Recitals 9 to 11 of the Preamble to the Convention:

   " Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

   "Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

"Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings" (emphasis added)

7. We note also the caution included in the Guide, that "*the effective implementation of the Convention depends on the Parties themselves and their willingness to implement its provisions fully and in a progressive manner*" (p15; emphasis added). We submit that the UK's attempt to restrict Article 8 to secondary legislation is incorrect in law, and is also a classic example of a refusal to progressively implement the Convention. This point is further demonstrated in the UK's breach of Article 3, as alleged in our Communication.

Significant Effect on the Environment

8. The UK further contends that the draft Bill did not, in any event, engage Article 8, on the basis that it will not have a significant effect on the environment (they go further than this, and say – extraordinarily – at para. 47, that there is no effect at all). However, the requirement in Article 8 is that the measure in question may have a significant effect on the environment; certainty is not required. As per the Communication, given that most of the UK's environmental law is derived from or interacts with EU law, it is in our view irrefutable that the UK's withdrawal from the EU via the draft Bill creates the realistic possibility of a significant effect on the environment (and see some examples given in our Communication on this point), and it is possibility only at the point at which the Bill is drafted that is required (and this is not changed by actions which may in fact be taken after the event).

9. The government's self-professed intentions and approach, which are referred to in the Response, do not detract from the reality that the draft Bill could at the point it was submitted and by its very nature have a significant effect on the environment. For example, as set out in our Communication, 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.

Timing of the Communication

10. If Article 8 was engaged, then the UK Government's assertion that our first complaint was premature is without merit. Our first complaint concerned a live breach of Article 8 – a failure on the part of the executive to consult in relation to the draft Bill, not a potential future breach. *We note that the Committee found our first complaint admissible.*

11. In the Committee's Preliminary Determination on Admissibility (at para.6), it concluded that our second complaint was inadmissible under paragraph 20(d) of the annex to decision I/7, as it concerned draft legislation not yet finally adopted which might therefore still be subject to change. We respectfully request that the Committee reconsider its preliminary view, in accordance with clause 2.4 of the Guide to the Aarhus Compliance Committee, and would invite the Committee to make a finding of admissibility in relation to our second complaint, given that the Bill has now been adopted (but without provision for public consultation in accordance with Article 8), and subsequent legislation is now being prepared. Therefore, our second complaint now concerns a current legal framework and current 'live' issues, not future breaches.

12. As per the reasoning in our Communication, the Act does not provide any legal framework mandating effective public participation. The Article 8 requirement for effective public participation is dependent on whether proposed legislation may have a significant effect on the environment. However, at present *there is no legal requirement under the Act to even consider and identify if this criterion is triggered*, and so to ensure that effective public participation is undertaken when preparing subsequent legislation which does have significant effects on the environment.

13. We refer back to our Communication (at p3), in which we quoted from a 2017 House of Lords report, which anticipated that the Bill would generate 800 to 1,000 statutory instruments (SIs) in the near future – we are now within that process. The UK is scheduled to leave the European Union in March 2019, but our understanding is that there are still significant numbers of SIs which have not been produced. According to a report by the National Audit Office published on 12 September 2018,[1] the Department for Environment Food and Rural Affairs needs to adopt a total of 151 SIs, comprising 93 SIs to complete the conversion of EU law into UK law at the point of exit, and 58 SIs for non-EU business (but related to the department's environmental remit). This is, according to the report, "*more than double*" the average number of SIs in the 8 years to 2017[2]. In the context of the UK's imminent exit from the EU, we submit that this demonstrates the scale of the problem, because there is no framework mandating effective public participation under the Act.

Breach of Article 8

Absence of Public Participation

14. The UK alleges there was sufficient public participation in any event to satisfy Article 8. This is disputed. Whilst the Guide states (p181) that parties have broad latitude on how to provide public participation in respect of Article 8, Article 8 requires that they strive to promote "*effective public participation*" (emphasis added). Effective public participation is not the same as any public participation, and in any event, as we have already pointed out no consultation with the public even occurred. We note that the Guide states that "*article 8 should be interpreted as obliging the Parties to take concrete measures in order to fulfil the objectives of the Convention*" (p.181; emphasis added). Importantly, Article 8b) requires that "*draft rules should be published or otherwise made publicly available*". The Guide states (p182) that parties should establish a reliable and regular vehicle for publishing drafts. However, the draft Bill was not published before entering Parliament. There was no early and effective engagement on a draft Bill. No measures, concrete or otherwise, were taken to fulfil the Article 8 objectives. No credible evidence has been supplied that demonstrates otherwise.

15. The Response does not properly address this point. It refers, for example, to the publishing of the White Paper, and the Referendum Campaign as evidence that Article 8 was satisfied. However, the White Paper raised no questions for the public to respond to in relation to a draft bill. The Referendum was also only concerned with whether the UK should leave the EU and not how the UK should leave, and what that meant (or could mean) for the

[1] *Progress in Implementing EU Exit* https://www.nao.org.uk/wp-content/uploads/2018/09/Defra-Progress-Implementing-EU-Exit-Summary.pdf p9 para.11 – accessed 19 October 2018
[2] Ibid

environment. The referendum did not deal with potentially significant effects on the environment.

16. Crucially, nothing obviated the executive's legal obligation to publish the draft Bill before introducing it to Parliament, which it failed to do. Given that what was proposed in relation to the environment was never made clear alongside a draft bill, it is also impossible that the common law requirements (see further paras. 18-20 below) for consultation could have been met even if there had been a consultation on the Bill (which there was not), let alone the requirements for effective participation under the Convention.

Consequences of Breach

17. Article 8 requires that the result of the public participation also be taken into account. However, as effective public participation never occurred, this could not happen. The draft Bill presented to Parliament did not have the benefit of the public's input prior to submission. Had the executive consulted the public it may have found that its proposed Bill was markedly different after taking into account the public's view (and they cannot say otherwise as they do not have the benefit of any consultation responses. This would, in turn, have influenced the back and forth of the consequent Parliamentary process, for example, the nature of the debate and the amendments which may (or may not) have been needed. It is not possible to say with any certainty how much of a missed opportunity this was, but we do note:

    a. The government is still to address appropriately the loss of a public complaints mechanism – a systemic environmental governance loss for the UK currently
    b. We have concerns over the UK's successor regulatory body and how this is to be funded. To date there has been no indication as to whether the Environment Agency, or Natural England will take on the European Commission's role. A new environmental watchdog has been promised under the Environment Bill, but the government has not guaranteed that this watchdog will be up and running either by the end of the transition period, or, by March 2019, if there is a No Deal scenario. In either case, we have serious concerns over the funding of this new watchdog (or of any other already established body such as the Environment Agency, were it to be handed this role) given the budget cuts to public services that have occurred.
    c. We also have concerns over the transposition gaps caused by section 4(2)b[3] of the Withdrawal Act, in relation to the loss of rights of directly effective directives which have yet to be transposed into national law. For example, the Energy Efficiency Directive (2012/27/EU) appears to have been implemented by way of a procurement note only, rather than by a legislative instrument, which will have no legal effect after exit day. This Directive is to ensure that central governments purchase only products, services and buildings with high energy-efficiency performance. The negotiated withdrawal agreement may yet

[3] Section 4(1) of the Withdrawal Act concerns the saving for rights under section 2(1) of the ECA, but section 4(2)b of the Act states that "Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they— (a) form part of domestic law by virtue of section 3, or (b)arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case)" http://www.legislation.gov.uk/ukpga/2018/16/section/4/enacted

change matters in a significant way for the environment and there is no obligation to consult the public when they do. However, it is important to note that whether or not these or other issues are eventually dealt with, they were not addressed to the public at the outset with the draft bill and effectively consulted on, as required by Article 8.

Breach of Article 3

18. The UK's Response asserts that compliance with Article 3(1) of the Convention is achieved through a combination of the Consultation Principles published in 2016 and the common law. We submit that whilst the common law may set out consultation requirements in a general sense, it does not assist with *when* exactly consultation must take place in matters subject to the Convention, and that is what is primarily at issue in this case. The common law did not operate in this case to require consultation in accordance with Article 8, as is clear because that consultation did not happen. In addition, the common law requirements do not appear to mirror or clearly transpose the Convention requirements, we also have concerns over the quality of the consultation process undertaken as well (set out above paras. 13-16).

19. In addition, Article 3(1) requires the formation of a "consistent framework" to implement the provisions of the Convention. We submit that a consistent framework cannot be said to be achieved via only a non-binding code of conduct, and judicial discretion operating a*fter the event* to remedy existing breaches *if* they are complained of at a court of law (i.e. the common law), because of the unpredictability inherent to both. A code of conduct is non-mandatory. The common law cannot always deliver the UK's Convention obligations. What is more, and as stated in our Communication, there is no legal remedy before the courts for the current breaches complained of in our Communication, as the UK government has not yet implemented a law directly and clearly implementing Article 8 which claimants can consistently rely on.

20. For completeness, we note, for example, that cost caps in Aarhus claims were introduced in the UK following the decision in *C-530/11 Commission v. UK* [2014], in which the CJEU ruled that the UK had failed to adhere to its obligations to ensure that judicial proceedings were not prohibitively expensive in environmental claims, holding that there was no rule of law to safeguard against prohibitive costs, that precision and clarity was required in the case law, and that there needed to be reasonable predictability for claimants. Similarly, in this matter, where the UK simply relies on the operation of the common law, there is no clear and consistent express requirement for compliance with Article 8, which therefore amounts to a breach of Article 3.

21. In summary, we respectfully request that the Committee proceed to consider all three of our complaints as set out in our Communication.

21 November 2018

Friends of the Earth