

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)**

OBSERVATIONS ON BEHALF OF THE GOVERNMENT OF THE UNITED KINGDOM

(i) Introduction

1. By a communication (the “Communication”) received by the Aarhus Convention Compliance Committee secretariat (the “Committee”) on 31 October 2017, complaint is made by Friends of the Earth (“the Communicant”) in relation to what is said to be the United Kingdom’s failure to comply with article 8 (“Article 8”) of the Aarhus Convention (the “Convention”) in the preparation of the European Union (Withdrawal) Bill (the “Bill”¹) specifically, and of generally applicable legally binding normative instruments more generally, amounting to a breach of para. 1 of article 3 (“Article 3”).

2. In summary, the complaints made are as follows:
 - (1) The preparation of the Bill by the UK Government represents a breach of Article 8 on the basis that: (i) the Government did not first hold a formal consultation on the contents of the Bill, and (ii) that it has not taken into account the general public’s views (the “First Complaint”).
 - (2) Secondary legislation which would be prepared under certain draft provisions contained in the Bill would breach Article 8, on the ground that the Bill as presently

¹ The Bill as originally introduced into Parliament is attached to the Communication, see document 2).

drafted does not require consultation with the public on such secondary legislation (the “Second Complaint”).

(3) The UK Government has breached Article 3 of the Convention by failing to implement a ‘*clear, transparent and consistent framework*’ implementing Article 8 (the “Third Complaint”).

3. On 15 December 2017, the Committee reached a preliminary determination of the admissibility of these three complaints, communicated in writing to the UK and to the Communicant on 5 January 2018. The Committee held that the First Complaint and Third Complaint were admissible. The Second Complaint was found to be inadmissible, on the basis that the allegation relates to the content of *draft* legislation that has not yet been finally adopted and may therefore still be subject to change.
4. By its letter dated 5 January 2018, the Committee invited the UK to submit any written explanations or statements clarifying the matter referred to in the Communication. The purpose of this statement, then, is to set out the UK’s position in respect of the First Complaint and Third Complaint.
5. The numbering of many of the clauses referred to in the Communication have changed following amendments made to the Bill in both Houses of Parliament during the passage of the Bill. The clause numbers referred to below in these observations are to those in the Bill as introduced to the House of Commons on 13 July 2017 and which is annexed to, and the subject of, the Communication². The Bill received Royal Assent on 26 June 2018 – this being the final step in the passage of a Bill through the legislative process - and is now an Act of Parliament, the European

² Footnotes have been included to explain where the clauses referred to can be found in the final version of the Bill which received Royal Assent on 26 June 2018 and became the European Union (Withdrawal) Act 2018.

Union (Withdrawal) Act 2018. In order to maintain consistency this Act is referred to as 'the Bill' throughout these observations.

6. The UK's position is that these complaints are substantially misconceived, for these reasons:

(1) Primary legislation, and any drafts of the same, fall within the Article 2 exemption and Article 8 is not engaged. However, to the extent that the Committee considers that it is able to examine such matters it can be clearly seen that the Bill as drafted, and as now enacted, reflects the Government's express intention that the UK's exit from the EU should be achieved so as to preserve existing EU law in the UK after exit day, and without having any effect on the environment. It follows from this that the Bill is not a generally applicable legally binding normative instrument which may have a significant effect on the environment and, as such, Article 8 was not engaged by its preparation.

(2) Even if the Committee takes the view, contrary to all the above submissions, that the 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.

(3) The complaint in relation to Article 3 lacks any merit for reasons set out fully below.

(ii) The facts

7. Membership of the EU and its predecessors has long been a topic of debate in the UK.

8. The UK joined what were then the three European Communities, principally the European Economic Community (EEC, or "Common Market"), in 1973. A first referendum on continued membership of the then European Communities was held

in 1975, and it was approved by 67.2% of "Yes" voters compared to 32.8% of "No" voters.

9. In January 2013 the then Prime Minister, David Cameron MP, announced that should the Conservative Party win a parliamentary majority at the 2015 General Election, the UK Government would seek to negotiate more favourable arrangements for continuing membership of the EU, before holding a referendum on whether the UK should remain in or leave the EU. The Conservative Party published a draft EU Referendum Bill in May 2013. The draft Bill stated that the referendum had to be held no later than 31 December 2017.
10. The Conservative Party accordingly made a manifesto commitment in the 2015 General Election to hold a referendum. Following the victory of the Conservative Party at that election the legal basis for a referendum on EU membership was established by the UK Parliament through the European Union Referendum Act 2015³.
11. The date of the referendum was announced on 20 February 2016.
12. Britain Stronger in Europe was the official group campaigning for the UK to remain in the EU and was endorsed by the then Prime Minister David Cameron. Vote Leave was the official group campaigning for the UK to leave the EU. Other campaign groups, political parties, businesses, trade unions, newspapers and prominent individuals were also involved, and each side had supporters from across the political spectrum.

³ The planned referendum was included in the Queen's Speech on 27 May 2015. The Queen's Speech is the central part of the State Opening of Parliament, which happens when Parliament reassembles after a general election and then at the start of each Parliamentary session. Only the monarch can call a Parliament together and no business can happen until the Queen reads her speech. Although the Queen delivers the Speech, the content is written by the government and approved by the Cabinet. It sets out the government's policies and the proposed legislative programme for the new Parliamentary session: see further <https://www.gov.uk/government/topical-events/queens-speech-2017/about>

13. In the lead up to the referendum there was full debate covered in the media on the pros and cons of EU membership. Throughout the campaigning there was focus on many issues including environmental protection⁴.
14. The referendum took place on 23 June 2016 in the UK and also Gibraltar to gauge support for the country either remaining a member of, or leaving, the EU under the provisions of the European Union Referendum Act 2015 and also the Political Parties, Elections and Referendums Act 2000. The referendum resulted in a majority of 51.9% of people voting in favour of leaving the EU.
15. Following the referendum, the European Union (Notification of Withdrawal) Act 2017 received Royal Assent⁵ on 16 March 2017. Notification to start the withdrawal process was given to Donald Tusk, the President of the European Council, on 29 March 2017.
16. On 30 March 2017 the UK Government published *Legislating for the United Kingdom's withdrawal from the European Union* (cm 9446, March 2017) (the "White Paper") (attached to the Communication, see document 1⁶) which set out its main objectives and approach in legislating to withdraw from the EU. White papers are policy documents produced by the Government that set out their proposals for future

⁴ See by way of example only: ukandeu.ac.uk/research-papers/eu-referendum-and-uk-environment-expert-review/ - this was published by a group of experts and provides a detailed review of the academic evidence on how EU membership has influenced UK policies, systems of decision making and environmental policy. And see in terms of press coverage more generally, again by way of example only: <https://www.independent.co.uk/environment/eu-referendum-what-europe-has-done-for-the-uk-environment-a6835501.html>; <https://www.theguardian.com/environment/2016/mar/07/why-green-groups-have-a-right-to-be-heard-on-the-eu-referendum>; <https://www.theguardian.com/commentisfree/2016/jun/13/eu-referendum-environment-filthy-beaches> and https://www.huffingtonpost.co.uk/entry/eu-referendum-environmental-consequences-of-remain-or-leave_uk_5751ee9de4b040e3e81996a5.

⁵ As to which see further below.

⁶ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2017-150/Annex_1_UK_FoE_The_White_Paper.pdf

legislation⁷. Page 12 of that White Paper stated that “[t]he Government welcomes feedback on this White Paper. Comments can be sent to repeal-bill@dexeu.gov.uk”.

17. Several responses to the White Paper were sent to DExEU. A dedicated inbox was established to receive responses to the White Paper and the Bill management team read, and considered, those responses. There were responses from a number of leading environmental NGOs including: WWF UK, Environment Links UK, Greener UK and the Royal Society for the Protection of Birds. It should be noted that Greener UK is a coalition of environmental groups which includes the Communicant⁸; so the Communicant did respond to the White Paper. The responses made covered subjects such as: concerns over the time limits and scope of the delegated powers contained in the Bill; the repeal of the European Communities Act 1972 (the “ECA 1972”) and the impact on the environmental principles contained in Art. 191 of the Treaty on the Functioning of the European Union (“TFEU”); and the importance of the role of EU institutions in ensuring the effective enforcement of environmental protection.
18. The UK Government called a General Election and Parliamentary business was formally closed on 27 April 2017.
19. Parliament reopened on 23 June 2017 and the Bill was given its first reading in the House of Commons on 13 July 2017.
20. An Impact Assessment and Explanatory Notes were published alongside the Bill (these were attached to the Communication, see documents 2)⁹ and 3)¹⁰). While

⁷ <https://www.parliament.uk/site-information/glossary/white-paper/>

⁸ Greener UK is a coalition of environmental groups working together to ensure that Brexit is used as an opportunity to strengthen the UK's environment, not damage it: see further below.

⁹ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2017-150/Annex_2b_UK_FoE_explanatory_notes_for_the_Bill.pdf

¹⁰ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2017-150/Annex_3_UK_FoE_impact_assessment.pdf

neither of these documents make any reference to the feedback received from the White Paper that is simply because it is not, and never has been, the practice to include these matters in Explanatory Notes¹¹ or an Impact Assessment¹². It is in no way suggestive, as the Communicant appears to suggest, of the fact that the responses were ignored. They were not.

21. It should be noted that it is well-established that Explanatory Notes are a permissible aid to the construction of an Act by a Court: see e.g. *Wilson v. First County Trust (No. 2)* [2004] 1 AC 816, per Lord Nicholls at para. 64 (attached, see Attachment 7 to these observations) and see further *Bennion on Statutory Interpretation* (7th ed.) at section 24.14 (attached, see Attachment 8 to these observations).
22. The stages of a passage of a Bill through Parliament leading to an Act of Parliament are summarised in the attached web pages taken from the Parliament website (see Attachment 1 to these observations).

¹¹ “Explanatory Notes are documents that explain the purpose of a Bill”: see <https://www.parliament.uk/site-information/glossary/explanatory-notes/>. The status and purpose of Explanatory Notes is recorded at the beginning of such notes namely “in order to assist the reader in understanding the Act ... [They] explain what each part of the Act will mean in practice ...”. Explanatory notes are required for all bills introduced in either of the House of Parliament by a government Minister with the exception of Finance Bills and consolidation bills, for which different explanatory material is provided. Explanatory notes are also required for all government bills published in draft. They are not intended to be an exhaustive description of the bill or to be a substitute for it. Their purpose is to make the bill accessible to readers who may not be legally qualified or have specialised knowledge of the subject area. Explanatory notes can achieve these outcomes by putting a bill into context, explaining what is not apparent from the provisions of the bill itself and giving examples of how the bill will operate in practice. They can answer the reader’s questions and prevent misconceptions. Explanatory notes are not legislation. They do not form part of the bill and are not amendable by Parliament nor endorsed by it. They are not designed to resolve ambiguities in the text of the bill. The notes must not purport to give authoritative rulings on the interpretation of the proposed legislation, as only the courts can give these.

¹² Impact Assessments are generally required for all UK government interventions of a regulatory nature that affect the private sector and/or, civil society organisation or public services. The impact assessment comprises a full assessment of economic, social and environmental impacts. In particular, there is a legal requirement for public bodies to demonstrate they are considering their responsibilities under the Equality Act 2010 (i.e. in relation to age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation).

23. The Bill progressed through its Commons stages from July 2017 to January 2018 and was introduced into the House of Lords on 18 January 2018. The Bill completed its passage through the House of Lords on 16 May 2018. Following which the Bill returned to the House of Commons for consideration of the amendments made to the Bill in the House of Lords on 12 June 2018. The Bill then proceeded to go back and forth between the Houses (a stage known as ‘Ping Pong’) until the Bill was agreed by both Houses of Parliament on 20 June 2018. The Bill received Royal Assent on 26 June 2018 and became an Act of Parliament. A screen shot from Parliament’s website showing the stage the Bill has reached is attached¹³ (see Attachment 2 to these observations).
24. The Bill and the accompanying Explanatory Notes have been amended since introduction in the House of Commons. The Bill as enacted is attached (see Attachment 3 to these observations). Also attached are the Explanatory Notes: which accompany the Bill as enacted.
25. The Bill received thorough scrutiny in both Houses. Over 1,400 amendments were tabled and debated during passage through the House of Commons and House of Lords, totalling approximately 280 hours of debate.

(iii) The First Complaint – alleged breach of Article 8

a. Introduction

26. The First Complaint relates to Article 8 of the Convention which provides as follows:

“PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

¹³ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

- (a) Time-frames sufficient for effective participation should be fixed;
- (b) Draft rules should be published or otherwise made publicly available; and
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.”

27. Thus, for Article 8 to be engaged, three requirements must be satisfied. There must be:

- (1) an executive regulation or generally applicable legally binding rule;
- (2) which is being prepared by a public authority, and
- (3) which may have a significant effect on the environment.

28. It is the UK’s case that none of these three requirements are satisfied by the Bill. Before considering these requirements for the application of Article 8 there is a further preliminary point in relation to the First Complaint that needs to be raised.

b. The timing of this complaint - prematurity

29. The Bill was, as is pointed out in the Communication¹⁴, at the date the Communication was submitted, “*currently being debated in Parliament and it is not yet law*”. Furthermore, as noted above the Bill has since been amended in the Parliamentary process.

30. The UK Government notes what the Committee said in its preliminary determination on the admissibility of the Second Complaint:

“Having considered the communication and the supporting documentation, the Committee determines the allegation concerning the preparation of subsequent legislation (i.e. the second issue listed on page 8 of the communication) to be inadmissible under paragraph 20(d) of the annex to decision 1/7 on compliance, on the ground that the allegation relates the content of draft legislation that has not yet been finally adopted and may therefore still be subject to change.”

¹⁴ Page 10.

31. It is submitted that this reasoning should have been applied by the Committee to the Bill itself. At the date the Communication was held to be admissible the content of the Bill and its supporting documentation (for example, explanatory notes) remained subject to change. It remained subject to change up until the Bill received Royal Assent and became law. Until the Bill was enacted the only way to determine whether Article 8 was engaged in terms of the third requirement identified above – namely whether the Bill may have a significant effect on the environment – was by doing precisely what the Committee decided that it could not do in relation to the Second Complaint: examining the content of a draft piece of legislation that has not yet been finally adopted. The Bill has now been enacted and so a prematurity point cannot be, and is not, maintained but it is submitted in future in similar circumstances the Committee should reject any communication concerning the content of a Bill that has yet to be enacted. Any communication should await the enactment of a Bill before it is made.

c. The three requirements for the application of Article 8

i. Executive regulations and other generally applicable legally binding rules

ii. Which is prepared by a public authority

32. The first two requirements need to be considered together as they are related.

33. Article 8 only applies to “*executive regulations and other generally applicable legally binding rules*”. These phrases are not defined in the Convention. There is it is submitted an important distinction between primary and secondary legislation. It is the UK Government’s case that Article 8 of the Convention only applies to the latter and not to the former.

34. In terms of the distinction:

(1) Secondary legislation is made under powers conferred (usually on government Ministers or government departments) by primary legislation. Making secondary legislation allows the Government to make changes in law without having to introduce a new Bill to Parliament. Powers to make secondary legislation are often conferred on the Government in primary legislation in order to enable the Government to add detail to provisions in primary legislation. Craies¹⁵ describes the range of matters left to be settled in this way as ranging “*from the amount of fees for specific services to, in effect, putting all the flesh on the statutory bones of an area of law*”. Secondary legislation can also be used to amend existing laws including, where the conferring power permits it to do so, primary legislation. The Parliament website¹⁶ defines secondary legislation as:

“Secondary, or delegated, legislation is used to add information or make changes to an existing Act of Parliament (primary legislation). Normally, this can only happen if the Act itself states that changes can be made to it in this way.

Secondary legislation allows the Government to make a small change to the law without having to introduce an entirely new Bill to Parliament. This might be done for a variety of reasons: from adjusting a figure to take account of inflation to updating the law in light of events.”

The website goes on to explain:

“What are statutory instruments?”

Statutory instruments (SIs) are the most frequently used type of secondary legislation¹⁷. They are typically brief documents drafted by the relevant government department that contain only the exact textual changes that are made to the legislation.

Each Statutory Instrument must be published with an explanatory note that explains in simpler language, what the effect of the instrument will be. These notes are not primarily intended for legal experts, but members of the public who may not be familiar with SIs.

Affirmative resolution procedure

SIs subject to the affirmative procedure must be actively approved by both Houses of Parliament. Usually, this approval is required before it becomes law. Sometimes, an SI can become law beforehand, but will stop being law if Parliament does not approve within a specified timeframe (typically 28 or 40 days).

Affirmative SIs are debated by each House, in committee or in the Chamber, before a decision is made on whether to approve.

¹⁵ See para. 1.3.4 of *Craies on Legislation: A Practitioner’s Guide to the Nature, Process, Effect and Interpretation of Legislation* (11 ed).

¹⁶ <https://www.parliament.uk/business/bills-and-legislation/secondary-legislation/>

¹⁷ The types of secondary (or delegated) legislation are listed in Bennion (See above) as “*regulations, orders, Orders in Council and rules*” see sections 1.10 and 3.2, and defined as “*law made by a person or body (the delegate) under legislative powers conferred by Act*” (see section 3.1). For most such legislation the delegate is a Minister: see section 3.3.

Negative resolution procedure

Negative resolution SIs do not require approval by Parliament. They are formally issued to each House and automatically come into force on a fixed date unless an objection is raised within 40 days.

A negative resolution SI is debated in the Commons only if there is sufficient opposition to it. Debates on negative SIs in the Lords occur more frequently. It is very rare for an SI to be annulled (prevented from passing) by either House ...”

So secondary legislation, in its most common form – namely statutory instruments¹⁸ – are made by ministers and then laid before Parliament. In many cases, where the negative resolution procedure is used, Parliament’s approval is automatically taken to have been given where no objection is raised within a certain time. Thus, secondary legislation clearly amounts to what the Convention, in Article 8, calls an executive regulation or “*generally applicable legally binding rules*¹⁹” and the preparation of such legislation might then engage Article 8.

(2) In contrast to this primary legislation – Acts of Parliament²⁰ – can only be enacted by Parliament through an elaborate and extensive process of successive readings on the floor of the House of Commons and the House of Lords, and in public bill committees in both Houses: see the documents attached on the process (see Attachment 1 to these observations). This process involves detailed scrutiny by Parliament of the clauses in a Bill, and the amending of that Bill until it is ready to receive Royal Assent and become an Act of Parliament.

35. It is submitted that Article 8 is intended to, and does, only apply to secondary legislation and not also to primary legislation such as the Bill the subject of this Communication. In support of this the following submissions are made.

¹⁸ It should be noted that the title to Article 8 uses the language “*generally applicable legally binding normative instruments*” (emphasis added).

¹⁹ It should be noted that the Parliamentary website says (emphasis added) “*Statutory instruments form the majority of secondary legislation but it can also include Rules or Codes of Practice*”.

²⁰ Save in a few exceptional cases not relevant here e.g. Finance Bills.

36. First, it is plain from Article 2 of the Convention that those acting in a “*legislative capacity*” are not the subject of the Convention at all. Thus para. 2 of Article 2 states as follows “*Public authority*” means: (a) *Government at national, regional and other level;*(...) *This definition does not include bodies or institutions acting in a judicial or legislative capacity.*”

37. Second, the background to this very clear exclusion is explained in *The Aarhus Convention An Implementation Guide* (June 2014) (“the Guide”) by reference to Recital (11) to the Convention. This Recital states “*Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings*”. This acknowledges the non-application of the Convention to legislative bodies and their proceedings and instead “*invites*” (note the word is “*invites*” not “*requires*”) those bodies to implement the principles of the Convention in their proceedings. In the Guide it is said (emphasis added):

“This paragraph acknowledges that the general principles contained in the Aarhus Convention can help in developing transparency in all branches of government and in assisting them in the discharge of their responsibilities. It is also one of the places in the preamble, along with its eighteenth and twenty-first paragraphs, that goes beyond a specifically environmental context and points to larger issues of democratization and the relationships among individuals, organizations and the State.

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. However, in September 1997, a group of parliamentarians actively taking part in the negotiations issued the “Stockholm Statement”, in which they endorsed the applicability to parliaments of the information provisions of the Convention in particular, and developed principles for public participation in “legislative work”. The Resolution of the Signatories also emphasized that parliaments have a key role to play in the implementation of the Convention. In keeping with this, the eleventh preambular paragraph invites legislative bodies to implement the provisions of the Convention on a voluntary basis.”

38. Third, the background to the exclusion is further explained in the Guide²¹ in this way (emphasis added):

“Bodies or institutions acting in a legislative capacity ... are not included in the definition of public authorities. This is due to the different character of such decision-making from many other kinds of decision-making by public authorities. Regarding decision-making in a legislative capacity,

²¹ Page 49.

elected representatives are in theory directly accountable to the public through the election process”

39. The message is clear that the Convention is not sought to be applied to, and to control, the process of the making of legislation. Instead elected representatives are accountable through the election process. This is important as the Convention is there to underpin and support representative democracy not to control it²². Moreover, the Guide also says in the context of Article 8 itself²³ that “*Governments were reluctant to negotiate specific requirements for parliaments, considering this a prerogative of the legislative branch.*”
40. Fourth, the UK Government also relies on the Committee’s decision in case ACCC/C/2011/61 (UK). That case concerned the approval via a Hybrid Bill process for the construction of a high-frequency railway from east to west across London, with connections to the city’s underground rail network. The UK argued that since the act in question authorising the activity was Parliamentary, it fell into the Article 2 exemption such that the Convention did not apply. In its decision, the Committee said this (emphases added):

“[54] In this respect, the Committee also notes that the hybrid bill process is a process under the Parliament, the body that traditionally manifests the legislative powers in a democratic state. Article 2, paragraph 2, of the Convention, excludes from the definition of a public authority “bodies or institutions acting in a... legislative capacity.” In the present case, however, the Parliament is no longer “acting” in a legislative capacity, but rather as the “public authority” authorizing a project. The fact that the Party concerned has in place an integrated procedure for “hybrid bills” in order for the Government to secure all powers and consents necessary for the authorization of major projects, instead of having fragmented procedures going through a number of different public authorities, central and/or regional, does not change the nature of the act as a decision permitting the project. The Committee observes that, if all large-scale projects were subject to parliamentary authorizations procedure and evoked article 2, paragraph 2, of the Convention, then there is a risk that important projects would never be subject to the public participation requirements of the Convention and this would run counter its objectives ...

[56] ... Although the Party concerned refers in the case of the Crossrail Act to a “specific legislative act”, the Committee holds that the process adopting the Crossrail Act by means of a hybrid bill

²² See the Guide at page 41; and see also the references to the Lucca and Almaty Declarations at pages 252 and 255 to similar effect.

²³ Page 181.

falls within the scope of article 6 of the Aarhus Convention as it serves as a decision to permit a specific activity."

41. What follows from this is that if the act in question authorising the relevant activity had been regarded as an Act of Parliament in the ordinary sense, rather than a decision to permit a specific activity, then it would have fallen within Article 2 so that the Convention would be inapplicable. Primary legislation is not an executive regulation or "*other generally applicable legally binding rules*". Those phrases catch only secondary legislation made by the executive (even if approved by the legislature).
42. Fifth, the Guide²⁴ in relation to Article 8 further supports the above analysis by suggesting that the principal scope of Article 8 is the role of the executive in "*developing and passing rules of general application*" and that the term "*rules*" is used broadly to catch "*decrees, regulations, ordinances, instructions, normative orders, norms and rules*". That captures secondary legislation in all its forms, but not primary legislation.
43. Sixth, it is relevant to consider further what is said in the Guide on these matters, remembering of course, that the Guide is not binding – it is merely guidance. Thus, it is said in relation to Article 2, para. 2 that²⁵:

"The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognized in article 8. As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention ..."

44. This can only be read as relating to the position of the executive in relation to secondary legislation. This is, as noted above, normally made by the executive but subject to approval by the legislature. This cannot be read as meaning that in relation

²⁴ Page 181.

²⁵ Page 49.

to primary legislation Article 8 is applicable to that process. In the UK the executive not only introduces the Bill to Parliament but is fully engaged in and promotes that Bill throughout the legislative process. Accordingly, the Government Department for Exiting the European Union (“DExEU”) is headed by the Secretary of State for Exiting the European Union, David Davis MP. He sponsors that Bill through the House of Commons, making speeches on the Floor of the Commons and participating in debates. The Secretary of State, as well as being a member of the executive, is a Member of Parliament. Similarly, in the House of Lords the Bill is being sponsored by, inter alia, Lord Callanan, Minister of State at DExEU. Again, he is both a Minister in the Government (and thus part of the executive) and also a member of the House of Lords (and so part of the legislature). It is impossible to suggest that the actions of the Secretary of State and his Ministers in promoting the Bill through Parliament are not acting in a legislative capacity. The process of promoting the Bill through the Parliamentary process continues up until the point that it is approved by Parliament and then receives Royal Assent and becomes an Act of Parliament. At no point is a draft piece of legislation ‘handed over’ to the legislature: the role of the Government department, and Ministers, responsible does not end when it begins its Parliamentary stages, by virtue of the minister being a member of the executive and the legislature.

45. The Guide in considering Article 8²⁶ suggests that it does apply to the role of public authorities in the legislative process. It says²⁷ that Article 8 covers “*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*”. In relation to secondary legislation in the UK this makes sense. The executive makes the statutory instrument and when that process is complete the instrument is passed to/handed over to the legislature for approval – see above. This is not though the case with primary legislation. This is, as

²⁶ Page 181 and repeated at page 182.

²⁷ Page 181 and repeated at page 182

explained above, never passed over to the legislature in this way. Ministers sponsor the Bill right through the process and are directly involved in that process.

46. For all these reasons it is submitted that primary legislation is not the subject of Article 8 of the Convention.

iii. Significant effect on the environment

47. Notwithstanding what is said above, it is the UK Government's case in any event that the Bill, which received Royal Assent and became an Act of Parliament on 26 June 2018, does not have any effect on the environment, let alone a significant effect.

48. The UK Government's position is that:

- (1) the Government's intention in preparing the Bill was to secure the UK's exit from the EU but to preserve EU law in the UK as it stands on exit day;
- (2) the Bill as enacted gives full effect to that intention; and
- (3) given (1) and (2) the suggestion made by the Communicant that the Bill may have a significant effect on the environment is wholly unarguable.

a. The government's intentions

49. The Government's intentions, and how it proposed to reflect them in a draft of legislation, were set out in the White Paper (see above).

50. The Prime Minister's foreword²⁸ to the White Paper stated that "*This Bill will, wherever practical and appropriate, convert EU law into UK law from the day we leave*".

The Secretary of State for Exiting the European Union's foreword put it like this²⁹:

"The Great Repeal Bill will convert EU law as it applies in the UK into domestic law on the day we leave - so that wherever practical and sensible, the same laws and rules will apply immediately

²⁸ Page 5.

²⁹ Emphasis added, page 7.

before and immediately after our departure. It is not a vehicle for policy changes – but it will give the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU.”

51. This is expanded at para. 1.12, which sets out the “*general rule*” that “*the same rules and laws will apply after we leave the EU as they did before.*”
52. The policy background is provided at paras. 1.14 and 1.15:

“Simply incorporating EU law into UK law is not enough, however. A significant amount of EU-derived law, even when converting into domestic law, will not achieve its desired legal effect in the UK once we have left the EU. For example, legislation may refer to the involvement of an EU institution or be predicated on UK membership of, or access to, an EU regime or system. Once we have left the EU, this legislation will no longer work. Government must act to ensure that the domestic statute book continues to function once we have left the EU.

That said, it is neither possible nor desirable for all of the changes that will be needed to domestic law to be made in the great Repeal Bill itself. This is for a number of reasons, including the nature and timing of many of the necessary changes do not lend themselves to inclusion in primary legislation. Also, some of the changes will be to devolved law and would be better made by devolved institutions. As such, the Great Repeal Bill will create a power to correct the statute book where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done by secondary legislation.”

53. At para. 1.21, the White Paper makes clear the intended limitations of these ‘correcting’ powers:

“The Great Repeal Bill will not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one... This is in line with our overall approach to the Great Repeal Bill – not to make major policy changes through or under the Bill, but to allow Parliament an opportunity to debate our future approach and give effect to that through separate bills. New legislation will be required to implement new policies or institutional arrangements that go beyond replicating current EU arrangements in UK law.”

b. The preservation of EU law via the Bill

54. Having set out the Government’s intention that EU law should apply in the UK to the same extent on the day after exit day as the day before, the White Paper carefully sets out the Government’s proposed approach to each source of EU law and how it proposes the effects of those laws will be retained.

55. At para. 2.5, the White Paper sets out how EU Directives, which under EU law must be transposed into UK law by legislation, will be retained as part of UK law after exit:

“By contrast, other types of EU law (such as EU directives) have to be given effect in the UK through national laws. This has frequently been done using section 2(2) of the [European Communities Act 1972], which provides ministers, including in the devolved administrations, with powers to make secondary legislation to implement EU obligations. Once the ECA has been repealed, all of the secondary legislation made under it would fall away. As this would also leave a significant gap in the statute book, the Bill will also preserve the laws we have made in the UK to implement our EU obligations.”

56. At para. 2.8, the White Paper explains how EU Regulations, which under EU law are directly applicable in UK law, will be retained as part of UK law after exit³⁰:

“EU regulations will not be ‘copied out’ into UK law regulation by regulation. Instead the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise.”

57. The Bill by clause 4³¹ saves directly effective rights under the EU Treaties. Moreover, in the specific context of this Communication, the White Paper makes clear that the EU Treaties will continue to be used as an aid to interpreting these retained EU laws, at para. 2.9³²:

“The treaties are the primary source of EU law. A substantial proportion of the treaties sets out rules for the functioning of the EU, its institutions and its areas of competence. While much of the content of the treaties will become irrelevant once the UK leaves the EU, the treaties (as they exist at the moment we leave the EU) may assist in the interpretation of the EU laws we preserve in UK law.”

58. At para. 2.14, the White Paper explains that the pre-exit case-law of the Court of Justice of the European Union (“CJEU”) will continue to apply after exit day³³:

“However, for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximise certainty, therefore, the Bill will provide that any questions as to the meaning of EU-

³⁰ Emphasis added.

³¹ Clause 4 of the Bill is now section 4 of the European Union (Withdrawal) Act 2018.

³² Emphasis added.

³³ Emphasis added.

derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law."

c. The effect of this on the environment

59. The White Paper contains a clear explanation of the significance of this for the environment. On page 14 is a textbox headed '*Example 2: Environmental protection*', which states as follows³⁴:

"The Government is committed to ensuring that we become the first generation to leave the environment in a better state than we found it.

The UK's current legislative framework at national, EU and international level has delivered tangible environmental benefits, such as cleaner rivers and reductions in emissions of sulphur dioxide and ozone depleting substances emissions. Many existing environmental laws also enshrine standards that affect the trade in products and substances across different markets, within the EU as well as internationally.

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".

60. What is clear from this is that the Government had, and still has, no intention of using the Bill as a means of altering the existing framework of environmental law as it exists on exit day, and also that the Government intends that any future measures which may have a significant effect on the environment will be preceded by consultation.

d. The Government's intentions for delegated legislation

61. The Committee has ruled that the complaint in relation to the provisions in the Bill which would confer on ministers' power to make secondary legislation are inadmissible. It was plainly right to do so. These observations will thus not respond to the Second Complaint. However, since the relevant passages in the White Paper support the UK's case that the Bill would have no effect on the environment, it is proposed briefly to set out the Government's intentions.

³⁴ Emphasis added.

62. At para. 3.6 of the White Paper, the Government acknowledges that the general rule that EU law on exit day should be transposed into UK law is incapable of perfect and universal application, and that *“a very significant proportion of EU-derived law for which Government departments are responsible contains some provisions that will not function appropriately if EU law is simply preserved.”* Three case studies set out examples of such difficulties: where a UK statute refers to “EU law”, where an EU institution is involved in some regulatory process, and where laws relate to information sharing with EU institutions. Clause 7(2)³⁵ of the Bill, see below, sets out the deficiencies that are the subject of the power.

63. The Government’s proposed solution is set out from para. 3.7:

“3.7 To overcome the challenge set out above, the Great Repeal Bill will provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done using secondary legislation, and will help make sure we have put in place the necessary corrections before the day we exit the EU.

3.16...[the power proposed] will also include the power to transfer to UK bodies or ministers powers that are contained in EU-derived law and which are currently exercised by EU bodies. This does not mean that the power will be wide in terms of the legislation to which it can be used to make changes.

3.17 Therefore, it is important that the purposes for which the power can be used are limited. Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU.”

64. This is clearly consistent with the Government’s intention that the Bill should have no effect on Government policy, or on the environment.

e. The relevant clauses of the Bill

65. In order to appreciate that the Bill as drafted was, and as subsequently amended in the Parliamentary process is, fully consistent with these statements of intention

³⁵ Clause 7(2) of the Bill is now section 8(2) of the European Union (Withdrawal) Act 2018.

contained in the White Paper, it is necessary to consider the relevant clauses, and the accompanying Explanatory Notes.

66. Attached to the Communication (see Document 2) are copies of the Bill as introduced into the House of Commons on 13 July 2017, and attached to these observations is the Bill as enacted (see Attachment 3).
67. The attention of the Committee is drawn to the Bill – and in particular the clauses referred to below – and is invited to consider these clauses alongside the Explanatory Notes the Government has provided. The references to clauses are to those in the Bill as introduced to Parliament with an explanation in the footnotes of the new numbering in the Bill as enacted.
68. In summary:
 - (1) Clause 2³⁶ preserves EU-derived domestic legislation which implements EU law obligations. This ensures that domestic legislation which implements EU directives remains on the domestic statute book after the UK leaves the EU. The Explanatory Notes state at para. 78 that “*the category of legislation that is preserved is widely drawn.*”
 - (2) Clause 3³⁷ ensures that EU law which is directly applicable in the UK under section 2(1) of the ECA is incorporated into UK law after exit day. This would preserve the effect of EU regulations and decisions.
 - (3) Clause 4³⁸ ensures that any remaining EU rights and obligations which do not fall within clauses 2 and 3 continue to be recognised and available in domestic law after exit: this includes directly effective rights contained within the EU treaties themselves.

³⁶ This clause has not been amended in the Parliamentary process and is now section 2 of the Act.

³⁷ This clause has not been amended in the Parliamentary process and is now section 3 of the Act.

³⁸ This clause has not been amended in the Parliamentary process and is now section 4 of the Act

- (4) Subsection 2 of clause 5³⁹ provides that the principle of the supremacy of EU law continues to apply on or after the UK's exit from the EU so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. This means that domestic law which has been passed or made before the UK's exit from the EU must be interpreted, as far as possible, in light of the wording and purpose of relevant directives.
- (5) Clause 6⁴⁰ preserves the applicability of the case law of the CJEU as it stood on exit day, and provides that any question as to the meaning of retained EU law will be determined in the UK courts in accordance with relevant pre-exit CJEU case law.
- (6) Clause 7⁴¹ gives ministers a power to make secondary legislation to deal with deficiencies arising on exit in retained EU law, but the list of 'deficiencies' makes clear that it would only be possible to use these powers to make policy changes where there is a deficiency which engages the power in the first place and that is the appropriate way of dealing with the deficiency. It cannot be used absent this to effect a policy change that is desired but not arising from a deficiency. This clause has been amended and its scope clarified. The Committee's attention is drawn to the Bill as enacted (see attached, Attachment 3 to these observations).

69. The impact assessment accompanying the Bill (and attached to the Communication – see Document 3) does not identify a single environmental impact which would result from the Bill, and indeed confirms that:

“The whole Bill is designed to bring the maximum possible continuity and certainty and is not designed to bring in any substantive policy changes. This does not only relate to the power to correct the law, but extends to the whole approach.”

³⁹ This sub-clause has not been amended in the Parliamentary process and is now sub-section 5(2) of the Act.

⁴⁰ This clause has been amended. It is now section 6 in the Act.

⁴¹ This clause has been amended. It is now section 8 of the Act.

70. In relation to clause 7 about which much is said in the Communication, mostly in relation to the Second Complaint, which has been ruled inadmissible the following additional points are made:

(1) The UK disagrees with the Communicants' suggestion that the delegated powers under the Bill create an unduly wide discretion to amend the existing environmental law of the UK. While the delegated power in clause 7(1) of the Bill (the deficiencies power) does give a broad discretion to Ministers to make "*appropriate*" provision, the power is limited in a number of key ways:

- a. it can only be used to prevent, remedy or mitigate a deficiency arising from the UK's withdrawal from the EU. Thus, for example, a Minister cannot use it simply because he/she does not like the existing law in a particular area;
- b. the deficiency which the Minister is acting upon must fall within one of the categories in 7(2) or 7(3)⁴². The wording of clause 7(2) has been amended to make clear the limits and that the power is not more open-ended;
- c. there are a number of limitations on exercise of the power set out in 7(6)⁴³ and the Government added additional restrictions to the Bill preventing it being used to impose or increase fees, create public authorities or amend the Devolution Acts;
- d. the power is "sunset", so regulations can no longer be made under clause 7 two years after exit day (subsection (7))⁴⁴.

(2) In addition, the following Parliamentary scrutiny procedures will apply to statutory instruments made under clause 7:

- a. there are a number of affirmative scrutiny procedure "triggers" in para. 1(2) of Schedule 7 to the Bill, i.e. if regulations made under clause 7 contain such provision, they are subject to the affirmative procedure;

⁴² 7(3) was added into the Bill during the Bill's passage through the House of Commons.

⁴³ Clause 7(6) was amended in the Parliamentary process and is now section 8(7) of the European Union (Withdrawal) Act 2018.

⁴⁴ Clause 7(7) is now section 8(8) in the European Union (Withdrawal) Act 2018.

- b. Ministers can choose to make other statutory instruments subject to the affirmative scrutiny procedure (see para. 1(3));
- c. where a Minister is proposing to use the negative scrutiny procedure, the statutory instrument will have to be laid before Parliament in draft and a sifting Committee given the opportunity to opine on whether they consider that the instrument should be subject to the affirmative scrutiny procedure (see para. 3 of Schedule 7)⁴⁵.

71. Thus, while at first glance clause 7 may seem like a very wide power there are a number of restrictions on its use built into the Bill. Moreover, it is a principle of statutory construction in the UK Courts that the more apparently wide a power is, the more the courts will feel obliged to impose some kind of limitation based on the context and probable legislative intent: see Craies at para. 12.2.7.2.

72. Finally, in this regard para. 123 and 124 of the amended Explanatory Notes also emphasise the limited scope within which the powers under Clause 7 of the Bill (now section 8 of the Act) can be used. It states as follows:

Section 8(1) gives ministers of the Crown a power to make secondary legislation to deal with deficiencies that would arise on exit in retained EU law. This includes the law which is preserved and converted by sections 2, 3 and 4 (i.e. both domestic law and directly applicable EU law). These problems, or deficiencies, must arise from the UK's withdrawal from the EU (which includes the consequence that the UK will cease to participate in the EEA Agreement).

The law is not deficient merely because a minister considers that EU law was flawed prior to exit. A minister is able to take action before exit in order to prevent the deficiency from arising. For the purposes of section 8(1), a failure of retained EU law is a type of deficiency: a *failure* means the law doesn't operate effectively whereas *deficiency* covers a wider range of cases where it does not function appropriately or sensibly

73. As noted above Explanatory Notes may be had regard to by the Courts in interpreting the legislation to which they relate.

⁴⁵ This provision was added into the Bill during the Bill's passage through the House of Parliament.

f. The Communicant's case and the UK Government's response

74. The Communication seeks to present a different case. Despite the clear statements of intention in the White Paper, and despite the careful drafting of the Bill, and the amendments, so as to give effect to these, the Communicant claims that "*it is plainly the case that the Bill could have a significant effect on the environment*"⁴⁶. The Communication provides no detailed evidence or reasoning in support of this assertion. Indeed, it is unclear precisely what case the UK is required to meet: the majority of the relevant paragraphs of the Communication address the inadmissible Second Complaint, and the factual question as to whether or not the Government held a formal consultation on the Bill – something of a curiosity, given that Article 8 does not impose any obligation to hold a formal public consultation – see below. In other words, the Communicant has focused on trying to demonstrate a failure of public participation, without first establishing in any clear way why it says that Article 8 is engaged.
75. It appears that the Communicant's case for the engagement of Article 8 is based on two separate grounds. The First Ground is the inadmissible Second Complaint, which the UK says in any event is misconceived. The Second Ground relates to certain 'environmental principles' contained in the TFEU. This ground is also misconceived.

i. The Communicant's first ground for arguing that Article 8 is engaged: secondary legislation

76. The Communicant makes much of what are said to be the "*unique and wide-ranging powers for ministers to make important legislative and policy changes by secondary legislation*". Indeed, this appears to be the main reason for saying that Article 8 is

⁴⁶ Page 8.

engaged at all. In a section headed 'Public participation implications', the Communicant summarises its position:

"The Bill sets out an advance framework of broad and far-reaching executive powers for ministers to legislate on EU derived environmental law and convention rights, again with no commitment to consult the public where such changes might impact the environment in a significant way. The broad scope of these powers makes it entirely possible (and we consider likely) that this will be significant for the environment."

77. This is the Second Complaint which the Committee has held this to be inadmissible. The UK adds that even if it were admissible, it would still be misconceived. The effect of the relevant clauses in the Bill, as enacted, is simply to confer a power on ministers to make secondary legislation. The coming into existence of that power does not, in itself, have any effect on the environment. Only the subsequent exercise of that power could in theory engage Article 8 – not the preparation of the Bill itself.

ii. The Communicant's second ground for arguing that Article 8 is engaged: environmental principles

78. It is necessary, then, to identify in the Communication an admissible reason for saying that Article 8 is engaged by the preparation of the Bill. The only suggestion of this is on page 3, where this is stated (emphasis added):

"However, the White Paper was not a consultation process with the public, even though the very effect of repealing the European Communities Act 1972 and withdrawal from the EU plainly could have a significant effect on the environment (for example, by removing treaty obligations, functions and requirements at a stroke)".

79. This general assertion is not substantiated in the text of the Communication, and no examples of any treaty obligations, functions and requirements which would be removed are provided. Footnote 8, however, says this:

"A specific example would be the undermining of the general principles of EU environmental law, such as the pre-cautionary, preventative and 'polluter pays' principle contained in Article 191(2) TFEU: see the effect of Clause 1 and Schedule 1, paragraphs 2 and 3, of the Bill."

80. In response the following submissions are made:

(1) The Communicants thus argue that the Bill has the effect of retaining only those EU principles which have direct effect in the UK (see clause 4). As a result it is

suggested that Article 191 in its current form is not retained by the Bill. It is accepted that there are no rights in Article 191 itself that will be saved by clause 4(1) of the Bill. Clause 4(1) only saves those rights which currently flow through section 2(1) of the ECA 1972. However, it is important to note firstly that the principles under Article 191 (2) do not have direct effect and so do not ground actionable rights. The CJEU has thus found that Article 191(2) TFEU only lays down general environmental objectives for EU policy, meaning it requires legislation to give it meaning and cannot be relied upon in its own right: see Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* [2015] Env. L.R. 3. There the CJEU held:

“39 Article 191(2) TFEU provides that EU policy on the environment is to aim at a high level of protection and is to be based, inter alia, on the “polluter pays” principle. That provision thus does no more than define the general environmental objectives of the European Union, since art.192 TFEU confers on the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, responsibility for deciding what action is to be taken in order to attain those objectives (see judgments in *ERG and Others*, EU:C:2010:126 , at [45]; *ERG and Others*, EU:C:2010:127 , at [38]; and order in *Buzzi Unicem and Others*, C-478/08 and C-479/08, EU:C:2010:129 , at [35]).

40 Consequently, since art.191(2) TFEU , which establishes the “polluter pays” principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation – such as that at issue in the main proceedings – in an area covered by environmental policy for which there is no EU legislation adopted on the basis of art.192 TFEU that specifically covers the situation in question (see judgments in *ERG and Others*, EU:C:2010:126 , at [46]; *ERG and Others*, EU:C:2010:127 , at [39]; and order in *Buzzi Unicem and Others*, EU:C:2010:129 , at [36]).

41 Similarly, the competent environmental authorities cannot rely on art.191(2) TFEU , in the absence of any national legal basis, for the purposes of imposing preventive and remedial measures.”

(2) The principles in Article 191(2) are given expression through various EU legislation transposed in the UK, and which will be via the Bill, preserved as law following exit. Thus, by way of example only, see:

- a. The Environmental Liability Directive (Directive 2004/35) which gives effect to the polluter pays and preventive principle see e.g. Recital (2) and Articles 1, 5 and 8⁴⁷;

⁴⁷ As transposed by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015/810, with similar regulations in other parts of the UK.

- b. The Habitats Directive (Directive 92/43/EEC) which gives effect to the precautionary principle see e.g. Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405 and Case C-258/11 *Sweetman and others v An Bord Pleanála* [2014] P.T.S.R. 1092 referring to Article 6(3) of that Directive having “integrated the precautionary principle”⁴⁸;
- (3) The latter point above (at b.) leads to another point which is that principles under Article 191 (2) are also given expression through case law concerning EU environmental legislation. And to that extent, they will form part of EU law which is retained by the Bill;
- (4) The common law itself recognises and gives effects to these principles, see e.g. the recent judgment of Lord Carnwath in the Privy Council in *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment* Privy Council [2017] UKPC 37⁴⁹.
81. Finally, in May 2018 the Department for Environment and Rural Affairs launched a consultation entitled “*Environmental Principles and Governance after the United Kingdom leaves the European Union – consultation on environmental principles and accountability for the environment*”. This is attached – see Attachment 6 to these observations. The proposal being consulted on is either, (i) to embody in primary

⁴⁸ As transposed in England and Wales by the Conservation of Habitats and Species Regulations 2017/1012 with similar regulations in other parts of the UK.

⁴⁹ See e.g. para. 2 “[t]he Polluter Pays Principle (“PPP” or “the Principle”) is now firmly established as a basic principle of international and domestic environmental laws.”

legislation or (ii) in a statutory policy⁵⁰, environmental principles⁵¹ including those in Article 191(2) of the TFEU⁵².

82. The Secretary of State in the foreword to the document states:

“For many who care deeply about the environment, and have fought for its protection over several decades, our membership of the European Union (EU) has coincided with increased awareness of environmental concerns and improved mechanisms to safeguard the natural world. And some have expressed fears that these gains could be put at risk by leaving the EU.

We want to ensure that the new mechanisms we put in place as we leave the EU don't just maintain, but strengthen protection for the environment.

As a baseline the EU (Withdrawal) Bill, will convert existing EU environmental law into UK law. In addition, we have also published our 25 Year Environment Plan, which sets out the scale of our future ambitions.

The plan outlines this government's intention to enhance our environment by replenishing depleted soil, planting trees, supporting wetlands and peatlands, ridding our seas and rivers of rubbish, reducing greenhouse gas emissions, cleansing the air of pollutants, developing cleaner, more sustainable energy and protecting threatened species and habitats. It also outlines an approach to agriculture, forestry, land use and fishing that puts the environment first.

And to ensure that both existing protections and new ambitions are underpinned by a strong statutory foundation we are consulting on new legislation.

⁵⁰ See paras. 32 – 43 of the document attached.

⁵¹ Annex A gives examples of such principles:

“Annex A – Environmental principles – some examples 149. There is no single agreed definition of environmental principles. This consultation is seeking initial views on which principles to include. This will inform the drafting of the new Environmental Principles and Governance Bill and the new comprehensive policy statement. Some environmental principles which are widely referred to in international agreements, the EU Treaties or both are set out below together with brief descriptions based upon them.

150. Sustainable Development. Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

151. Precautionary Principle. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

152. Prevention Principle. Preventive action should be taken to avert environmental damage.

153. Polluter Pays Principle. The costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.

154. Rectification at Source Principle. Environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.

155. Integration Principle. Environmental protection requirements must be integrated into the definition and implementation of policies and activities”

⁵² See para. 23 which says *“Environmental principles also form part of the Treaty on the Functioning of the European Union (TFEU). These are framed in the EU Treaties as general objectives for the EU, rather than having a direct, binding effect on the delivery of EU measures by the Member States. They underpin the development of policy and legislation by the EU institutions, requiring the EU to take account of and ensure that its environment policy incorporates consideration of these principles throughout the policy and law-making process. For example, Article 11 of the TFEU requires the integration of environmental protection into the definition and implementation of the EU's policies and activities with a view to promoting sustainable development. Similarly, Article 191(2) of the TFEU requires EU environmental policy to 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.”*

Our new Environmental Principles and Governance Bill is designed to create a new, worldleading, independent environmental watchdog to hold government to account on our environmental ambitions and obligations once we have left the EU. The role which has been played in the past by the EU Commission and courts should be filled now by a UK body embedded in the UK's parliamentary democracy.

This consultation asks how we can make sure our new watchdog works most effectively. How should environmental principles be embedded into law? How should public policy making and delivery be scrutinised? What functions and powers should the new environmental watchdog have to oversee environmental law and policy?"

83. The consultation document notes:

"28. Environmental principles are central to government policy, but they are not set out in one place. The Secretary of State for the Environment, Food and Rural Affairs therefore announced on 12 November 2017 our intention to create a new, comprehensive policy statement setting out the environmental principles which will guide our environmental policy-making and legislation, in a similar way to existing EU principles. As we leave the EU, we need to carefully consider how these principles will inform our ongoing commitment to protect our environment and there are different options for their legislative basis.

29. One option is to set out the environmental principles in new primary legislation – the Environmental Principles and Governance Bill – which would at the same time require government to come forward with a policy statement on how the principles should be interpreted and applied. Another option is for the Bill to require government to come forward with a policy statement on environmental principles and how they should be interpreted and applied, without the Bill itself listing the principles.

30. To provide democratic accountability, Parliament would need to scrutinise the statutory policy statement. This would simultaneously provide certainty for business around how environmental principles will be applied domestically. We will publish a draft Environmental Principles and Governance Bill in the autumn of 2018, then introduce a Bill early in the second session of this Parliament. This new piece of legislation and policy statement will guide successful and sustainable policy-making.

31. As explained above, there is no single, agreed definition of environmental principles. This consultation is seeking initial views on which principles to include. These will inform the drafting of the new Environmental Principles and Governance Bill and the new comprehensive statutory policy statement ..."

84. Moreover, as explained below the Bill, as enacted, contains section 16 which provides:

"Maintenance of environmental principles etc.

(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of –

(a) a set of environmental principles,

(b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,

(c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),

(d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including

legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill),
and

(e) such other provisions as the Secretary of State considers appropriate.

(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of –

(a) the precautionary principle so far as relating to the environment,

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

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) the principle of sustainable development,

(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g) public access to environmental information,

(h) public participation in environmental decision-making, and

(i) access to justice in relation to environmental matters.”

85. Section 16 thus requires the Government, within six months of the Bill receiving Royal Assent, to publish draft legislation which sets out a list of environmental principles. It requires that the draft legislation must place a duty on the Secretary of State to publish a policy statement in relation to the application and interpretation of those principles which, when circumstances to be set out under the legislation apply, ministers of the Crown must have regard to in making and developing policy. The draft legislation must also define environmental law and make provision for the establishment of a public authority with functions for taking proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a minister of the Crown is not complying with environmental law.

86. Given these developments, the Communicant is now invited to withdraw the Communication. This development also further underlines why this Communication was when made premature and should not have been held admissible.

g. Conclusion on the applicability of Article 8

87. The UK Government's case, is thus as follows. In the first place primary legislation falls within the Article 2 exemption and Article 8 is not engaged. However, to the extent that the Committee considers that it is able to examine these matters, it can be clearly seen that the Bill as drafted by the Government, and as enacted, reflected its express intention that the UK's exit from the EU should be achieved so as to preserve existing EU law in the UK after exit day, and without having any effect on the environment. It follows from this that the Bill is not a generally applicable legally binding normative instrument which may have a significant effect on the environment and, as such, Article 8 was not engaged by its preparation.

h. Compliance with objectives of Article 8

i. The nature of the obligations

88. Even if the Committee takes the view, contrary to all the above submissions, that the 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.

89. The following points are made by way of introduction in terms of the requirements:

90. First, the requirements under Article 8 are more flexible in nature than those under Article 6 & 7 and should be applied in that way. Thus:

(1) The obligation is to "*promote effective public participation*"⁵³;

(2) The Guide says that Article 8 imposes "*a comparatively soft obligation to use best efforts, and uses indicative rather than mandatory wording for the steps to be taken*"⁵⁴.

⁵³ Emphasis added.

⁵⁴ Page 181.

(3) In its findings on communication ACCC/C/2010/53 (UK), the Compliance Committee found that the requirements are more flexible than with say Article 6⁵⁵:

“The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a *general manner*, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient time frames for the public to consult a draft and comment). *Parties are then left with some discretion as to the specificities of how public participation should be organized.*”

(4) In addition Article 8 can expressly be satisfied both by the direct participation of the public and through the participation of “*representative consultative bodies*”.

91. An additional problem with the Communicant’s case is this. It assumes that, where Article 8 is engaged, then *prima facie* a failure to hold a formal public consultation amounts to a breach. At page 8 of the Communication, it is complained that “*there has been no consultation with the public on the preparation of the Bill... there has been no exchange of ideas through a transparent and published consultation process... There is currently no separate statutory legal requirement in the UK for public consultation in these circumstances*”. It goes on to state that the preparation of the Bill is in breach of Article 8 because “*there has been no formal public consultation in the preparation of the Bill before it was presented to Parliament for making into law. None of the minimum requirements in A8 (a) – (c) have been met.*” At page 10 of the Communication, it refers to “*the non-compliant lack of consultation in the first place*”, which can only be corrected by holding “*a fully compliant consultation*”, in the absence of which the legislative process “*is being conducted in the context of a total failure of A8 public consultation.*”

92. It appears that the Communicant’s overall complaint is based on an obvious misreading of Article 8. The word ‘*consultation*’ is not mentioned in that Article. It imposes a requirement to promote “*effective public participation*”, and to take “*public*

⁵⁵ See para. 84, emphasis added.

participation” into account ‘*as far as possible*’. As the Guide makes clear at pages 119 – 120, ‘*public participation*’ is not the same as public consultation:

“In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation.(...) Ultimately, public participation should result in some increase in the correlation between the view of the participating public and the content of the decision. In other words, the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input.”

93. Reference is also made to page 181 of the Guide, which states this:

“The measurement of the extent to which parties meet their obligations under article 8 is not based on results, but on efforts. Parties are required to make efforts towards the attainment of public participation goals”.

94. Thus, even if (contrary to the UK’s primary case) Article 8 was engaged by the preparation of the Bill, the absence of a formal public consultation would not, in itself, amount to a breach.

ii. The public participation there has been in relation to the Bill and exiting the EU generally

95. In relation to public participation, and notwithstanding that Article 8 was not engaged, the UK makes the following general observations about the involvement of the public in making the decision to exit the EU and in the formation of its policy towards implementing this decision.

96. First, the UK Government draws the Committee’s attention to the extensive period of campaigning prior to a national referendum on exiting the EU. This campaign, and the referendum itself, it is suggested, represents the most direct possible approach to securing correlation between the view of the participating public and the content of a policy decision. As set out above the public debate covered the environmental consequences of exit.

97. Second, in the aftermath of the referendum, and throughout the period during which the Bill was being prepared for introduction to Parliament, the question of the Government's policy on exiting the EU was extensively debated in the UK media and public sphere, as well as in Parliament in the presence of Government ministers and officials. This debate encompassed the White Paper itself.
98. Third, two General Elections were fought, one in 2015 and one in 2017, in both of which (but especially the latter) the issue of exiting the EU, and how that would be achieved, was an issue.
99. Fourth, the White Paper (published in March 2017) was intended to enable a constructive and open dialogue with Parliament and other key stakeholders across a broad spectrum who would be impacted by the Bill. There was an opportunity for the public to provide feedback to inform handling ahead of the formal introduction of the Bill in July 2017.
100. Fifth, in this context, 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. This, it is submitted, represents the most appropriate stage at which to promote effective public participation. As the final draft of the Bill is prepared and voted on on the floor of the House of Commons and the House of Lords, members of the public, interest groups and other organisations are free to scrutinise these draft clauses and amendments, and to recommend and campaign for amendments of their own. That this public participation has been taken into account is evident from the Bill's passage through Parliament.

101. Sixth, there has also been significant parliamentary scrutiny of the Bill since Introduction. The Bill was committed to a Committee of the Whole House. This means that all MPs and Peers were able to take part in the detailed line-by-line scrutiny of the Bill⁵⁶, many of whom referenced briefings from external organisations which had informed their contributions. In the Lords, more speakers than any other Bill in UK history spoke at Second Reading. The Bill has received thorough scrutiny in both Houses. Over 1,400 amendments were tabled and debated during passage through the House of Commons and House of Lords, totalling approximately 280 hours of debate. The Lords debated 19 amendments at Committee, Report and Third Reading that related wholly or in part to environmental protection.

102. In the House of Lords at the Third Reading an amendment was proposed by Lord Krebs. This proposed a clause providing:

“Maintenance of EU environmental principles and standards

- (1) The Secretary of State must take steps designed to ensure that the United Kingdom’s withdrawal from the EU does not result in the removal or diminution of any rights, powers, liabilities, obligations, restrictions, remedies and procedures that contribute to the protection and improvement of the environment.
- (2) In particular, the Secretary of State must carry out the activities required by subsections (3) to (5) within the period of six months beginning with the date on which this Act is passed.
- (3) The Secretary of State must publish proposals for primary legislation to establish a duty on public authorities to apply principles of environmental law established in EU law or on which EU environmental law is based in the exercise of relevant functions after exit day.
- (4) The Secretary of State must publish proposals for primary legislation to establish an independent body with the purpose of ensuring compliance with environmental law by public authorities.
- (5) The Secretary of State must publish –
 - (a) a list of statutory functions that can be exercised so as to achieve the objective in subsection (1); and
 - (b) a list of functions currently exercised by EU bodies that require to be retained or replicated in UK law in order to achieve the objective in subsection (1).
- (6) The Secretary of State must before 1 January 2020 lay before Parliament a Statement of Environmental Policy which sets out how the principles in subsection (7) will be given effect.
- (7) The principles referred to in subsection (3) include –
 - (a) the precautionary principle as it relates to the environment,
 - (b) the principle of preventive action to avert environmental damage,
 - (c) the principle that environmental damage should as a priority be rectified at source,
 - (d) the polluter pays principle,

⁵⁶ That is to say 650 MPs and 800 or so Lords. In contrast a Public Bill Committee would ordinarily be limited to 16 - 50 members only.

- (e) sustainable development,
 - (f) prudent and rational utilisation of natural resources,
 - (g) public access to environmental information,
 - (h) public participation in environmental decision making, and
 - (i) access to justice in relation to environmental matters.
- (8) Before complying with subsections (3) to (6) the Secretary of State must consult –
- (a) each of the devolved administrations;
 - (b) persons appearing to represent the interests of local government;
 - (c) persons appearing to represent environmental interests;
 - (d) farmers and land managers; and
 - (e) such other persons as the Secretary of State thinks appropriate⁵⁷.”

103. The purposes of this proposed clause was to require the UK Government to take steps to ensure that environmental protection is not reduced as a result of EU exit. In particular, it would have required the UK government to publish within six months of the Bill receiving Royal Assent: (a) proposals for primary legislation establishing a duty on public authorities to apply EU environmental principles when exercising relevant functions after exit day; (b) proposals for primary legislation to establish an independent body to ensure compliance with environmental law; and (c) a list of statutory functions that can be exercised so as to achieve the objective in subsection 1, and a list of functions currently exercised by EU bodies that must be retained or replicated in UK law in order to achieve that objective. The proposed clause would also have required the Secretary of State to lay before Parliament a Statement of Environmental Policy before 1 January 2020 which sets out how specified principles (listed in subsection (7) above) will be given effect. The proposed clause would also require the Government to consult before publishing the proposals and information referred to, and before the Statement of Environmental Policy is laid before Parliament.

104. The Government opposed this amendment but lost a vote in the House of Lords by 294 votes to 244. When the Bill returned to the House of Commons for consideration of the amendments made to the Bill by the House of Lords (Ping Pong, see above)

⁵⁷ The debate leading to this amendment can be found at <https://goo.gl/bSNi8x> (up to column 702 - 705)

the House of Commons chose to insert an amendment proposed by a member of parliament, Sir Oliver Letwin, in place of Lord Krebs's amendment. The House of Lords agreed to this when the Bill returned to the House of Lords and it is now section 16 of the Bill as enacted (see above).

105. There have been other amendments voted for in the House of Lords including an opposition amendment made at the Report stage and inserting a proposed clause providing:

"Enhanced protection for certain areas of EU law

(1) Following the day on which this Act is passed, a Minister of the Crown may not amend, repeal or revoke retained EU law relating to—

...

(e) environmental standards and protection, except by primary legislation, or by subordinate legislation made under any Act of Parliament insofar as this subordinate legislation meets the requirements in subsections (2) to (5).

(2) Subordinate legislation which amends, repeals or revokes retained EU law in the areas set out in subsection (1) must be subject to an enhanced scrutiny procedure, to be established by regulations made by the Secretary of State.

(3) Regulations under subsection (2) may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament.

(4) The enhanced scrutiny procedure provided for by subsection (2) must include a period of consultation with relevant stakeholders.

(5) When making regulations relating to the areas of retained EU law set out in subsection (1), whether under this Act or any other Act of Parliament, a Minister of the Crown must—

(a) produce an explanatory statement under paragraph 22 of Schedule 7, and (b) include a certification that the regulation does no more than make technical changes to retained EU law in order for it to work following exit ..."

106. This proposed clause would limit how delegated powers (including those contained within the Bill) can amend, repeal or revoke retained EU law which relates to certain areas, including environmental standards and protection. The amendment would have required the Government to establish, by regulations, an enhanced scrutiny procedure which any subordinate legislation which amends, repeals or revokes retained EU law would be subject to. The enhanced scrutiny procedure would have required a Minister to produce an explanatory statement and include a certification that the regulation does no more than make technical changes to retained EU law in order for it to work following exit and a requirement to consult relevant stakeholders.

Both Houses of Parliaments agreed to remove this proposed clause from the Bill during Ping Pong (see above) in favour of amendments put forward by the Government providing for the enhanced protection of subordinate legislation made under section 2(2) of the European Communities Act 1972. This includes subordinate legislation that implements EU directives, including EU directives relating to the environment.

107. These amendments now form paragraph 13 and 14 of Schedule 8 of the Act (see attachment 3). Paragraph 13 of Schedule 8 provides that the affirmative procedure will apply to certain statutory instruments made on or after exit day which amend or revoke subordinate legislation made under section 2(2) of the European Communities Act 1978 if they would otherwise be subject to a lesser parliamentary procedure. This means that the instrument must be laid in draft and approved by a resolution of each House of Parliament. Paragraph 14 provides that an enhanced scrutiny procedure will apply to certain instruments which amend or revoke subordinate legislation under section 2(2) of the European Communities Act. A statutory instrument subject to the requirements of paragraph 14 must be published in draft at least 28 days before it is intended to be laid before Parliament. A “scrutiny statement” must also be made by the Minister or other authority before the instrument or draft is laid before Parliament. This statement must explain the steps taken to make the published draft statutory instrument available to parliament; set out the response to any recommendations made by a parliamentary committee; set out the response to any other representations made to the Minister or authority about the published draft instrument; and, give any other information which the Minister or authority considers is appropriate in relation to scrutiny of the proposed instrument.

108. Furthermore, the Government’s responsibility for the Bill did not come to an end when it was introduced to Parliament: it was steered through the Houses of

Parliament by *Government ministers*, assisted by *Government officials*. Those Ministers were still able to table amendments to the Bill and to accept amendments drafted by others up until the moment the Bill completed its passage through Parliament. Indeed, Ministers can even temporarily withdraw and redraft a Bill.⁵⁸

109. Seventh, and related to the points above, there has been extensive engagement with Parliament and external stakeholders, such as business and the charity sector, from the start of the process of legislating for the UK's withdrawal from the EU. Alongside publication of the White Paper, stakeholder bulletins were sent from DExEU to around 850 subscribers. This took place alongside a coordinated cross-Whitehall calls campaign to key stakeholders (i.e. departments contacted key stakeholders to update them on introduction of the Bill).

110. Eighth, this was in addition to a significant volume of cross-Whitehall engagement which took place both prior to and following publication of the White Paper. DExEU officials have engaged with groups established by other government departments (for example, the legal profession's Brexit Law Committee), and have organised and attended several academic roundtables to discuss and hear views on the Bill. Officials have also met with various external organisations, including Green Alliance and the Fawcett Society.

111. Ninth, alongside passage of the Bill, DExEU ministers have made multiple appearances at parliamentary committees, and the Government has published various responses to select committee reports on the Bill.

⁵⁸ An approach which was taken during the passage of the Health and Social Care Bill through Parliament, which was withdrawn during its House of Commons Committee stage, and re-committed (with changes) for further Parliamentary scrutiny and debate. See the Official Report of the House of Commons, 21st June 2011, column 198 (available at <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110621/debtext/110621-0002.htm#11062160000002>).

112. Tenth, in 2017, DExEU received over 90 pieces of correspondence regarding the Bill and has received 32 letters thus far in 2018⁵⁹ either sent directly to ministers or forwarded across from other Parliamentarians or stakeholders.

113. Eleventh, a Delegated Powers Memorandum was prepared for the Delegated Powers and Regulatory Reform Committee⁶⁰ to assist with its scrutiny of the Bill. The memorandum was published online on 13 July 2017. The remit of the Committee in relation to delegated powers is *“to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny”*. The Committee’s report was published on 28 September 2017. An updated Delegated Powers Memorandum (to reflect the Bill as brought from the House of Commons to the Lords on 18 January 2018) was provided to the Committee on 18 January 2018 and the Committee published a new report on 1 February 2018. These are attached – see Attachments 10 and 11 to these observations).

114. All of this, it is submitted, is ample evidence of a healthy and well-functioning democratic process which places the participation of the public at the heart of policymaking and law-making.

⁵⁹ Figure as at 31 May 2018

⁶⁰ See <https://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/role/>

“The remit of the Committee in relation to delegated powers is “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny”.

Delegated powers are frequently included in the Bills presented to Parliament by the Government. These powers allow Ministers to use ‘delegated legislation’ (usually in the form of statutory instruments or SIs) to do things which would otherwise need another Bill. The powers are often practical and sensible: for example, a Bill may set out all the key elements of a policy, but allow a Minister to make minor modifications to the policy as circumstances change over time, by making a set of Regulations.

The Committee considers Bills when they are introduced into the Lords (at present there is no equivalent committee in the Commons). The Government provides a memorandum for each Bill, identifying each of the delegations, its purpose, the justification for leaving the matter to delegated legislation, and explaining why the proposed level of Parliamentary control is thought appropriate.”

115. Finally, in this regard the Communicant⁶¹ relies on what was said by the Committee in ACCC/A/2014/1 (Belarus) in the context of Article 8 and in particular the suggestion at para. 58(h) that “[t]he final version of a normative instrument be in practice accompanied by an explanation of the public participation process and how the results of the public participation were taken into account, bearing in mind that article 8, paragraphs (a)–(c), of the Convention sets forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation, and also that the final sentence of article 8 requires Parties to ensure that the outcome of public participation is taken into account as far as possible.” The Communicant points out that the Explanatory Notes and the Impact Assessment for the Bill did not refer to the public participation at the White Paper stage and did not say how these were taken into account.

116. In response the UK Government submits that what is key under Article 8 is that any public participation is taken into account. And here it has been. The inclusion of “an explanation of the public participation process and how the results of the public participation were taken into account” is one way of demonstrating this but not the only way. There is a danger here of elevating form over substance. There has been extensive public participation and this has been had regard to – see above. Throughout the preparation process, the Government received numerous representations from the public and from civil society, as well as from individual Members of Parliament on behalf of their constituents and other interest groups. All of this was taken into account throughout the preparation process, and also through the on-going legislative process.

(iv) The Third Complaint

a. introduction

117. Para. 1 of Article 3 of the Convention provides as follows:

⁶¹ Page 9

“Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”

118. Article 8 creates two different levels of obligation in respect of public participation.

First, there are two mandatory obligations: Parties “*shall strive to promote effective public participation...*” and “*the result of the public participation shall be taken into account*”. Secondly, there are three ‘*indicative*’ requirements contained in paragraphs (a) – (c) that “*should*” be taken into account. As already noted the Guide states, “[t]his area of activity is covered by a comparatively soft obligation to use best efforts, and uses indicative rather than mandatory wording for the steps to be taken.”

b. Compliance with Article 3

119. The Communicant recognises that the Cabinet Office (in 2016) published updated consultation principles (the “*Consultation Principles*”). In the Communication, it is suggested that these breach Article 3 in two ways. First, the Communicant points out that the Consultation Principles are not “*legally binding*”. Secondly, it complains that principle B “*could be interpreted as actively discouraging consultation.*”

120. The UK Government’s case is:

- (1) Compliance with Article 3 is not achieved just via the “*Consultation Principles*” but also via the common law, and which the Communication somewhat surprisingly, appears to wholly ignore;
- (2) The Communicant’s second complaint is based on a misreading of the Consultation Principles, and it is submitted that these do form part of a “*clear, transparent and consistent framework*” to implement the mandatory obligations in Article 8 which is compliant with Article 3.

c. The scope of the obligation under Article 3 and the UK's compliance with it

121. As pointed out in the Guide, Article 3 imposes an obligation “to develop implementing legislation, executive regulations” and “other measures” to “establish and maintain a clear, transparent and consistent framework”. As to the nature of such “other measures”, it is evident that Article 3 does not require them to be legally binding. In case ACCC/C/2004/1 (Kazakhstan), at para. 23, the Committee suggested that Article 3 would be satisfied by “providing clear instructions on the status and obligations of bodies performing functions of public authorities.” The Guide states that possible “other measures” might include strategies, codes of conduct and good practice recommendations. Austria, for example, has promoted the implementation of the Convention through “political guiding principles” for the promotion of sustainable development. These principles establish inclusive good governance standards constituting a “code of conduct” for authorities to comply with while developing plans, programmes, policies and legal instruments.

122. The UK's Consultation Principles thus clearly fall into the category of “other measures”, and are akin to a ‘code of conduct’ for the purposes of implementing the consultation and participation requirements of the Convention.

123. But the matter goes further than that. England, Wales and Northern Ireland is a common law jurisdiction. Scotland is a mixed system and has been heavily influenced by the common law⁶². The common law is judge-made law and it is binding. The common law is based on case-law not a civil code. Judicial case-law is an authoritative source of law because of the doctrine of precedent. This is fundamental to all the legal systems in the United Kingdom. There is a helpful account of the comparison between the United Kingdom and civil systems in

⁶² See e.g. *Gloag and Henderson The Law of Scotland* (14 ed.) at para 1.19 “Scotland belongs to a third legal family whose systems of law are composed of a mixture of the civil law and the common law”.

Precedent in English Law Cross and Harris (4th ed, 1991) at pp. 10 – 19 (attached – see Attachment 13 to these observations).

124. Under the common law as developed in relation to judicial review, and the control of administrative action, the Courts have developed principles concerning lawful consultation both as to when it is required and, when it is required, what it must involve. Thus fair consultation requires, as a matter of law, that:

- (1) The consultation must be undertaken at a time when the proposals are still at a formative stage;
- (2) It must provide sufficient information, in detail and clarity, for consultees to give the proposals intelligent consideration and an intelligent response;
- (3) There must be adequate time for the response; and
- (4) The responses must be considered conscientiously and taken into account when a decision is taken⁶³.

125. The UK Government publishes a document for officials entitled *Judge Over Your Shoulder A guide to good decision making*⁶⁴. This summarises for officials the common law relevant to their work and includes at page 12:

“Consultation

(Also see sections 2.43-2.44 at page 41 of JOYS⁶⁵)

- The decision maker must allow the person who is the subject of a decision to know the case against him
- The four key conditions of proper and fair consultation that need to be met are:
- The consultation must be undertaken when proposals are still at a formative stage;
- Sufficient explanation for each proposal must be given so that consultees can consider them intelligently and respond;
- Adequate time for the consultation process must be given; and
- The consultees’ responses must be conscientiously taken into account when the ultimate decision is taken

⁶³ See: *R v North and East Devon HA ex p Coughlan* [2001] QB 213 – see Attachment 12 to these observations. See also in the context of ACCC/C/2014/100 the following documents submitted by the UK Government in relation to Article 7: (i) Annex 44(i); (ii) the UK Government’s opening statement at paras. 17 – 18; and (iii) the UK Government’s comments on the Communicant’s reply.

⁶⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538447/160708_JOYS_final.pdf

⁶⁵ “JOYS” is an abbreviation for *Judge Over Your Shoulder*.

- (See the Government Consultation Principles 2016)
- Where a consultation has taken place and before the decision has been made, proper weight must be given to the representations received. The decision must make it clear that this has been done”

126. It also says at page 41:

“Consultation

2.43 Consultation with the persons likely to be affected by the decision, is an aspect of “hearing the other side’s case” (and often part of the decision making process). Consultation helps to make the process a fair one; and helps to ensure that the decision maker is in possession of all the relevant information, so that the decision is a “rational” one. Where consultation is undertaken, whether or not strictly required, it has to be conducted properly to satisfy the requirement for procedural fairness. The four key conditions that need to be met are:

- The consultation must be undertaken when proposals are still at a formative stage;
- Sufficient explanation for each proposal must be given so that consultees can consider them intelligently and respond;
- Adequate time for the consultation process must be given; and
- The consultees’ responses must be conscientiously taken into account when the ultimate decision is taken.

These principles are taken from case law and are codified for government departments and their agencies in the Consultation Principles 2016.

2.44 Where a consultation has taken place and before the decision has been made, proper weight must be given to the representations received. The decision must make it clear that this has been done. The representations do not need to be recited in full, but you must show that the main points have been grasped and taken into account.”

127. Treaties such as the Aarhus Convention have a bearing on the development of the common law: see *R v Lyons* [2003] 1 AC 976 at para 13 per Lord Bingham⁶⁶. Thus the Courts have held that developments of the common law should ordinarily be in harmony with the United Kingdom's international obligations: *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, para. 27, again per Lord Bingham⁶⁷. And treaties may also be used to resolve ambiguities in the common law: *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534⁶⁸. Moreover, it is clear that the consideration by the Courts of whether a Government department is under a legal duty to consult, and if so what any consultation requires to be done, takes into

⁶⁶ See Attachment 14 to these observations.

⁶⁷ See Attachment 15 to these observations.

⁶⁸ See Attachment 16 to these observations.

account the relevant articles of the Convention: see e.g. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env. L.R. 29 per Sullivan J. at para. 49. That case concerned Article 7 of the Convention and the duty to consult on policy, distinct from the obligation in Article 8 to strive to promote public participation. However, it established that where the Convention does impose obligations on the Government, the Courts will take these into account in determining what the common law requires in judicial review proceedings. Indeed in *Walton v Scottish Ministers* [2013] P.T.S.R. 5⁶⁹ at para. 100 Lord Carnwath, sitting in the Supreme Court, said “[a]lthough the Convention is not part of domestic law as such (except where incorporated through European Directives) ... the decisions of the Committee deserve respect on issues relating to standards of public participation.”

128. The Courts would also have regard in any judicial review to the Consultation Principles. The Consultation Guidelines indicate that:

- (1) Consultations should last for a proportionate amount of time (Principle E).
- (2) Government departments should consider whether any appropriate representative groups exist and ensure that they are aware of and have access to the consultation process (Principle F).
- (3) In order to ensure the participation of the relevant public, stakeholders should be consulted in a way that suits them (Principle G).

d. The specific complaint made about the Consultation Principles

129. Principle B of the Consultation Principles states as follows:

“Consultations should have a purpose

Do not consult for the sake of it. Ask departmental lawyers whether you have a legal duty to consult. Take consultation responses into account when taking policy forward. Consult about policies or implementation plans when the development of the policies or plans is at a formative stage. Do not ask questions about issues on which you already have a final view.”

⁶⁹ See Attachment 18 to these observations.

130. Properly construed, this principle makes clear that (1) Government departments may be under a legal duty to consult the public and must consider whether this is the case when developing and implementing policies; (2) if a duty exists in a particular case, consultation must be carried out at an appropriate stage, and before any final view has been reached; and (3) responses to consultation must be taken into account when policies are being developed and implemented.

131. The common law would further support these principles in any event, see above.

132. As the Guide makes clear at page 119:

“There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation.(...)”

133. Consistent with this, the word ‘consult’ is widely defined in the Consultation Guidelines. Principle D states as follows:

“Consultations are only part of a process of engagement

Consider whether informal iterative consultation is appropriate, using new digital tools and open, collaborative approaches. Consultation is not just about formal documents and responses. It is an on-going process.”

134. Thus, it is evident that the duty to ‘consult’ includes a duty to secure public participation, even by less formal, ‘iterative’ means. This is fully compliant with the obligation set out in Article 8 which, contrary to the Communicant’s position, does not impose a requirement on public authorities to carry out formal public consultations.

e. Conclusions

135. The complaint in relation to Article 3 lacks any merit for all the above reasons.

(v) **Concluding observations**

136. It is not entirely clear what remedy the Communicant seeks. At page 10 of the Communication, however, they say this:

“The only practical outcome that would remove the First Issue is for the Bill not to be made by Parliament (although notwithstanding the noncompliant lack of consultation in the first place), but that is highly unlikely at this stage. It could then be possible for a fully compliant consultation to take place on a variety of legislative options for the UK’s withdrawal from the EU.(...)”

The bill is currently before Parliament for debate by politicians, but the Communicant does not have any control of that process, or any particular standing within it. In any event, that process is being conducted in the context of a total failure of A8 public consultation.”

137. The only conclusion to draw from this is that the Communicant desires that the Bill be withdrawn from Parliament. It desires this because, in its own words, “*it does not have any control of that process, or any particular standing within it.*” This is a somewhat bizarre complaint. There is no reason why the Communicant should have ‘control’ over the fully democratic and transparent law-making process in the UK. But, as set out above, that does not mean that it has no influence as a campaigning organisation in the legislative process, or that it has no ‘standing’ through this to participate in it.

138. Indeed, as already mentioned above, the Communicant is part of a group known as the “Greener UK”. Greener UK is a coalition of environmental groups working together to ensure that Brexit is used as an opportunity to strengthen the UK’s environment, not damage it. On their website (http://greeneruk.org/EU_Withdrawal_Bill.php) Greener UK acknowledge they have been working with Parliamentarians to amend the EU (Withdrawal) Bill in line with their priorities. They have published a steady stream of briefings prior to introduction of the Bill, all publicly available⁷⁰. A very large number of amendments

⁷⁰ Three priorities for the bill (June 2017); Ensuring the Withdrawal Bill leads to a Greener UK: parliamentary briefing (September 2017); Briefing for MPs on the committee stage (November 2017); Briefings for MPs on Day 2, Day 6 and Day 8 of the committee stage (November and December 2017); Briefing for MPs on the report stage (January 2018); Briefing for the second reading of the bill (January 2018); Briefing for Lords on the committee stage of the Bill on amendments 21, 26, 28, 33, 58 and 59 (February 2018); Briefing for Lords on the committee stage of the bill on amendments 41, 66, 112, 113 and 317 (March 2018); Lords Report Stage of the EU (Withdrawal) Bill: briefing on amendment 12 (May 2018); Lords Report Stage of the EU (Withdrawal) Bill: briefing on amendment 27 (May 2018) and Briefing for Lords Third Reading of the EU (Withdrawal) Bill (May 2018).

have been proposed by members of the House of Commons and House of Lords as a result of briefings produced by Greener UK, see the table of attached amendments (see Attachment 19 to these observations).

139. The Guide acknowledges that *“there is an element of politics in law-making that Parties will need to take into consideration. It is implicit in this provision that lawmakers and legislators bear ultimate responsibility for the outcome of law-making and rule-making processes, and that therefore some accommodation must be made for them”*. So it is acknowledged that it is Parliament that has the final say, and Parliament which has direct democratic power to amend the Bill.

140. This Communication is without merit and the complaints made should be rejected.

JAMES MAURICI QC

Thursday, 28 June 2018

List of attachments to these observations

1. Print outs from Parliament website on the Passage of a Bill and the stages of the process;
2. Print out screenshot from Parliament on stage reached with the European Union (Withdrawal) Act.
3. The European Union (Withdrawal) Act 2018
4. Explanatory Notes for the European Union (Withdrawal) Act 2018
5. *Environmental Principles and Governance after the United Kingdom leaves the European Union – consultation on environmental principles an accountability for the environment.*
6. *Wilson v. First County Trust (No. 2)* [2004] 1 AC 816
7. *Bennion on Statutory Interpretation* (7th ed) at sections 1.10, 3.1 - 3.3 and 24.14
8. *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation* (11 ed), at paras. para. 1.3.4 and 12.2.7.2
9. Delegated Powers Memorandum
10. Amended Delegated Powers Memorandum
11. *R v North and East Devon HA ex p Coughlan* [2001] QB 213
12. Precedent in English Law Cross and Harris (4th ed, 1991) at pp. 10 - 19
13. *R v Lyons* [2003] 1 AC 976
14. *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221
15. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534
16. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env. L.R. 29
17. *Walton v Scottish Ministers* [2013] P.T.S.R. 5
18. Table of amendments proposed in the House of Commons and House of Lords as a result of Greener UK briefings.