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)

COMMUNICANT COMMENTS ON THE PARTY CONCERNED'S REPLY DATED 31 AUGUST 2022 TO QUESTIONS POSED BY THE COMMITTEE ON 1 JULY 2022

INTRODUCTION

1. Under cover of a letter dated 1 July 2022, the Committee put questions to the Party Concerned ("the United Kingdom", "the UK Government") and the Communicant ("Friends of the Earth"). Each was invited to comment on each other's reply. These are Friends of the Earth's comments on the United Kingdom's reply of 31 August 2022 **("the UKR2Q").**

2. We note the UK Government has provided lengthy and discursive responses to the Committee's pithy, focused questions. Those responses frequently divert from the question posed and engage in extensive and often peripherally relevant argumentation. In the comments that follow, Friends of the Earth does not seek to respond to every point made in the UKR2Q, but instead focuses on the key relevant issues.

3. Friends of the Earth notes the UK Government's claims of prejudice arising from the delay in considering this communication. The UK's challenge to the admissibility of this communication meant that the substantive consideration of the communication would inevitably come after the European Union (Withdrawal) Bill (EUWB) had been passed into law. Once admissibility was established, the UK Government knew, or ought to have known, that the Committee would want a proper explanation of the process that had been followed and would require evidence of any claims of public participation in that process. The UK only has itself to blame if it cannot now locate contemporaneous correspondence. Indeed,

if the UK had complied with its Convention obligations, the content of that correspondence would be readily available: see further the response to the Party's reply to question 5 below.

4. If there has been prejudice caused by the delay in hearing this communication, that prejudice has been to the Communicant who, from the outset, sought expedition of the communication procedure to ensure any failure by the UK to comply with its obligations under the Convention could be remedied before having permanent consequences. Friends of the Earth appreciates the unprecedented pressure on the Committee's work programme and is grateful to the Committee for considering this matter now.

THE PARTY'S REPLY TO QUESTION 1

5. Before addressing the Party's reply to this question in detail it is worth emphasising that public participation in the development of UK legislative proposals at a formative stage is not unusual or rare. There are examples of good practice of such consultation in relation to proposals that may have significant effects on the environment.[1] There are of course other examples of where this good practice has not been followed[2], but the fact that it does sometimes happen shows that there is nothing difficult or constitutionally challenging about enabling such public participation.

[1] For example, the Department for Environment Food and Rural Affairs (DEFRA) held a seven-week consultation on the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill (Dec 2017-Jan 2018). This included a survey with seven questions. A link to the draft bill was provided. The consultation received over 9,000 responses, via survey, post and email. A summary of responses was published, which recorded that 98% of the responses were from individuals and 2% were from organisations. DEFRA explained how it had taken the views of consultees into consideration in relation to proposals to increase the maximum penalty for animal cruelty cases: "*Taking into consideration the high proportion of responses that indicated that they agreed with the new maximum penalty, the government intends to bring forward proposals to increase the maximum penalty*". Another example of consultation on (devolved) legislation would be the Wales Draft Environmental Protection (Single-use Plastic Products) Bill. The Government conducted a consultation on reducing single use plastic in Wales in 2020. It then, in 2022 published a draft Bill before its introduction into the Senedd (though there was no consultation on this draft Bill at that point).

[2] For example, the draft Fisheries Bill (which became the Fisheries Act 2020) was not itself subject to consultation/ public participation in its development. The Fisheries Bill was laid before Parliament on 25 October 2018. A consultation on the fisheries white paper ran from 4 July 2018 to 12 September 2018, but the draft Fisheries Bill was not included in this. Similarly, there was a consultation on "The future for food, farming and the environment" from 27 February 2018 to 8 May 2018. This did not include the text of the draft Agriculture Bill itself, which was laid before Parliament on 12 September 2018, and became the Agriculture Act 2020.

6. The House of Lords Select Committee on the Constitution issued a report in in 2017 entitled *The Legislative Process: Preparing Legislation for Parliament* which positively encourages pre-legislative consultation and says (p.3) as follows:

> ***"Consultation and pre-legislative scrutiny***
> *We identify a number of points in the policy development process at which the Government should actively seek to engage stakeholders in the policy development process. These include informal discussions with stakeholders during the process of formulating policy proposals; formal consultation by means of Green and White Papers; and additional consultation during the legislative drafting process. We also draw attention to the conclusions of the House of Lords Secondary Legislation Scrutiny Committee on consultation mechanisms, including in particular its recommendation that six weeks should be considered a minimum feasible consultation period, save in circumstances which would generally be regarded as exceptional.*
>
> *Once a draft legislative text is prepared, pre-legislative scrutiny by a parliamentary committee offers further opportunity for scrutiny and revision before it is introduced. In our 2004 report, Parliament and the Legislative Process, we recommended that it should be the norm for bills to be published in draft to afford more opportunities for formal pre-legislative scrutiny.*
>
> *At present, pre-legislative scrutiny of draft bills is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation from the other stages of scrutiny which legislation undergoes. We conclude that pre-legislative scrutiny should be considered an integral part of the wider legislative process. This may mean adapting other parts of the process to take account of pre-legislative scrutiny. We do not prescribe how this might occur, but as one example we recommend that the business managers of both Houses take into account whether a bill has undergone pre-legislative scrutiny when considering how much parliamentary time to allocate to the bill when it is formally introduced."*

7. It is also the Government's intention to publish more bills in draft[3] because pre-legislative consultation is recognised as good practice in the context of the UK constitution. Indeed, the Cabinet Office's *Guide to Making Legislation* 2022 states that there "*are a number of reasons why publication in draft for pre-legislative scrutiny is desirable. It allows thorough consultation while the bill is in a more easily amendable form, and makes it easier to ensure that both potential parliamentary objections and stakeholder views are elicited. This can assist the passage of the bill when it is introduced to parliament at a later stage and increases scrutiny of government legislation"*. [4]

[3] **UKR2P** 18(6)

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf p. 167, para. 21.4. This is at p163, para. 22.4 in the 2017 version.

8. That good practice was not, however, followed in the development of the EUWB and is not universal. Friends of the Earth submits that failure amounted to a breach of the UK's obligations under Article 8 of the Convention. The UK Government contests that submission because it contends that the executive is not a 'public authority' for the purposes of Article 2 of the Convention when it is engaged in policy development or legislative drafting preceding introduction of a bill into Parliament.

9. In the first part of question 1, the Committee asked the Party to explain how and when, under English law, the executive signs off on the text of a draft Bill that has been prepared for the government for submission to the legislature (i.e. to Parliament) for its consideration. In its reply, the UK Government contends that it is not possible to identify such a point. That is clearly wrong. That point is when the Parliamentary Business and Legislation Committee approves the introduction of a bill to Parliament.[5] Prior to that point, the development and drafting of a bill is a matter of policy-making controlled exclusively by the executive. After that point, the bill is introduced to Parliament and is subject to a legislative process which is governed by the Standing Orders of the Houses of Parliament.[6] While it is true that the executive has a role to play in that legislative process, that role does not retroactively render 'legislative' all steps taken by the executive in relation to the bill prior to introduction.

10. The Party's reliance on the domestic case law at **[UKR2Q 27 – 36]** is misplaced. As it acknowledges in passing at **[UKR2A 26]**, this communication is about the interpretation, and performance, of obligations under an international treaty. That is relevant in three respects: first, the constitutional arrangements or domestic law of a party cannot be used as justification for a failure to perform the obligations arising under a treaty (see Article 27 of the Vienna Convention on the Law of Treaties 1969); secondly, the separation-of-powers doctrine at the heart of those cases (as concerning the relationship between the courts and the legislature) has no application to this communication; and thirdly, the case-law does not establish that one cannot sensibly separate pre-legislative executive acts from post introduction legislative acts for the purposes of Article 8 of the Convention.

[5] Guide to Making Legislation (July 2017) at 21.6 et seq; and para.20 of the UKR2Q

[6] The authoritative description of the process is found in Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, available online at https://erskinemay.parliament.uk

11. First, the Convention has an autonomous meaning which is not determined by the domestic law of a party, nor limited by the contemporary domestic court's approach. It is not a case of interpreting the obligations of the Convention according to the national laws or convenience of a party that is a signatory to it. By choosing to become a party to the Convention, the UK freely assumed certain obligations which apply at international law regardless of the United Kingdom's domestic constitutional or legal arrangements. As affirmed in Article 27 of the Vienna Convention on the Law of Treaties and in Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, parties to an international treaty may not invoke the provisions of its internal law as justification for its failure to perform the obligations arising under the treaty. As affirmed by the Committee in ACCC/C/2014/120 at [99ff],[7] Article 8 of the Convention applies to the preparation of legislation by executive bodies to be adopted by national parliaments. In this case, it therefore required the UK to promote public participation in the development of a significant piece of legislation that had the potential to have significant effects on the environment. It is irrelevant that its failure to do so would be found to be non-justiciable or lawful if challenged in the domestic UK courts.

12. Secondly, the separation-of-powers doctrine at the heart of the case law cited at **[UKR2Q 27 – 36]** has no application to this communication.

13. The issue here turns on the meaning and effect of the Convention, not to be read-down or constrained by any domestic law approach.

14. Anyway, as considered further below, contrary to the UK's protestations, there is no grand principle of UK domestic law which stands in the way of the application of Article 8 in the present context.

15. The 1689 Bill of Rights and the cases cited affirm the proposition that the UK domestic courts may not question any proceedings in Parliament or the validity or legitimacy of any Act of Parliament. That is a foundational principle affirming the supremacy of Parliament and the limited role of the domestic courts in the UK constitutional arrangements. It is, however, wholly inapplicable to the Committee in these proceedings. The Committee does not sit within the carefully balanced power arrangements of the UK constitution. It is a non-confrontational, non-judicial and consultative body established under the framework of an

[7] On which see the Communicant's separate post-hearing submissions.

international treaty to review compliance with international obligations freely entered into by the parties to the Convention. It cannot call into question the domestic law validity or legitimacy of an Act of the UK Parliament. But it is entitled to – indeed mandated to[8] – express a view on whether the UK discharged its obligations under Article 8 of the Convention when developing generally applicable legally binding rules that may have had a significant effect on the environment. For that reason, the UK Government is wrong to say at **[UKR2Q 26]** that *"much of the logic [of the domestic case law] would apply to the Convention".* In any case, as we explain below, nothing in the Convention cuts across the 1689 Bill of Rights in a way which somehow undermines the legitimacy or appropriateness of what is set out in this Communication.

16. For the same reasons, it is ill-judged for the UK Government to submit, in this case, that there are *"real dangers in an unelected International Committee questioning what has been done by an elected Parliament and in giving effect to a policy endorsed not just in a referendum but in a subsequent election."*[9] Setting aside the gross mischaracterisation of the nature of the Communication (which does not call into question the decision of the United Kingdom to leave the European Union or the acts of the United Kingdom Parliament[10]) the Committee is simply discharging the role conferred on it by the parties under the Convention and under Decision I/7 and it is entirely appropriate for it to do so.

17. Thirdly, the case law relied on by the UK does not establish that one cannot sensibly distinguish between pre-legislative executive functions and post introduction legislative functions for the purposes of Article 8 of the Convention. What the case law establishes is that some executive acts are presently non-justiciable by UK domestic courts if they constitute material steps in a process that leads to an Act of Parliament. That is because, in the UK constitutional arrangements, (1) the courts are not entitled to call into question any proceedings in Parliament or question the validity of Acts of Parliament, and (2) that has been interpreted to include pre-legislative steps of the kind in contemplation here.

[8] Through Decision I/7

[9] **UKR2Q 16**

[10] That said, elected Parliaments with clear mandates from their electorate are still capable of acting in breach of international obligations: see, for example, the statement of the UK's Minister for Northern Ireland on 8 September 2020 that elements of the Internal Market Bill would break international law "in a limited and specific way". In those circumstances, there is nothing dangerous or inappropriate about an international tribunal finding that the elected Parliament has acted in breach of its international obligations: see for example the European Court of Human Rights judgment in *Hirst v United Kingdom (No 2)* (2005) ECHR 681.

18. In other words, while pre-legislative executive acts do not constitute proceedings in Parliament or Acts of Parliament there have been circumstances in which the UK courts have still declined jurisdiction because:
    a. The remedy sought would have the effect of requiring, prohibiting or delaying the introduction of legislation to Parliament, which is properly a matter for Parliament and not the courts: see *Unison* at **[UKR2Q 29]**
    b. The remedy sought would have the effect of calling into question – explicitly or implicitly – the validity of the subsequent Act of Parliament: see *Adiatu* and *A, K, J, F, B* at **[UKR2Q 31-35]**

19. In circumstances where the Committee has no role to play in the UK's constitutional separation of powers and where its findings have no binding effect in domestic law, none of these concerns apply. Nor, as below, do they anyway provide some insuperable domestic barrier to proper operation of Article 8.

20. We do nonetheless respond to the UK's contention that Article 8 is somehow inconsistent with the Bill of Rights 1689 or the UK "constitutional" principle that proceedings in Parliament are non-justiciable. The highpoint of the UK argument is a point which first appeared in the UK's oral submissions to the Committee. The UK now says that, if the currently voluntary (and intermittent) practice of pre-legislative consultation on draft bills were somehow (such as by operation of Article 8) made mandatory that would (impermissibly in UK terms, so it is said) conflict with the UK "constitution". That (and here is the crux of the point) is because to be meaningful and enforceable that would require the courts to adjudicate on the legality of proceedings in Parliament which would (so the UK's complaint goes) be unconstitutional in the UK.

21. In answering that new concern, it is necessary to distinguish two things: (1) the prohibition on UK courts questioning proceedings in Parliament (arising from the Bill of Rights) and (2) the assumption that there would be no way to comply with Article 8 of the Convention, as regards the drafting of legislation, without transgressing that prohibition. That assumption is simply wrong.

22. While it is not for Friends of the Earth (or indeed the Committee) to prescribe how Article 8 compliance might be achieved, we note that there is a range of ways in which the UK could implement Article 8 in a manner which would not transgress the prohibition on UK courts questioning proceedings in Parliament. There could be a tapestry of measures to achieve compliance, including – for example:
    a. Parliament could enact legislation clarifying that the pre-legislative phase is not to be treated as part of the proceedings in Parliament, thereby permitting judicial review of failures to allow adequate public participation in the development of legislation that might have significant effects on the environment.
    b. Parliament could legislate for an administrative, non-judicial review process for complaints relating to a failure to allow adequate public participation in the development of such legislation[11], so long as that arrangement complied with Article 9, in that it was ultimately subject to oversight by the courts.
    c. Parliament could enact legislation requiring the executive to make a statement upon Introduction of any bill that might have significant effects on the environment, confirming that that there had been adequate public participation in the development of the bill itself, in accordance with the Gunning Principles and the requirements of Article 8 (akin to what is required under s 19 of the Human Rights Act 1998).
    d. Parliament could amend its Standing Orders to disallow presentation of any relevant bill that is not accompanied by such a statement.

23. Of course, all of these examples would need to be worked out in detail so that they did in fact deliver substantive compliance with Articles 8 and 3 whilst allowing for Article 9 compliance should a member of the public concerned need to vindicate their rights. We do not advance these measures to be prescriptive or to say that individually or collectively they are the only or best way to achieve compliance but to show that there are measures available to the UK in the implementation of Article 8 of the Convention in domestic law that would be entirely consistent with the Bill of Rights and would not transgress upon the prohibition of UK courts questioning proceedings in Parliament.

24. Consequently, even if the approach taken by the Committee to Article 8 were (for some reason) to be informed by the specifics of the current UK domestic arrangements, that would

[11] note that administrative review is capable of complying with Article 9 of the Convention

not provide any barrier to a finding that there has been a breach of Article 8 and Article 3 in this case.

25. Overall then, Friends of the Earth rejects the proposition that this communication *"is directly concerned with the legislative process in the UK Parliament"*. It is not. We accept that the Parliamentary process itself is outside the scope of Article 8 of the Convention.[12] However, we submit – consistently with the Committee's findings in ACCC/C/2014/120 – that the UK Government was under an obligation to promote effective public participation in the development of the proposals that became the European Union (Withdrawal) Bill before introducing it to Parliament. And it failed to do so. The complaint crystallised (here, at least) at the point when the Parliamentary Business and Legislation Committee approved its introduction to Parliament.

26. To suggest, as the UK Government does, that the Article 8 obligation does not apply to the executive at *any* stage of the development of legislation that may have significant effects on the environment is to denude the Article of its very purpose. One can see the fallacy of the argument if it is taken to its logical extreme. On the UK's position, the government could develop policy on a 'bonfire of environmental law' and draft legislation to repeal every piece of environmental regulation and would not, at any stage, need to promote public participation in the development of that policy or legislation. That cannot have been the intention of the parties when they negotiated the Aarhus Convention and it does not reflect the object and purpose of the Convention,[13] the language of Article 8, or the content of the Guide to Implementation.[14]

27. The fallacy of the UK's argument is also clear when one considers its consequences for Article 4 of the Convention on access to environmental information. A very substantial proportion of the work carried out by government departments is preparatory to legislation. Many pieces of legislation require years of preparatory policy work, correspondence between departments, and Ministerial briefings before draft legislation is introduced to Parliament. On the UK's preferred construction of Article 2, departments asked for such information would arguably be entitled to decline to provide it on the basis that they are – for the

[12] See our reply at para.2
[13] See paragraphs 6 and 7 of the Communicant's Reply dated 21 November 2018
[14] See paragraph 3 of the Communicant's Reply dated 21 November 2018

purposes of the request – acting in a legislative capacity and therefore not a "public authority".[15]

THE PARTY'S REPLY TO QUESTION 2

28. Question 2, as directed to the United Kingdom, focuses only on the effect of repealing Article 191 TFEU from UK law. In our response to the Committee's questions dated 31 August 2022, and in oral submissions before the Committee, Friends of the Earth has set out a number of additional ways in which the draft EUWB had potentially significant effects on the environment. Consequently, the UK Government is wrong to say at **[UKR2Q 41]** that *"it cannot be asserted in any other regard across the generality of EU environmental law that the WA 2018 itself risked any possible significant likely effect on the environment."*

29. In response to Question 2, the UK Government accepts at **[UKR2Q 42]** that Article 191 is no longer part of UK law but contends that this is of no consequence. Its reasoning, in essence, is that the repeal of Article 191 TFEU has not had a significant effect on account of, *inter alia*, the subsequent conclusion of the UK-EU Trade and Cooperation Agreement; the subsequent passing of the Environment Act 2021; and the subsequent creation of the Office for Environmental Protection – all of which embody similar legal principles. This response is flawed on a number of levels.

30. First, the question of whether the EUWB "may" have had significant effects on the environment has to be considered by reference to the position at the time the draft legislation was approved for introduction to Parliament, and not by reference to later events. The Aarhus Convention is concerned with procedural rights. A breach of a procedural right is not cured by a favourable substantive outcome (although we do also dispute that a favourable outcome is evident here on the facts).[16]

31. Secondly, on that basis, the UKR2Q proves the very point Friends of the Earth has been making: when developing policy and drafting the legislation that became the EUWB, the

[15] On this, see the approach of the CJEU in case C-204/09 *Flachglas Torgau v Germany*

[16] A parallel can be drawn with the Committee's decision in ACCC/C/2014/120 #109: the fact that the legislative provisions which had been consulted on were amended in the later parliamentary process did not mean there had not been A8 compliant consultation on the drafts; the reverse must also be true.

executive was engaged in the development of legally binding rules that had potentially significant effects on the environment. If, which is not accepted, subsequent legislative and treaty measures prevented the Bill from having such an effect, that underscores rather than undermines the complaint: the draft Bill was capable of having significant effects on the environment (positive or negative effects) and it was necessary to conclude further legislative and treaty instruments to mitigate some of these effects.

32. Thirdly, Friends of the Earth does not accept that the matters identified by the UK Government at **[UKR2Q 54 - 85]** render the repeal of Article 191 TFEU of no consequence. Claims of equivalence are clearly not justified. For example:

    a. The obligation on Ministers under s 19 of the Environment Act to have "due regard" to the policy statement on environmental principles is, on any interpretation, weaker than the obligatory requirements (the "shalls") in Article 191(2) TFEU. As an illustration, pursuant to Article 191(2) TFEU, a Union policy on the environment must be based on the precautionary, preventative, and polluter pays principles and aim at a "high level of protection". By contrast, under s 19 of the Environment Act, a Minister is entitled, when developing environmental policy, to pay due regard to these principles but give them very little weight or no weight at all in the final policy.[17] There is no requirement at all to "aim for a high level of protection". That is not an equivalent provision.
    b. The creation of the Office of Environmental Protection (OEP) does not render of no consequence the removal of the role of the European Commission. Apart from any other concern, the OEP is appointed directly by Government and subject to Government direction so is in no way comparable to the EU Commission which is independent of the organisations it oversees.
    c. Article 391(2) of the UK-EU Trade and Co-Operation Agreement does not prevent the UK from weakening environmental protections, except "in a manner affecting trade or investment between the Parties". Unless all environmental matters are to be treated as falling within that boundary (which seems highly unlikely), then Article 391(2) is not an effective, generalised non-regression clause.

[17] See *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) at [77] – [78], endorsed in *Bracking* (Party Annex 16) at [26]

33. Moreover, the UKR2Q fails meaningfully to engage with one significant issue raised by the Communicant , namely that without the input of EU law, the UK treats the Convention and the Committee's decisions as binding only in international law, only to be "taken into account by" the UK courts, and not necessarily followed.[18] By virtue of the EU's status as a party to the Convention, EU law – as it applied in the UK pre EUWB – in effect required compliance with the Convention and Committee decisions. For example, the UK only introduced court rules to give effect to the Committee's decision in ACCC/C/2008/33 after the CJEU ruled on the requirements for "prohibitive expense". The EUWB removed, or at least had the potential to remove (which is what matters here) that latter effect.

THE PARTY'S REPLY TO QUESTION 3

34. By question 3, the Committee seeks clarity on the purported relevance of the May 2018 consultation to the discharge of the UK's Article 8 obligation to promote effective public participation in the development of the draft European Union (Withdrawal) Bill, at an appropriate stage, and while options were still open. The UK's response at **[UKR2Q 90]** appears to be that the May 2018 consultation was "not… irrelevant" on account of the fact that the consultation opened six weeks before the legislative process concluded and informed public and parliamentary debate on the Bill.

35. Respectfully, the May 2018 consultation is irrelevant to the discharge of the UK's Article 8 obligation. The May 2018 consultation was not a consultation on the EUWB, but on, as its name suggests, environmental principles.

36. Moreover, the UK Government and Friends of the Earth agree that the Article 8 obligation did not apply to the legislative phase. While additional public participation in the legislative phase is desirable,[19] it is not a cure for a failure of the relevant public authority to comply with the obligation in the pre-legislative period.

37. In any case, the May 2018 consultation closed on 2 August 2018, some six weeks *after* the legislative process had concluded. On no sensible basis can such a consultation be

[18] See the Party's 2018 Observations at [127] and *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107
[19] See the preamble to the Convention: "Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings"

considered to have enabled effective public participation in the legislative process, while options were still open, let alone during the *preparation* of the EUWB *before* it was submitted to the legislature.

THE PARTY'S REPLY TO QUESTION 4

38. In question 4, the Committee asked the UK Government a simple factual question. It has, however, failed to provide a simple factual answer. The short answer is that the Bill was not made publicly available on Parliament's website until after it was introduced to Parliament on 13 July 2017. The Parliament website contained timeframes for each stage of the legislative process but did not invite public participation, ask any relevant consultative questions, or inform the public as to how best to make representations on the Bill.

39. At **[UKR2Q 96]**, the UK Government submits that *"throughout the whole of the legislative process, the ongoing participation of the public and representative consultative bodies is guaranteed."* Friends of the Earth does not understand that submission. When neither the Communicant nor the Party Concerned claim that Article 8 applied after introduction of the EUWB to Parliament, it is odd that the UK points to public participation in the post-introduction legislative process to demonstrate compliance with Article 8. This point was made in submissions during the hearing.

40. In any case, opportunities for public participation in the UK legislative process are opaque and unreliable. The House of Lords Select Committee on the Constitution concluded in its 2017 Report *The Legislative Process: The Passage of Bills Through Parliament*[20] that *"engaging the public with the legislative process is a challenge, as many of our witnesses suggested it was opaque to those not closely involved."*[21] It referred specifically to evidence from Mark Ryan, Senior Lecturer in Constitutional and Administrative Law at Coventry University, who gave the following evidence to the Committee:[22]

"It is of paramount importance for the principle of constitutionalism and participatory democracy that the public are connected to the internal legislative process at Westminster. This is crucial so that

[20] 24th Report of Session 2017-19 - published 8 July 2019 - HL Paper 393 at https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/393/39302.htm
[21] At [98]
[22] LEG0059 at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/legislative-process/written/81471.html

Parliament is not perceived to be an insular and inward looking legislative institution. It is fair to say that it appears that the public are not really involved in the legislative process. One of the barriers is the inherent complexity of parliamentary legislation, which to some extent is inevitable. The 2017-18 European Union (Withdrawal) Bill is a case in point, as its complexity and legal nuances are without doubt largely unfathomable to the general public. In addition, it does appear that the public have more of an opportunity to influence the legislative process at the draft stage of a Bill."

41. Moreover, as the UK Government identifies at **[UKR2Q 97(3)]** the obvious route for participation in the legislative process is through a constituent MP. Such MPs are under no obligation to pass on representations to appropriate Ministers or to ensure that representations are "taken into account as far as possible" in the legislative process, as would be required by Article 8 of the Convention. In short, access to a constituent MP does not satisfy the requirements of effective public participation.

42. Finally, public participation in the legislative process – to the extent it is available at all – is not participation at a stage where options are genuinely open. By the time a bill is introduced to Parliament the government has already agreed and settled all significant policy decisions relating to the draft bill[23] and has completed its assessment of all economic, social and environmental impacts of the draft bill.[24] Those are the very issues on which public participation is critical.

THE PARTY'S REPLY TO QUESTION 5

43. The Party's reply to question 5 is noted. Friends of the Earth observes that it is the consistent practice of UK Government departments, when carrying out proper consultation exercises, to summarise and publish the responses received (see para 5 above). That approach helps ensure compliance with common law consultation requirements, in particular the obligation conscientiously to take into account the consultation responses. If the UK Government had undertaken a proper consultation on the policy underpinning the EUWB and/or on the draft Bill itself, it would have created and published such a summary. The inability to provide any relevant documents in response to this question demonstrates that the correspondence received was not treated in the same way as ordinary consultation responses, and that no summary of the correspondence was created or published. That, in turn, shows that the correspondence was not properly taken into account by the UK Government at all, and is in

[23] See the Guide to Making Legislation at Chapter 7
[24] See the Guide to Making Legislation at Chapter 14

keeping with Friends of the Earth's submission that effective public participation in the preparation of the draft EUWB did not take place.

THE PARTY'S REPLY TO QUESTION 7

44. In question 7, the Committee asked the UK Government to provide evidence to demonstrate that government ministries/agencies engaged in the preparation of draft legislation that may have a significant effect on the environment are required to apply the Consultation Principles when doing so. It has not done so because there is no such evidence. Moreover, it has not done so because the Consultation Principles do not specify *when* a consultation is required, only *how* a consultation should be conducted if it is carried out.

THE PARTY'S REPLY TO QUESTION 8

45. By question 8 the Committee invited the UK Government to provide extracts from case law to demonstrate that the courts require the *Gunning* principles to be applied during the preparation of draft legislation on behalf of the government. The UK Government of course cannot do so because, as it acknowledges, *"there is no requirement to consult before creating primary legislation"* and therefore no requirement even to comply with the *Gunning* principles should such a consultation be carried out voluntarily. [25]

46. That is the nub of this complaint. The UK Government has:
    a. failed to ensure effective public participation in the policy development or drafting of the EUWB, as required by Article 8 of the Convention; and
    b. failed to establish the clear, transparent and consistent framework needed to implement the provisions of the Convention which require public participation in the development of generally applicable legally binding rules that may have had a significant effect on the environment, as required by Article 3.

47. The Communicant does not understand the UK Government's concern that the communication and the Committee's questions *"indicate that the operation of a common*

[25] UKR2Q 109-111

law legal system is incompatible with the Convention"[26]. The communication does not contend that the common law is inherently flawed or incapable of providing clear, transparent and consistent legal frameworks in general. Instead, it maintains that the UK Government has not adequately implemented the provisions of the Convention requiring public participation in the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment, and that the common law has not ridden to the rescue to fill the gap. That is unsurprising. In common law systems, new treaty obligations frequently require legislation to ensure their implementation in domestic law.

48. The UK Government's summary of common law consultation requirements at **[UKR2Q 105-116]** illustrates the problem. It does not identify any case law demonstrating that the common law contains a requirement for consultation or other public participation in the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. The *Gunning* principles only determine *how* a consultation should be carried out, not *whether* it should be carried out. The *Plantagenet Alliance* case demonstrates that a legal requirement for consultation may arise where there is a statutory obligation to do so or where there has been a clear promise to consult, or an established practice of consulting, or where failure to consult would result in conspicuous unfairness. But none of the cases demonstrate an obligation to consult in all the circumstances required by the Convention.

49. The UK Government cites *Greenpeace* at **[UKR2Q 106]** and suggests that "in part" the common law obligation to consult in that case arose from the Convention. That is not, however, the *ratio* of the case. The obligation to consult in that case arose from the more traditional ground of legitimate expectation. While the Convention may have bolstered the traditional common law position, it did not operate as a self-standing ground requiring consultation.

50. As a result, the UKR2Q confirms that i) the UK Government has not introduced legislation to implement the public participation obligations of the Convention under Article 8; and ii) English common law does not fill the resulting gap because it does not require a public

[26] UKR2Q 13

authority to consult on the preparation of executive regulations and other generally applicable legally binding rules on the ground that they may have significant effects on the environment. That is a breach of Article 3 of the Convention.

51. But, as stated above, it is important to be clear that this does not amount to an attack on the common law. Just because the common law (i.e. judge-made law) has not as a matter of fact provided an Article 3 compliant framework in the UK, that does not mean that an Article 3 compliant framework could not be enacted through legislation or developed through case law, or both. The introduction – through legislation and/or case law – of a legal obligation on the executive to provide the public with an opportunity to participate in the development of draft legislation that may have significant effects on the environment is entirely consistent with the UK's constitutional arrangements.

THE PARTY'S REPLY TO QUESTIONS 9, 10 AND 11

52. The UK Government's responses to questions 9, 10, and 11 are noted.

THE PARTY'S REPLY TO QUESTION 12

53. The Communicant does not understand the UK Government's reply to question 12. First, Parliament is clearly excluded from the definition of "public authority" in Article 2 of the Convention and therefore the legislative process in Parliament does not fall within the scope of Article 8(c). Further, even if Parliament was a public authority for the purposes of Article 2 of the Convention, Parliament could not perform the role of a representative consultative body making representations to itself. The Party's submissions are, in this regard, non-sensical.

THE PARTY'S REPLY TO QUESTION 13

54. The Party's reply to question 13 is noted. The inadequacy of current arrangements for public participation in the parliamentary process is set out at [21] – [23] above.

THE PARTY'S REPLY TO QUESTION 14

55. The Party's reply to question 14 is noted.

CONCLUDING COMMENTS

56. In signing and ratifying the Aarhus Convention, the UK undertook to provide its citizens with very important procedural rights to further the objective of environmental justice. The UK has recently reaffirmed its commitment to the Convention.[27] However, the general flavour of the UK's approach in this Communication is that the Convention should be interpreted in such a narrow way so as to effectively work around the UK's legal system and laws as they stand now, and that any finding of a breach would imply some sort of an "attack" on the UK's common law system.

57. That is putting things entirely the wrong way round. The UK is a signatory to and has ratified the Convention. It is for the UK to ensure that it is compliant with the Convention. There is nothing in the UK's common law system which precludes that. The UK nonetheless complains in various ways about the Convention and about the Committee and its approach. All of that is regrettable. It is particularly unfortunate that the UK has treated the Committee's questions as being somehow hostile or otherwise inappropriate. The questions to both parties properly sought to clarify aspects of our respective positions in an entirely properly way.

58. Despite the passage of time, the communication remains important in ensuring that there should be no repeat of what went wrong here. In the context of the climate and nature crises,

[27] See statement made by Victoria Prentis (then Parliamentary Under Secretary of State at Defra; now Minister of State at Defra) on 6 September 2021: "The Government is committed to the continued effective implementation of our international obligations under the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters. The Government strongly supports the contribution the Convention makes to enhancing environmental protection and remains committed to its objectives." At https://questions-statements.parliament.uk/written-questions/detail/2021-08-18/40934.
Also, on 3 November 2020, Rebecca Pow (then Parliamentary Under Secretary of State at Defra) said: "I thank the hon. Gentleman for drawing the Committee's attention to the Aarhus convention, which is of course an international agreement. I do not deny its importance, so he and I agree on that. The UK ratified the convention in 2005, and we remain a party to it in our own right. Our exit from the EU does not change our commitment to respect, protect and fulfil the rights contained in this important international agreement. Implementation of the Aarhus convention is overseen by the Aarhus convention compliance committee, and the Department for Environment, Food and Rural Affairs co-ordinates the UK's ongoing engagement with the committee on our implementation and on findings pertaining to the UK on specific issues. The committee has welcomed the willingness of the United Kingdom to discuss compliance issues in a constructive manner." See: https://hansard.parliament.uk/Commons/2020-11-03/debates/c1ef941e-1c11-4e5e-8d66-dd276f6d70e1/EnvironmentBill(NinthSitting)?highlight=aarhus#contribution-A8A4897C-4135-409C-B9B5-1112EFE66C52

it remains of continuing importance that the public do have a guaranteed right to participate in the preparation of draft legislation that may affect the environment.

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28 September 2022