

THE “FINDINGS” IN COMMUNICATION 2017/150

Purpose

1. *To provide awareness* - of draft findings that will inform the way the SCJC responds to communication ACCC/C/2025/216.

Background

2. Until this year, there had been no ACCC ‘findings’ specific to a decision “not to consult” as part of an allegation of non-compliance with article 8. That changed on 7 July 2025 when the ACCC issued delayed ‘findings’ on an allegation first made against the UK 8 years ago in ACCC/C/2017/150 (**Paper 4.3A**).
3. Those draft findings were finalised on 3 October 2025 and on 30 October 2025 the UK lodged strong objections to the conclusions reached. They awaits a response from the 17-20 November 2025 Meeting of the Parties (MOP).
4. The relevant timeline for that communication has been:
 - *During 2017* – in advance of implementing its exit from the European Union:
 - The UK progressed a set of draft rules (*the “withdrawal act”*) and took a decision not to consult (for what it considered to be valid reasons); and
 - A communication (ACCC/C/2017/150) was soon lodged that alleged that those draft rules had been prepared in a manner that was non-compliant with both Article 3 (1) and Article 8 of the Convention, due to a failure to consult.
 - *On 8 October 2025* - the ACCC issued its draft findings in that case (**Paper 4.3A**) and concluded that the UK member state was non-compliant with Article 8 due to “a failure to consult”, and also non-complaint with article 3 (1) as officials had taken an inconsistent approach when deciding whether (or not) to consult.
 - *On 30 October 2025* – the UK Government responded (**Paper 4.3B**) stating that the UK completely disagrees with the findings reached and that the ACCC has exceeded its role (to the extent of encroaching on the sovereignty of the UK).
 - *On 17-20 November 2025* - those findings, and the UKs fundamental objection, were considered and accepted at the Meeting of the Parties (MOP), subject to any further developments with regard to the objection by the UK.
5. Irrespective of what develops regarding the UKs objections, the content of those findings does usefully inform the way the ACCC will consider the similar alleged failure of the SCJC to consult on the the 2024 Act of Sederunt.

The need to provide a “framework for implementation” under article 3(1)

6. Article 3 (1) does require a *public authority* such as the SCJC to have “**a clear, transparent and consistent framework**” in place to implement public participation in general, and more specifically regarding the decisions on any draft rules proposed by the Council that would fall under Article 8.
 7. Within their findings the ACCC had welcomed the guidance the UK had provided to officials by way of the “*Consultation Principles 2018*” and the “*Judge Over Your Sholder (JOYS)*” publication. Despite the quality of that guidance, the ACCC still concluded that the UK had fallen short of delivering “a **consistent** framework”:
 - *Firstly* - because the ‘Withdrawal Act’ could have had a significant effect on the environment, irrespective of whether it did or did not in practice; and
 - *Secondly* - because UK officials had decided “not to consult” on the ‘Withdrawal Act’ but had taken an entirely different decision when deciding “to consult” on the establishment of the statutory ‘environmental principles’.
 8. The ACCC saw that disparity as evidence of a clear “inconsistency” within the working practices adopted by officials, which in turn implied that the UK did not yet have the ‘framework’ needed for implementation of article 8.
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Reasonableness test - on the SCJC’s compliance with article 3 (1)

9. In Scotland that same guidance to officials applies by way of the “*Consultation Principles 2018*”. In addition the “[*Right First Time*](#)” publication from SGLD provides a Scottish equivalent of the “*Judge Over Your Sholder (JOYS)*” publication that’s used in E&W.
10. When assessing compliance the key positives in the SCJCs favour are:
 - *Additional Guidance* – the publication of “*The ‘consultation process’ used by the SCJC (Aug 2025, SCJC)*” has set out the “way we consult” in some detail and that procedure is closely followed by officials. The ACCC may consider the content of that report does make a more positive contribution towards meeting the requirement to provide a “**clear, transparent and consistent framework**” (for article 8 public participation on draft rules).
 - *Consistency (of decision makers)* – all decisions on when and how to consult on our draft rules are made by a small number of officials within the secretariat and members of the Council. That significantly reduces the risk of inconsistency compared to having such decisions made by a myriad of officials across Whitehall and beyond.
11. To further mitigate risk, our procedure was updated in August 2025 to require officials to assess whether (or not) each draft rules instrument “may” have a

significant effect on the environment, and then state the outcome of their assessment within the Public Consultation paper when issued:

Para 33 – “Where a proposed change will have an impact on the environment then the Consultation Paper is to include:

- An assessment of any “significant effects” on the environment from the proposed change, the opportunities to avoid or reduce any adverse effects and the opportunities to enhance any positive effects; or*
- An assessment of why the proposed change falls below that threshold and would be characterised as only having a “moderate effect” or a “minimal effect” or an “indirect effect” or “no effect” on the environment.”*

Recommendation

12. It is recommended that the Council notes that:

- The draft findings as set out within communication ACCC/C/2017/150 (*paper 4.3A*) was tabled at the 17-20 November 2025 Meeting of the Parties (MOP); and**
- That whilst that decision was discussed by the MOP it does remain subject to any further development regarding the objection lodged by the UK member state (*Paper 4.3B*).**

13. In addition, it is recommended the Council notes that:

- The secretariat will consider how the content of those findings inform the way the Council may choose to respond to ACCC/C/2025/216**

**Secretariat to the Scottish Civil Justice Council
December 2025**

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