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Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Compliance Committee

Eighty-eighth meeting

Geneva, 17–20 November 2025

Item 10 of the provisional agenda

Communications from the public

Findings and recommendations with regard to communication ACCC/C/2017/150 concerning compliance by the United Kingdom

Adopted by the Compliance Committee on 3 October 2025*

I. Introduction

1. On 31 October 2017, Friends of the Earth Ltd, an environmental non-governmental organization (NGO), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland (the Party concerned) failed to comply with articles 3(1) and 8 of the Convention regarding the preparation of draft legislation, known as the “Withdrawal Bill”, concerning its withdrawal from the European Union.¹

2. The communication contained three main allegations:

- The Withdrawal Bill’s preparation breached article 8 (first claim);
- Preparation of subsequent legislation would breach article 8 (second claim);
- The Party concerned has no clear, transparent, and consistent framework to implement article 8 (third claim).

3. At its fifty-ninth meeting (Geneva, 11–15 December 2017), the Committee determined that the communicant’s second claim was inadmissible on the ground that it

* This document was submitted late owing to additional time required for its finalization.

¹ The communication and related documentation is available at:
https://unece.org/env/pp/cc/accc.c.2017.150_united-kingdom.



concerned the content of draft legislation not yet finally adopted and therefore still subject to change.²

4. The communication was forwarded to the Party concerned on 5 January 2018 for its response by 5 June 2018.

5. On 29 June 2018, the Party concerned provided its response, after the above-mentioned deadline.

6. On 21 November 2018, the communicant requested the Committee to reconsider its determination that its second claim was inadmissible.

7. At its sixty-third meeting (Geneva, 11–15 March 2019), the Committee confirmed its determination of inadmissibility regarding the second claim because the request for reconsideration had been submitted after the five-week deadline for such requests.³

8. The Committee held a hearing to discuss the substance of the communication at its seventy-sixth meeting (Geneva, 13–16 September 2022), with the participation of the communicant, the Party concerned and observers Irish Environmental Network and World Wide Fund for Nature–United Kingdom (WWF-UK).

9. The Committee completed its draft findings through its electronic decision-making procedure on 1 July 2025. The draft findings were forwarded on 7 July 2025 to the Party concerned and the communicant for possible comments by 18 August 2025.

10. On 14 August 2025, the Party concerned requested further time to comment on the draft findings. On 15 August 2025, the Committee Chair decided exceptionally to grant an extension until 8 September 2025 for comments on the draft findings.

11. On 8 September 2025, the communicant and observer Environmental Law Ireland submitted comments. On that date, the Party concerned stated that it was continuing to consider the implications of the draft findings and was not yet in a position to provide its comments.

12. On 15 September 2025, at the Committee’s request and instructions, the secretariat held a call with the Party concerned to: explain that the six-week deadline for comments on draft findings is set out in the *Guide to the Aarhus Convention Compliance Committee*⁴ and the extension granted by the Chair on 15 August 2025 was therefore exceptional; clarify the nature of the comments stage in the Committee’s procedure, in particular that this is not an opportunity to “re-litigate” the legal issues considered in the draft findings; outline the timeframe for the Committee to finalize all findings and reports for the eighth session of the Meeting of the Parties (Geneva, 17–19 November 2025); and stress the importance of the Committee adhering to its procedures and treating all Parties equally. In response to the Committee’s enquiry, the Party concerned repeated that it was unable to indicate by when it would provide its comments.

13. The Committee adopted its findings through its electronic decision-making procedure on 3 October 2025. The Committee agreed that the findings should be published as a formal pre-session document to its eighty-eighth meeting (Geneva, 17–20 November 2025).

II. Summary of facts, evidence and issues

A. Legal framework

European Union Withdrawal Bill

14. Clause 2(1) of the “European Union (Withdrawal) Bill” (the Withdrawal Bill or the Bill) states that European Union-derived domestic legislation: “as it has effect in domestic

² ECE/M.P.PP/C.1/2017/23, para. 52.

³ ECE/M.P.PP/C.1/2019/2, para. 53.

⁴ ECE, second edition (2019), para. 99.

law immediately before exit day, continues to have effect in domestic law on and after exit day.”⁵

15. Clause 6(1)(a) provides that: “A court or tribunal – (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court”. Clause 6(4)(a) states that: “the Supreme Court is not bound by any retained EU case law”.⁶

16. Clause 7 provides that:

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.

...

(4) Regulations under this section may make any provision that could be made by an Act of Parliament.

(5) Regulations under this section may (among other things)—

(a) provide for functions of EU entities or public authorities in member States ... to be –

- (i) exercisable instead by a public authority ... in the United Kingdom, or
- (ii) replaced, abolished or otherwise modified,⁷

...

(7) No regulations may be made under this section after the end of the period of two years beginning with exit day.⁸

17. Clause 9 provides that:

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.

...

(4) Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).⁹

Guidance for officials

18. In 2012, the Cabinet Office issued guidance entitled “Consultation Principles” on what should happen when consultation takes place.¹⁰

19. The Government has published guidance entitled “The Judge Over Your Shoulder” (JOYS), which summarizes for officials the common law relevant to their work.¹¹

⁵ Communication, annex 2a, p. 4.

⁶ Ibid., annex 2a, pp. 6–7.

⁷ Ibid., annex 2a, pp. 8–9.

⁸ Ibid., annex 2a, pp. 8–9.

⁹ Ibid., annex 2a, p. 9–10.

¹⁰ Party’s response to communication, para. 129.

¹¹ Ibid., para. 125.

B. Facts

20. On 23 June 2016, a referendum took place in the Party concerned and Gibraltar on remaining in or leaving the European Union. A majority of 51.9 per cent voted in favour of leaving.¹²

21. On 29 March 2017, the Party concerned notified the President of the European Council, initiating the withdrawal process.¹³

22. On 30 March 2017, the Government published the document *Legislating for the United Kingdom's withdrawal from the European Union* (the “White Paper”), setting out its main objective and approach in legislating withdrawal from the European Union.¹⁴ Page 12 of the White Paper stated that “the Government welcomes feedback on this White Paper. Comments can be sent to repeal-bill@dxeu.gov.uk”.¹⁵

23. The Withdrawal Bill received its first reading in the House of Commons on 13 July 2017 and was introduced into the House of Lords on 18 January 2018. The Bill was agreed by both Houses of Parliament on 20 June 2018 and received Royal Assent on 26 June 2018, thereby becoming an Act of Parliament.¹⁶

C. Domestic remedies and admissibility

24. The Party concerned submits that the communication is inadmissible because:

(a) It does not fall within the scope of the Convention;

(b) The allegations under article 8 are unsubstantiated and an abuse of the right to bring a communication (decision I/7, annex, para. 20(b));

(c) The allegation concerning article 3(1) is manifestly unreasonable due to an absence of sufficient information (decision I/7, annex, para. 20(c));

(d) At the time the communication was filed the Bill was before the House of Commons, meaning that it was subject to parliamentary scrutiny. The communication was therefore premature.¹⁷

D. Substantive issues

Applicability of article 8

Generally applicable legally binding normative instruments

25. The Party concerned submits that article 8 applies only to secondary legislation. Primary legislation, such as the Withdrawal Bill, is outside its scope because:

(a) The definition of “public authority” in article 2(2) shows that bodies or institutions acting in a “legislative capacity” are not subject to the Convention;

(b) Recital 11 of the Convention acknowledges that the Convention does not apply to legislative bodies and “invites”, not “requires”, those bodies to implement its principles in their proceedings.

(c) Elected representatives are directly accountable to the public through the election process. *The Aarhus Convention: An Implementation Guide*¹⁸ (the Implementation

¹² Ibid., para. 14.

¹³ Ibid., para. 15.

¹⁴ Communication, p. 3; annex 1.

¹⁵ Party’s response to communication, para. 16.

¹⁶ Ibid., paras. 19, 23.

¹⁷ Party’s comments on admissibility, 8 December 2017, pp. 1–3.

¹⁸ Second edition (2014), United Nations publication, p. 181.

Guide) states that: “Governments were reluctant to negotiate specific requirements for parliaments, considering this a prerogative of the legislative branch”;

(d) It follows from the Committee’s findings on communication ACCC/C/2011/61 (United Kingdom) that, if the Crossrail Act had been an act of Parliament in the ordinary sense, rather than a decision to permit an activity, it would have fallen within the article 2(2) exclusion;

(e) The Implementation Guide, by suggesting that the term “rules” in article 8 is used broadly to cover “decrees, regulations, ordinances, instructions, normative orders, norms and rules”, thereby captures secondary legislation in all its forms, but not primary legislation.¹⁹

26. The Party concerned submits that its system has no distinct stage where the executive “signs off” on a draft bill and submits it to the legislature. The role of the government department and minister responsible does not end when draft legislation begins its parliamentary stages, by virtue of the minister being simultaneously a member of the executive and of the legislature.²⁰

27. The communicant submits that its communication concerns preparation of the Withdrawal Bill before it reached the legislature. It submits that when the executive, namely the Department for Exiting the European Union (DExEU), was preparing the draft Withdrawal Bill to introduce to Parliament, it was not acting in a legislative capacity, but as a public authority. Only at the point of the Bill’s introduction to Parliament did the legislative process begin and any relevant members of the executive to act in a legislative capacity.²¹

28. The communicant contends there is nothing in the wording of article 8 to suggest it applies only to secondary legislation. Such a reading would contradict not only the wording of the Convention, including its preamble, but also the Implementation Guide (p. 181), which states that: “the term ‘rules’ is here used in its broadest sense, and may include decrees, regulations, ordinances, instructions, normative orders, norms and rules”.²²

29. The communicant challenges the proposition that there is no clear dividing line between the executive and the legislature of the Party concerned when preparing primary legislation. It submits that the “hand over” takes place when the Parliamentary Business and Legislation Committee approves a bill’s introduction to Parliament.²³

Significant effect on the environment

30. To support its claim that the Withdrawal Bill may have a significant effect on the environment, the communicant cites amongst others the following examples:

(a) The Bill’s undermining of general principles of European Union environmental law, such as the precautionary, preventative and “polluter pays” principles in article 191(2) of the Treaty on the Functioning of the European Union (TFEU);

(b) Clause 6 of the Bill (see para. 15 above) provides that, when interpreting retained European Union environmental law, domestic courts are no longer legally bound by new Court of Justice of the European Union (CJEU) case law and the Supreme Court is empowered to depart from retained European Union case law;

(c) The Bill provides for ministers to amend or delete major aspects of the Party concerned’s environmental law as derived from European Union law. In particular, clauses 7–9 (see paras. 16–17 above) empower the executive to do this through secondary legislation, without parliamentary scrutiny or public participation.²⁴

¹⁹ Party’s response to communication, paras. 33–42.

²⁰ Party’s reply, 31 August 2022, paras. 19, 35, 37, 109–110.

²¹ Communicant’s comments, 21 November 2018, paras. 2–5.

²² *Ibid.*, paras. 4–7.

²³ Communicant’s comments, 28 September 2022, para. 9.

²⁴ Communicant’s reply, 31 August 2022, pp. 4–6.

31. The communicant submits that article 8 requires that the measure in question “may” have a significant effect on the environment – certainty is not required.²⁵

32. The Party concerned submits that the Bill does not have any effect on the environment, let alone a significant one. It explains that:

(a) In preparing the Bill, the Government’s intention was to secure the exit from the European Union but to preserve law as it stood on exit day;

(b) The Bill as enacted gives full effect to that intention;

(c) Given (a) and (b), the communicant’s suggestion that the Bill may have a significant effect on the environment is wholly unarguable.²⁶

33. The Party concerned submits that the Government’s intentions were set out in the Bill’s White Paper, the foreword to which states that: “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 before and immediately after our departure.” The foreword highlights that the Bill: “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”.²⁷

34. The Party concerned contends that the White Paper (para. 1.21) makes clear that such “correcting powers” are subject to limitations: “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”.²⁸ Any future measures which may have a significant effect on the environment will be preceded by consultation.²⁹

35. The Party concerned explains that the White Paper also carefully sets out the Government’s approach on how the effects of each source of European Union law will be retained. For example, European Union Regulations: “will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise”. CJEU case law will continue to apply after the exit and, to maximize certainty: “questions as to the meaning of EU-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”.³⁰

36. The Party concerned notes that the White Paper (para. 3.7) states that the Bill “will provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU” and that this will be done by using secondary legislation. The Party concerned submits that the above is consistent with the intention that the Bill should have no effect on Government policy or the environment.³¹

37. The Party concerned submits that the impact assessment accompanying the Bill does not identify a single environmental impact resulting from the Bill. Rather, the assessment confirms that the Bill is designed to “bring the maximum possible continuity and certainty and is not designed to bring in any substantive policy changes”.³²

38. Regarding clause 7 of the Bill, the Party concerned submits that ministers’ delegated power is limited in various ways:

(a) It can only be used to prevent, remedy or mitigate a deficiency arising from withdrawal;

(b) The deficiency must fall within the categories in clauses 7(2) or (3);

²⁵ Communicant’s comments, 21 November 2018, para. 8.

²⁶ Party’s response to communication, paras. 47–48.

²⁷ Ibid., para. 50.

²⁸ Ibid., para. 53.

²⁹ Ibid., paras. 59–60.

³⁰ Ibid., paras. 54–58.

³¹ Ibid., paras. 61–64.

³² Ibid., para. 69.

(c) Clause 7(6) imposes various limitations on the minister's discretionary power;

(d) The power is subject to a "sunset" provision and regulations can no longer be made after two years from exit day.³³

39. The Party concerned also submits that the affirmative or negative parliamentary scrutiny procedures may apply to statutory instruments made under clause 7.³⁴

40. The Party concerned claims that the limited scope of the powers under clause 7 is further emphasized by the Explanatory Notes³⁵ which the courts may use as an aid to interpretation.³⁶

41. The Party concerned submits that, consistent with the Explanatory Notes, following the passing of the Bill, the powers under clause 7 were not used to effect any change in policy.³⁷

42. The Party concerned accepts that article 191(2) of TFEU is no longer part of domestic law but claims that that does not mean that the principles thereunder cease to have effect. It submits that, in the first place, the principles under article 191(2) do not have direct effect and so do not ground actionable rights. Furthermore, such principles are given expression through various European Union laws transposed in the Party concerned, to be preserved following withdrawal, and case law concerning European Union environmental legislation, which is retained by the Bill. Moreover, common law itself recognizes and gives effect to these principles.³⁸

43. The Party concerned states that, in May 2018, the Department for Environment, Food and Rural Affairs (DEFRA) launched a consultation entitled "Environmental Principles and Governance after the United Kingdom leaves the European Union", which proposed to embody environmental principles, including those in article 191(2) of TFEU, in primary legislation or in statutory policy. Section 16 of the Bill, as enacted, required the Government to publish within six months of Royal Assent draft legislation setting out a list of environmental principles and to establish a public authority to take proportionate enforcement action should a minister not comply with environmental law.³⁹ The listed principles were transposed into domestic law through the Environment Act 2021 and the Office for Environmental Protection was established to replace the scrutiny and enforcement functions previously fulfilled by the European Commission.⁴⁰

44. The Party concerned submits that clause 6 does not demonstrate that the Bill may have a significant effect on the environment. Rather, it meant that European Union-derived environmental law was frozen at that point and the protections theretofore would continue.⁴¹

45. The Party concerned submits that, in the light of the foregoing, the Bill, as drafted and enacted, aimed at preserving existing European Union law after exit day, without having any effect on the environment. Accordingly, the Bill is not a generally applicable legally binding normative instrument which may have a significant effect on the environment and thus article 8 of the Convention was not engaged by its preparation.⁴²

Article 8 – public participation on Withdrawal Bill

46. The communicant alleges that there was no formal public consultation on the Withdrawal Bill before it was presented to Parliament and none of the minimum requirements in article 8, paragraphs (a)–(c), were met.⁴³

³³ Party's response to communication, para. 70.

³⁴ Ibid.

³⁵ Available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>.

³⁶ Party's response to communication, paras. 71–73.

³⁷ Party's reply, 31 August 2022, para. 51.

³⁸ Ibid., paras. 42–50, 84.

³⁹ Party's response to communication, paras. 81–85.

⁴⁰ Party's reply, 31 August 2022, paras. 59–64, 74–80; annex 17.

⁴¹ Party's reply, 12 September 2022, paras. 9–12.

⁴² Party's response to communication, para. 87; Party's reply, 31 August 2022, para. 84.

⁴³ Communication, p. 8.

47. The communicant submits that the White Paper was not a public consultation process. While the White Paper provided an email address for feedback, it did not request public responses as part of an express consultation and the Government published no response regarding the feedback it may have received.⁴⁴

48. The communicant submits that the Explanatory Notes for the draft Bill do not refer to any public consultation.⁴⁵

49. The communicant submits that article 8 requires Parties to strive to promote “effective public participation”. As mentioned in the Implementation Guide (p. 181), article 8 should be interpreted as obliging Parties to take “concrete measures”. Moreover, the Implementation Guide (p. 183) states that draft rules should be published or otherwise be made publicly available under article 8, paragraph (b), yet the Bill was not published before entering Parliament.⁴⁶

50. The communicant claims that the referendum only concerned whether the Party concerned should leave the European Union, and not how or what that may mean for the environment.⁴⁷

51. Observer Irish Environmental Network submits that the possibility for members of the public to engage with their Members of Parliament does not mean that their views will be given voice, particularly where their views do not coincide with those of the Member of Parliament.⁴⁸

52. The Party concerned submits that, should the Committee conclude that the Bill falls within article 8, its position is that sufficient public participation was provided. It argues that the requirements under article 8 are “more flexible in nature” than those under articles 6–7. It cites the Committee’s findings on communication ACCC/C/2010/53 (United Kingdom) in which the Committee held that: “The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner” and that “Parties are then left with some discretion as to the specificities of how public participation should be organized”.⁴⁹ The Party concerned submits that article 8 can be satisfied both by the direct participation of the public and through the participation of “representative consultative bodies”.⁵⁰

53. The Party concerned contends that article 8 imposes a requirement of effective “public participation” which is not the same as “public consultation”. Furthermore, the Implementation Guide (p. 181) states that article 8 imposes “a comparatively soft obligation to use best efforts” and that “the measurement of the extent to which parties meet their obligations under article 8 is not based on results, but on efforts”. Therefore, the absence of a formal public consultation does not in itself breach article 8.⁵¹

54. The Party concerned submits that neither the Explanatory Notes nor the Impact Assessment refer to the feedback received on the White Paper because it is not the practice to include these matters in such documents. This does not mean that the responses were ignored, as they were not.⁵²

55. Regarding public participation on the Bill and the European Union withdrawal generally, the Party concerned highlights the following:

(a) The extensive period of campaigning prior to the national referendum on exiting the European Union, which represented the most direct possible approach to securing

⁴⁴ Ibid., p. 3.

⁴⁵ Communication, p. 9; annex 2b.

⁴⁶ Communicant’s comments, 21 November 2018, para. 14.

⁴⁷ Ibid., para. 15.

⁴⁸ Observer statement, Irish Environmental Network, 14 September 2022, p. 1.

⁴⁹ ECE/MP.PP/C.1/2013/3, para. 84.

⁵⁰ Party’s response to communication, paras. 88–90.

⁵¹ Ibid., paras. 92–94.

⁵² Ibid., para. 20.

correlation between the public's view and the policy decision. The public debate also covered the environmental consequences of exit;

(b) The extensive debate in the media and public sphere as well as in Parliament following the referendum, during which the Bill was being prepared;

(c) The general elections in 2015 and 2017;

(d) The White Paper, which was intended to enable a constructive and open dialogue with Parliament and a broad spectrum of key stakeholders. Page 12 of the White Paper stated that "the Government welcomes feedback on this White Paper. Comments can be sent to repeal-bill@dexeu.gov.uk". Several responses to the White Paper were sent to DExEU. A dedicated inbox was established to receive responses and the Bill management team read, and considered, those responses;

(e) The draft Bill was made publicly available on the Parliament's website, and the ongoing participation of the public and of representative consultative bodies was guaranteed by their directly elected Members of Parliament;

(f) Each stage of the Bill's progress through parliament was published online, with "clear time frames" for the next stage;

(g) While the final draft of the Bill was before the House of Commons and the House of Lords, members of the public, interest groups and other organizations were free to scrutinize its text and campaign for amendments. The Bill's passage through Parliament demonstrates that such public participation was taken into account;

(h) The Bill was committed to a Committee of the Whole House and received significant parliamentary scrutiny. All Members of Parliament and peers were able to participate and over 1,400 amendments were tabled and debated;

(i) The Government's responsibility for the Bill did not end upon its introduction to Parliament: ministers were still able to table amendments until the Bill completed its passage through Parliament;

(j) There was extensive engagement with Parliament and external stakeholders from the start of legislating for the withdrawal. DExEU sent stakeholder bulletins to around 850 subscribers;

(k) DExEU officials engaged with groups established by other government departments, and organized and attended academic roundtables to discuss and hear views on the Bill;

(l) During the Bill's passage, DExEU ministers made multiple appearances at parliamentary committees, and the Government published various responses to select committee reports on the Bill;

(m) Between January 2017 and June 2018, DExEU received over 122 letters regarding the Bill sent either directly to ministers or forwarded from other parliamentarians or stakeholders;

(n) The Delegated Powers and Regulatory Reform Committee prepared a Delegated Powers Memorandum, published online on 13 July 2017, to assist its scrutiny of the Bill. The Committee's remit 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 can call people to give oral evidence and members of the public can write to Committee members asking them to raise specific issues. The Committee's report was published on 28 September 2017. An updated Delegated Powers Memorandum was provided to the Committee on 18 January 2018 and the Committee published a new report on 1 February 2018.⁵³

56. The Party concerned submits that, if the Committee were to embrace the artificial distinction between the Government when it prepares legislation prior to introducing a bill to

⁵³ Party's response to communication, paras. 16–20 and 88–113; Party's reply, 31 August 2022, paras. 96–97, 122, 132–134; annex 24.

Parliament and the legislative process once a bill is before Parliament, Parliament itself should be regarded as a “representative consultative body” under article 8, paragraph (c).⁵⁴

57. The Party concerned contends that a large number of amendments were proposed by members of the House of Commons and House of Lords as a result of “Greener UK” briefings, a group to which the communicant belongs.⁵⁵

58. Lastly, the Party concerned submits that the Committee’s recommendation that final versions of normative instruments be accompanied by “an explanation of the public participation process and how the results of the public participation were taken into account”,⁵⁶ is one way of demonstrating this but not the only way. The extensive public participation on the Withdrawal Bill was taken into account during both the preparatory and legislative processes.⁵⁷

Article 3(1)

59. The communicant claims that the Party concerned’s failure to implement article 8 breaches article 3(1) since there is no “clear, transparent and consistent framework” that achieves compliance with article 8.⁵⁸

60. The communicant submits that the Consultation Principles (see para. 18) refer to the possibility of consulting on legislation but there is no guidance on the circumstances when consultation must occur.⁵⁹ Nor does the common law establish “when” consultation needs to take place. Moreover, judicial discretion operating “after the event” to remedy breaches in applying a non-binding code of conduct cannot achieve a “consistent framework”.⁶⁰

61. Observer WWF-UK submits that the absence of a system ensuring public participation creates uncertainty and leaves consultation wholly at governmental discretion, which is not what the Convention intends.⁶¹

62. The Party concerned submits that article 3(1) imposes an obligation “to develop implementing legislation, executive regulations” and “other measures” to “establish and maintain a clear, transparent and consistent framework” but does not require such “other measures” to be legally binding. The Party concerned cites the Committee’s findings on communication ACCC/C/2004/1 (Kazakhstan) in which it held that article 3(1) would be satisfied by “providing clear instructions on the status and obligations of bodies performing functions of public authorities”, and to the Implementation Guide, which states that possible “other measures” might include strategies, codes of conduct and good practice recommendations. It asserts that the Consultation Principles clearly fall into the category of “other measures” and are akin to a “code of conduct” for implementing the Convention.⁶²

63. The Party concerned submits that the common law has developed principles on when consultation is required and what it must involve. It submits that the common law is part of a “clear, transparent and consistent framework” under article 3(1).⁶³

64. The Party concerned states that JOYS (see para. 19) summarizes for officials the common law relevant to their work and is intended to ensure that officials take their obligations arising, *inter alia*, under the common law into account.⁶⁴

⁵⁴ Party’s reply, 31 August 2022, paras. 124–129.

⁵⁵ Party’s response to communication, paras. 138–139.

⁵⁶ ECE/MR.PP/C.1/2017/11, para. 58(h).

⁵⁷ *Ibid.*, paras. 115–116.

⁵⁸ Communication, p. 9.

⁵⁹ *Ibid.*, p. 2.

⁶⁰ Communicant’s comments, 21 November 2018, para. 19.

⁶¹ Observer statement, WWF-UK, 20 September 2022, para. 4(d).

⁶² Party’s response to communication, paras. 121–122.

⁶³ Party’s reply, 31 August 2022, paras. 105–117.

⁶⁴ *Ibid.*, paras. 119–121.

III. Consideration and evaluation by the Committee

65. The United Kingdom of Great Britain and Northern Ireland deposited its instrument of ratification of the Convention on 23 February 2005, meaning that the Convention entered into force for the Party concerned on 24 May 2005.

Admissibility

66. Regarding the Party concerned’s submissions on admissibility (see para. 24), having determined the communicant’s second claim to be inadmissible, the Committee considers that its first and third claims are neither manifestly unreasonable nor amount to an abuse of the process. The Committee is asked to review the compliance of a public authority (DExEU) with article 8 and the existence of a clear, transparent and consistent framework to implement article 8. This *prima facie* falls within the scope of the Convention. The Committee also does not consider that the communicant failed to provide sufficient information for the Committee’s assessment. The Committee therefore determines the communicant’s first and third claims to be admissible.

Scope of consideration

67. Having determined the communicant’s second claim to be inadmissible, the Committee will not review any legislation or other measures adopted after the Withdrawal Bill’s enactment.

68. The Party concerned has made extensive submissions on the powers of domestic courts to review primary legislation.⁶⁵ The Committee reminds the Party concerned that, in accordance with article 15 of the Convention, its review is limited to compliance with the Convention’s provisions, that is to say, the Party concerned’s international law obligations under the Convention, and not the domestic law validity of national legislation which is the purview of domestic courts. Contrary to the Party concerned’s suggestion, there is therefore no risk that a finding of non-compliance by the Committee would undermine the principle of parliamentary sovereignty. Were there to be such a finding, it would be for the Party concerned in the exercise of its sovereign powers to determine how to bring its processes into compliance with the Convention within the framework of its constitutional structures. In this context, the Committee recalls article 27 of the Vienna Convention on the Law of Treaties, whereby a Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

69. The Committee notes the parties’ references⁶⁶ to the CJEU judgment in *Flachglas Torgau GmbH v. Federal Republic of Germany*.⁶⁷ The Committee’s role is to review compliance by Parties with their Convention obligations.⁶⁸ The CJEU is an institution of the European Union, which is a Party to the Convention. Thus, CJEU decisions are themselves subject to the Committee’s review.⁶⁹ The CJEU, as the courts of any Party, has the right to develop its own jurisprudence, provided that it meets the Convention’s requirements. The Committee is not, however, bound by CJEU jurisprudence.

Article 8 – applicability to Withdrawal Bill

70. Article 8 applies to “executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment”.

71. The Party concerned has contested the application of article 8 to primary legislation generally and the Withdrawal Bill specifically.

72. Consistent with article 31 of the Vienna Convention on the Law of Treaties, in addressing the interpretation of article 8, the Committee is first and foremost guided by the

⁶⁵ *Ibid.*, paras. 26–37, 109–110.

⁶⁶ Party and communicant’s submissions, 28 September 2022.

⁶⁷ Case C-204/09, of 14 February 2012.

⁶⁸ Decision I/7, para. 1.

⁶⁹ ECE/MP/PP/C.1/2017/7, paras. 39–40.

ordinary meaning of the Convention's terms, read in their context and in the light of the Convention's object and purpose.

(a) *Preparation by a public authority of executive regulations and other generally applicable legally binding rules*

73. The Party concerned claims that primary legislation falls within the article 2(2) exclusion for bodies acting in a legislative capacity. The Party concerned submits that article 8 is therefore not engaged by the Withdrawal Bill.⁷⁰

74. The Committee recalls its findings on communication ACCC/C/2014/120 (Slovakia), in which it held that:

95. The Committee considers that there is nothing in the title or text of article 8 of the Convention to suggest that it does not include the preparation of legislation by executive bodies to be adopted by national parliaments. On the contrary, although the terms "legislation" and "laws" do not appear in the provision, the wording of article 8 and the ordinary meaning given to its terms nevertheless support the inclusion of legislation and other normative instruments of a similar character.

96. First, article 8 refers to "generally applicable legally binding normative instruments", which is exactly what legislation is. The Committee understands this as a generic expression intended to cover different kinds of generally applicable legally binding normative instruments, which may be referred to in different ways in different jurisdictions. In addition to draft legislation prepared by executive bodies to be adopted by national parliaments, the provision also applies to the preparation by executive bodies of other generally applicable legally binding normative instruments to be adopted by local or regional assemblies, whether or not the outcome is referred to as "legislation".

97. Second, the term "generally applicable legally binding normative instruments" is included in addition to "executive regulations". If article 8 was only intended to apply to such regulations by the executive branch, then there would be no reason to add the reference to generally applicable legally binding normative instruments. In this context, the Committee recalls its findings on communication ACCC/C/2009/44 (Belarus), where it stressed that "the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment". The Committee also notes that this view is supported by the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making on Environmental Matters*, which, on several occasions refer to "executive regulation or law" or similar expressions, where "law" is shorthand for "generally applicable legally binding normative instruments". It is thus clear to the Committee that article 8 of the Convention applies also to the preparation of legislation by executive bodies to be adopted by national parliaments.⁷¹

75. The Party concerned has invited the Committee to reconsider the above findings, in particular because the applicability of article 8 was not contested regarding that communication. However, the Committee considers that the above reasoning is equally valid for the present communication. The wording of article 8 clearly indicates the drafters' intention to cover any normative instrument, including the preparation of draft primary legislation, that may have a significant effect on the environment. That is illustrated by the reference to both "executive regulations" and "other generally applicable legally binding rules", which is intended to encapsulate the differences in terminology and legislative processes between Parties.

76. That interpretation is further supported by the object and purpose of the Convention, which is *inter alia* to enhance transparency in decision-making in all branches of government (preambular paras. 10–11). Limiting the scope of article 8 to secondary legislation, as

⁷⁰ Party's response to communication, para. 6.

⁷¹ ECE/MPP/C.1/2021/19, paras. 95–97.

submitted by the Party concerned, would run counter to that objective and unduly limit the scope of the obligation under article 8 to conduct public participation.

77. The Committee recalls that the Implementation Guide (p. 181) explains the obligation in article 8 as follows: “The Convention addresses the role of the executive branch of government in lawmaking, and specifically provides that the public must be involved. Public participation in the making of law is thus an important aspect of the overall scope of the Convention.”

78. The Implementation Guide (p. 181) then specifically addresses the applicability of article 8 to draft primary legislation as follows:

Another significant part [of a public authority’s responsibilities] is carried out by developing and passing rules of general application. The term ‘rules’ is here used in its broadest sense ... It also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Article 8 established public participation in the preparation of such rules as a goal of the Convention, and sets forth certain requirements that Parties should meet in reaching it.

79. The Committee therefore confirms that article 8 in principle covers both the preparation of draft primary legislation, such as the Withdrawal Bill, and secondary legislation.

80. In its findings on communication ACCC/C/2014/120 (Slovakia), the Committee continued that:

98. While article 8 of the Convention is thus applicable to legislation, article 2(2) sets out that the definition of “public authority” does not include bodies or institutions acting in a legislative capacity. The question then arises of what is covered by that provision. When do bodies or institutions of a Party act in a legislative capacity, and more specifically, when in the process starting with the preparation of legislation does a body or institution act in a legislative capacity? Although the Convention does not set out exactly when a body or institution – be it central, regional or local – acts in a legislative capacity, it is clear that the Convention only excludes the body or institution when it acts in this specific capacity. Accordingly, a parliament may act as a public authority under the Convention when it is not acting in its legislative capacity, for example when authorizing an activity or project. The Committee thus understands the expression “legislative capacity” to have a rather precise meaning, referring to the acts of the body when it is indeed legislating, that is to say, when it uses its legislative power, but not when it carries out other functions.

99. The understanding of “acting in legislative capacity” as having a rather strict and precise meaning implies that it only covers activities by the body or institution with the capacity and power to adopt the legislation. This understanding is also supported by the French and Russian versions of the Convention (in French “dans l’exercice de pouvoirs ... législatifs” and in Russian “действующие в законодательном качестве”). Taking into account that the legislative process is likely to differ between the Parties, the Committee also considers that this strict understanding ensures a uniform application of article 2 (2) of the Convention by the Parties. ... Lastly, the understanding of the phrase “acting in legislative capacity” as not including executive bodies in the preparatory proceedings when drafting legislation to be adopted by the national parliament is in line with the eleventh recital of the preamble of the Convention, whereby the Parties invite the “legislative bodies to implement the principles of this Convention in their proceedings”.

100. The Committee thus concludes that the reference to bodies and institutions acting in their legislative capacity does not exclude public authorities, including the Government, when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation.⁷²

⁷² ECE/MR.PP/C.1/2021/19, paras. 98–100.

81. The Committee considers that the above reasoning is equally valid regarding the present communication.

82. As to the scope of the article 2(2) exclusion, the Committee considers that the ordinary meaning of the terms of that article, in their context and in the light of the Convention's object and purpose, demonstrates that that exclusion should be construed narrowly. It should therefore be limited to bodies or institutions acting in a context where legislative powers are being exercised. Interpreting the exclusion narrowly accords with the general legal principle that exemptions from legal obligations be restrictively applied. The above reading is also consistent with the Committee's findings on communication ACCC/C/2011/61 (United Kingdom). There, the Committee found that where a parliament is not "acting" within a legislative capacity, but exercising permitting powers of a public authority, that does not fall within the article 2(2) exclusion.⁷³ Thus, the applicability of the article 2(2) exclusion turns on whether a body or institution that has legislative capacity is in fact exercising legislative powers at the relevant time.

83. The Committee therefore does not accept the Party concerned's argument that the entire procedure leading up to the introduction of legislation to parliament is part of the legislative function and thus automatically excluded from article 8. Members of the executive when preparing draft legislation prior to its introduction to parliament are not exercising "legislative powers". Rather, it is only when the draft legislation passes from the stage of preparation by the public authority to the body or institution with the capacity and power to adopt the legislation, and that body or institution begins to exercise its legislative powers, that the article 2(2) exclusion is triggered. At that point, the requirements of public participation under article 8 cease to apply.⁷⁴

84. Such a reading of article 2(2) also creates internal consistency between the Convention's provisions. It ensures efficacy of both articles 2(2) and 8 and separates the process of a body or institution "acting in a ... legislative capacity", under article 2(2), from the prior stage of "preparation by public authorities", under article 8. Indeed, article 8 expressly envisages that public authorities may be engaged in drafting legislation. It is therefore logical to conclude that the Convention does not consider such activities to involve acting in a "legislative capacity" within the meaning of article 2(2). The Party concerned's proposed reading draws no distinction between the preparatory drafting phase and the subsequent process whereby a body or institution with legislative capacity deliberates on and passes legislation. The Committee considers that such an interpretation would strip article 8 of its core purpose and effectiveness.

85. Moreover, and contrary to the Party concerned's submissions,⁷⁵ the Committee's interpretation ensures the flexibility needed to address the intrinsic differences in the legislative processes between Parties. By focusing on the exercise of legislative powers, as opposed to a rigid distinction between executive and legislature which may not translate equally to all Parties' systems, such an interpretation accommodates systems where, as in the Party concerned, members of the executive play a role in both the preparatory phase and the legislative phase of the passing of normative instruments, as well as systems where there is a clear dividing line between the public authority preparing a normative instrument and the legislative body passing that instrument into law.

86. Based on the foregoing, the Committee affirms its previous findings that article 8 of the Convention applies to the preparation of draft primary legislation by executive bodies to be adopted by national parliaments. When engaged in preparing such draft laws, public authorities, including members of the executive, do not act in a legislative capacity. Once the draft is submitted to the body or institution with legislative capacity and that body commences its deliberations on the draft, the exception in article 2(2) excluding 'bodies acting in a legislative capacity' from the scope of the Convention will apply.⁷⁶

⁷³ ECE/MPP/C.1/2013/13, para. 54.

⁷⁴ Implementation Guide, p. 49.

⁷⁵ Party's submissions, 28 September 2022, para. 49.

⁷⁶ ECE/MPP/C.1/2021/19, para. 101.

87. The Committee therefore concludes that article 8 applies to the preparation by DExEU, a public authority within the meaning of article 2(2) of the Convention, of draft primary legislation that may have a significant effect on the environment. The Committee examines below whether the Withdrawal Bill may indeed have such an effect.

(b) *“May have a significant effect on the environment”*

88. The Party concerned submits that the Government’s express intention was that its exit from the European Union should be achieved in a way that preserved existing European Union law in the Party concerned after exit day, without having any effect on the environment. It submits that the Withdrawal Bill therefore falls outside the scope of article 8.⁷⁷

89. The Committee is not convinced by the Party concerned’s submissions that the Withdrawal Bill had no environmental effect. To come within the scope of article 8, it must merely be demonstrated that the normative instrument “may” have a significant effect on the environment. That reflects the fact that the Convention contains procedural rights and is thus concerned with the process of preparing legislation. It is therefore irrelevant for the application of article 8 whether the potential significant effects on the environment do or do not subsequently materialize. What matters is whether the draft legislation is capable of having a significant effect on the environment at the point in time when the legislation is being prepared. If so, article 8 requires that the public have the opportunity to participate in the preparation of the draft law.

90. The Party concerned accepts that, as a result of the Bill, article 191 of TFEU is no longer part of its domestic law.⁷⁸ The Committee considers that, given the environmental protection requirements and principles of environmental law enshrined in that provision, its removal clearly “may have a significant effect on the environment”. It is irrelevant whether, at a later point in time, subsequent legislation reintroduced some or all of those principles into domestic law.

91. The Committee further considers the fact that the Withdrawal Bill removes the European Commission’s role as an institution to scrutinize compliance with European Union-derived environmental law is an additional important way in which the Bill “may have a significant effect on the environment”. The same applies to the Bill’s impact on the hitherto binding nature of CJEU case law within the Party concerned’s domestic law.

92. Individually, or taken together, the Committee considers that the points identified in paragraphs 90–91 above establish clearly that the Withdrawal Bill “may have a significant effect on the environment” within the meaning of article 8.

93. Accordingly, the Committee concludes that the preparation of the Withdrawal Bill by DExEU falls within the scope of article 8, as comprising “executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment”.

Article 8 – compliance during preparation of Withdrawal Bill

94. Having concluded that article 8 applies to the preparation by DExEU of the Withdrawal Bill, the Committee examines whether the Party concerned met the requirements of that provision during preparation of the Bill.

95. As a starting point, the Committee points out that article 8’s opening words “each Party shall strive” impose a mandatory obligation. During the preparation of every generally applicable legally binding rule within the scope of article 8, Parties are therefore required to strive to promote effective public participation at an appropriate stage, and while options are still open.

96. Regarding the minimum requirements imposed by article 8, in its findings on communication ACCC/C/2010/53 (United Kingdom), the Committee held that:

⁷⁷ Party’s response to communication, para. 6.

⁷⁸ Party’s reply, 31 August 2022, para. 42.

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.⁷⁹

97. Concerning article 8, final sentence, which stipulates that “[t]he result of the public participation shall be taken into account as far as possible”, in its findings on communication ACCC/C/2010/53 (United Kingdom), the Committee held that:

This is mandatory under article 8 and in practice it means that the final version of the normative instrument ... should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.⁸⁰

98. In its advice on request ACCC/A/2014/1 (Belarus), the Committee held 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.⁸¹

99. In line with the above, the Committee makes it clear that, while article 8 gives the Parties a degree of leeway in deciding how to fulfil their obligations to provide for effective public participation, paragraphs (a)–(c) and the final sentence thereunder together impose a minimum set of requirements, namely:

- (a) Time frames sufficient for effective participation should be fixed;
- (b) Draft rules should be published or otherwise made publicly available;
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies;
- (d) The result of the public participation shall be taken into account as far as possible.

100. The Committee examines below the extent to which those four minimum requirements were met during the preparation of the Withdrawal Bill. Before doing so, the Committee notes that, given that article 2(2), final sentence, excludes a body or institution acting in a legislative capacity from the definition of a “public authority”, Parties cannot rely on bodies or institutions acting in a legislative capacity to perform the obligations imposed by article 8 on “public authorities”. In consequence, in considering the extent to which the Party concerned met the obligations in article 8, the Committee cannot consider events that occurred after the Bill’s introduction to Parliament. That includes parliamentary debates and any input received from the public while the Bill went through the legislative stages.

(a) Time frames sufficient for effective participation should be fixed

101. The Party concerned submits that each stage of the Bill’s progress through the legislative process was published online, alongside clear dates for the next parliamentary stage, thus guaranteeing the possibility of participation by the public and representative consultative bodies within clear time frames.⁸²

102. The Committee notes that the time frames cited by the Party concerned refer to the parliamentary stages for the passing of the Bill only, not to the public’s opportunities to

⁷⁹ ECE/MPP/C.1/2013/3, para. 84.

⁸⁰ Ibid., para. 86.

⁸¹ ECE/MPP/C.1/2017/11, para. 53.

⁸² Party’s reply, 31 August 2022, para. 96.

participate. Moreover, even if the cited time frames had referred to opportunities for the public to participate, those time frames all concern the period after the Bill was introduced into Parliament.

103. At that point, Parliament was acting in a legislative capacity (see para. 86). Any public participation that may then have taken place could not cure a failure by DExEU, the responsible public authority, to provide for public participation meeting the requirements of article 8 during its preparation of the Bill.

104. The Committee notes that it has been provided with no evidence that timeframes for effective public participation were fixed during the preparation of the Withdrawal Bill by DExEU.

105. Given the foregoing, the Committee concludes that the minimum requirement under sub-paragraph (a) of article 8 to fix timeframes sufficient for effective public participation was not met during the preparation by DExEU of the Withdrawal Bill.

(b) Draft rules should be published or otherwise made publicly available

106. The Party concerned acknowledges that the White Paper did not contain the draft text of the Withdrawal Bill. Nor was the draft text otherwise made publicly available before its submission to Parliament.⁸³

107. The Committee therefore concludes that the minimum requirement under sub-paragraph (b) of article 8 for draft rules to be published or otherwise made publicly available was not met during the preparation by DExEU of the Withdrawal Bill.

(c) Public should be given the opportunity to comment

108. It is both logical, and also implicit from the ordering of article 8, sub-paragraphs (b) and (c), that the draft rules should be publicly available at the time that the public is given the opportunity to comment.

109. Regarding opportunities for public participation, the Party concerned refers, among other things, to the fact that the exit from the European Union was subject to lively public debate and widely discussed in the media prior to the 2016 national referendum and the 2015 and 2017 general elections (see para. 55). The Committee makes it clear that those elements are irrelevant for assessing compliance with article 8 regarding the preparation of the Withdrawal Bill. That is because, when the general elections and the referendum were held, the draft Withdrawal Bill had not yet, as required by article 8, been published or otherwise made available for the public to review and comment upon. The general discussions and debate about European Union membership that took place in 2015, 2016 and 2017 in no way meet the obligation to give the public the opportunity to comment during the preparation by DExEU of the Withdrawal Bill.

110. It therefore appears that the only relevant opportunity for the public to submit specific comments regarding the potential effect on the environment of the Withdrawal Bill was in response to the brief statement, on page 12 of the 37-page White Paper, that: “The Government welcomes feedback on this White Paper. Comments can be sent to repeal-bill@dexeu.gov.uk”.

111. The Committee takes note of that invitation. However, it is common ground that the White Paper did not contain a draft text of the Bill upon which the public could provide its comments. Rather, as the Party concerned itself concedes, White Papers are policy documents that set out the Government’s proposals for future legislation.⁸⁴ Thus, any comments received in response to that invitation would have related to the Government’s policy direction. The invitation cannot be construed as amounting to an opportunity for the public to comment specifically on the proposed legislative initiative during the preparation of the draft Bill.

⁸³ Ibid., para. 123.

⁸⁴ Party’s response to communication, para. 16.

112. The White Paper is also silent as to the time frame within which the public must submit its feedback. The public therefore had no way of knowing by when they should submit comments (on even the general policy directions in the White Paper) for those comments to be taken into account during the preparation of the draft Bill.

113. The failure to provide the public with an opportunity to review and submit comments on draft legislation prior to its introduction to Parliament cannot be cured by a subsequent possibility for members of the public to submit their views whilst the draft was pending before Parliament. While the Committee welcomes the public engagement during the legislative phase outlined extensively in the Party concerned’s submissions, such participation falls outside the scope of article 8 and thus the Committee’s assessment of the present communication. That includes the public’s opportunity, as emphasized by the Party concerned, to provide their comments to specific Members of Parliament.

114. First, it is entirely within Members’ discretion as to which, if any, of their constituents’ concerns they wish to relay to Parliament. Members of Parliament do not therefore serve to provide the public with an opportunity to comment “through representative consultative bodies” within the meaning of article 8.

115. Second, once the draft text is before Parliament, it has already passed outside the scope of article 8. It is in the hands of the body or institution acting with legislative capacity and is covered by the article 2(2) exclusion.

116. Lastly, the Party concerned cannot rely on the extensive consultation on environmental principles launched by DEFRA on 10 May 2018 to meet its obligation to give the public the opportunity to comment during the preparation by DExEU of the Withdrawal Bill. The Withdrawal Bill received Royal Assent, and thereby became law, on 26 June 2018. The deadline for the public’s comments on DEFRA’s consultation on environmental principles was 2 August 2018. The Withdrawal Bill had thus already passed into law whilst DEFRA’s consultation was still ongoing. It is not therefore possible for the Party concerned to assert that the DEFRA consultation provided an opportunity for the public to comment on the Withdrawal Bill.

117. In the light of paragraphs 108–116, the Committee concludes that the minimum requirement under sub-paragraph (c) of article 8 to give the public the opportunity to comment was not met during the preparation by DExEU of the Withdrawal Bill.

(d) Result of the public participation shall be taken into account as far as possible

118. The Party concerned concedes that while its Government often publishes a report on consultation exercises, “it is not invariably its practice” to do so.⁸⁵ It accepts that no such report was published regarding the Withdrawal Bill.⁸⁶

119. In its findings on communication ACCC/C/2010/53 (United Kingdom), the Committee highlighted the mandatory language in the final sentence of article 8 (“shall be taken into account”). This direct obligation is followed by the softer language of “as far as possible”. Read together, those words impose a mandatory requirement to take into account the results of the public participation. However, that requirement only applies “as far as possible”. In the context of draft primary legislation, once the draft text has been transmitted to the body acting with legislative capacity, the final text of such primary legislation is for that body to determine.

120. The obligation thus rests on the public authority to show that it took into account the results of the public participation as far as possible. As the Committee explained in its findings on communication ACCC/C/2010/53 (United Kingdom), “in practice it means that the final version of the normative instrument...should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.”⁸⁷

⁸⁵ Party’s comments, 30 November 2022, para. 24.

⁸⁶ Ibid.

⁸⁷ ECE/MP.PP/C.1/2013/3, para. 86.

121. It is common ground that no such explanation was published regarding the Withdrawal Bill nor included in the Explanatory Notes or Impact Assessments. Nor has the Committee been provided with any other evidence to demonstrate that DExEU took into account the results of the public participation as far as possible.

122. The Committee therefore concludes that the requirement under the final sentence of article 8 for the public authority to take into account, as far as possible, the results of the public participation was likewise not met during the preparation by DExEU of the Withdrawal Bill.

Concluding remarks on article 8

123. In the light of its conclusions in paragraphs 105, 107, 117 and 122, the Committee finds that by failing, during the preparation by DExEU of the Withdrawal Bill, to: (a) fix timeframes sufficient for effective public participation; (b) publish or otherwise make available the draft rules in advance; (c) give the public the opportunity to comment; and (d) take into account the result of the public participation as far as possible, the Party concerned failed to comply with article 8 of the Convention.

Article 3(1)

124. Article 3(1) requires each Party to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to ensure the effective implementation of the Convention.

125. In its findings on communication ACCC/C/2014/120 (Slovakia), the Committee held that “so long as the measures in place in the Party concerned ensure that the requirements of article 8 are fully met in practice, there is no express requirement in the Convention that those measures be enshrined in a legally binding form.”⁸⁸

126. Moreover, as the Committee held in its findings on communication ACCC/C/2016/143 (Czechia), non-compliance with other provisions of the Convention “does not automatically also result in non-compliance with article 3(1) ... Rather, the communicants would need to show that the legal framework to implement these provisions was not clear, transparent or consistent”.⁸⁹

127. It is common ground that the constitutional system and legal framework of the Party concerned does not preclude the possibility for the public to participate during the preparation of draft legislation that may have a significant effect on the environment. Indeed, the communicant highlights the 2018 public consultation carried out on the environmental principles as an example of good practice in this regard.⁹⁰

128. It is further common ground that, in the Party concerned, there is no legal duty to consult before creating primary legislation and that the common law-derived principles on public participation, the Consultation Principles, and JOYS are not required to be followed in the preparation of legally binding instruments.⁹¹

129. The Committee in principle welcomes the Party concerned’s initiative to create and publish such documents to guide its officials. However, while the non-binding nature of these measures does not per se amount to non-compliance with article 3(1), the preparation of the Withdrawal Bill demonstrates that the Consultation Principles, alone or taken in conjunction with common law principles and other existing measures, do not provide a clear, transparent and consistent framework to implement the requirements of article 8. The very fact that a more elaborate public participation procedure was carried out in 2018 on the environmental principles but not on the Withdrawal Bill illustrates that the Party concerned does not have a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment, as required by article 8.

⁸⁸ ECE/MPP/C.1/2021/19, para. 115.

⁸⁹ ECE/MPP/C.1/2021/28, para. 141.

⁹⁰ Communicant’s comments, 28 September 2022, para. 5.

⁹¹ Party’s reply, 31 August 2022, paras. 109–111.

130. Accordingly, the Committee finds that, by not having taken the necessary legislative, regulatory or other measures to establish and maintain a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment under article 8 of the Convention, the Party concerned has failed to comply with article 3(1) of the Convention.

IV. Conclusions and recommendations

A. Main findings regarding non-compliance

131. The Committee finds that:

(a) By failing, during the preparation by DExEU of the Withdrawal Bill, to: (i) fix timeframes sufficient for effective public participation; (ii) publish or otherwise make available the draft rules in advance; (iii) give the public the opportunity to comment; and (iv) take into account the result of the public participation as far as possible, the Party concerned failed to comply with article 8 of the Convention.

(b) By not having taken the necessary legislative, regulatory or other measures to establish and maintain a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment under article 8 of the Convention, the Party concerned has failed to comply with article 3(1) of the Convention.

B. Recommendations

132. The Committee, pursuant to paragraph 37(b) of the annex to decision I/7 of the Meeting of the Parties, recommends that the Meeting of the Parties recommend that the Party concerned take the necessary legislative, regulatory or other measures to establish a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment.
