

Format for communications to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

Full name of organization or person(s) submitting the communication: **Irish Raptor Study Group**
Permanent address: 78 Gleann Alainn, Drogheda, Co Louth, Ireland

Represented by:

Name: Fred LOGUE
Address 8/10 Coke Lane, Smithfield, Dublin 7, Ireland
Title/Position: Solicitor (lawyer)
Telephone: +353 (0) 1 531 3510
E-mail: fred.logue@fplogue.com

II. Party concerned

Ireland

III. Length of the communication

This communication is 13 pages long

IV. Facts of the communication

1. Summary

The communicant is an environmental non-governmental organisation constituted as an unincorporated association. It is committed to the monitoring and conservation of raptors and owls in Ireland, in particular the Hen Harrier.

The communicant alleges non-compliance with the Convention by Ireland because:

1. It does not provide a statutory basis to accept confidential sensitive environmental information in applications for development consent subject to public participation rules under article 6 of the Convention..
2. It does not provide an administrative or judicial review procedure to challenge the publication of such information after the application documents are published or made available for inspection.
3. It does not provide a statutory basis to allow the submission of confidential sensitive environmental information by members of the public exercising their rights under article 6, paragraph 7 of the Convention.

These allegations are illustrated with reference to a particular public participation procedure and ensuing judicial review involving the communicant.

2. Factual background

The facts grounding this communication arose in the context of an application to An Bord Pleanála¹ by Planree Limited for a permit to construct a wind farm in Co Donegal. The development site is situated in the North West of Ireland and is in an area which, although not designated under the Habitats Directive² as a Special Protection Area, has nonetheless been identified by the National Parks and Wildlife Service³ (NPWS) as a regionally important area for Hen Harrier given that it supports 7% of the national population of this species. The area is sometimes referred to as a non-designated Special Protection Area for Hen Harrier.

On 15 December 2017 the developer submitted a planning application for a development of up to 19 wind turbines with ground to blade tip height of 156.5 metres, a 110 metre meteorological mast, a 110kV electrical substation and other works. The application was accompanied by an Environmental Impact Assessment Report (EIAR) and a Natura Impact Statement.

The EIAR identified data from the NPWS indicating Hen Harrier breeding activity between 2004 and 2015 within the site boundary and within zones of 0-1 km, 1-3km and 3-5km from the site. The developer also provided details of its own surveys conducted between 2015 and 2017 which although observing some Hen Harrier activity did not identify breeding activity within the site or a 2km buffer. The EIAR concluded that “*No evidence of breeding activity was recorded for [Hen Harrier] at or within the 2km survey buffer of the development site boundary. In addition this species was not observed within the study area during the core breeding season of mid May-June.*”⁴

Between April and June 2017 in the course of the communicant’s routine survey activity in the development area, a volunteer observed two breeding pairs of Hen Harrier, one within the site boundary and one within the 2km buffer-zone. The volunteer made detailed notes of the precise location of these observations and reported them to the communicant.

The communicant became aware of the proposed windfarm development when notice of the planning application was published in December 2017. It prepared a submission which among other things was aimed at providing evidence of actual Hen Harrier breeding activity within the site and the buffer zone that directly contradicted the conclusions of the EIAR on Hen Harrier breeding activity.

The communicant was mindful that international best practice⁵ recommends that the location of rare species should not be put into the public domain for fear that this information will put those species at risk of persecution.

The communicant’s submission included the following:(emphasis in original):

¹ An Bord Pleanála is the Irish public authority competent to grant planning permission for certain large projects designated as “Strategic Infrastructure Development” (www.pleanala.ie)

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0043>)

³ The NPWS is a unit of the Irish Department for Culture, Heritage and the Gaeltacht and is tasked with advising on protection of habitats and species identified for nature conservation (www.npws.ie)

⁴ Planree Limited’s EIAR Section 7.4.5

⁵ Guidance Note – Environmental Statements and Annexes of Environmentally Sensitive Bird Information Guidance for Developers, Consultants and Consultees (Scottish National Heritage, Version 2, September 2016) – Annex 2 (Note this is Scottish Guidance which means the relevant legislation does not apply in Ireland).

“The IRSG are aware through voluntary monitoring of the Hen Harrier population in South Donegal that there were nesting Hen Harrier within the site boundary and a second breeding pair within 2km of the proposed wind farm in 2017. We are also aware that the townlands of Crosshill, Crocknacunny, Tullynatumoge, Meenamullan, Carn Hill, Altmullan and Slievdoe, all had confirmed evidence of breeding Hen Harrier in 2017. These breeding pairs have either been missed by the developer’s consultants or omitted from the EIAR.

The IRSG can provide to An Bord Pleanála the exact location of breeding Hen Harrier in relation to the proposed Meenbog wind farm. IRSG can also make available all records from within the 10km squares H07, H08, H17, H18 submitted to us in 2017. These are not printed in this submission as this would be on public record and as the Hen Harrier is a sensitive protected species, we can issue this information in a separate confidential communication if required.”

The communicant properly and in line with international best practice did not disclose the precise grid references of the breeding sites and other locations because at this stage it was not satisfied that this information would be kept confidential.

The communicant also took issue with the publication in the developer’s EIAR of sensitive environmental information obtained from the NPWS.

The EIAR Appendices contain detailed mapping showing the locations of communal winter roost sites of Hen Harrier in vicinity of the proposed Meenbog wind farm. The threats of persecution on Hen Harrier, especially at communal sites are real. There is strong anecdotal historical evidence of persecution and the disappearance of Hen Harrier at areas that have been subject to planning applications for wind farm development. Hen Harrier are perceived as a threat to consent for wind farm development and are subsequently targeted and illegally persecuted. NPWS position is that such sensitive data should not be made generally available (e.g. in reports, Environmental Impact Assessments/Statements, maps). Sensitive information in relation to Hen Harrier Winter Roost sites should not have been available in the public domain and should have been submitted as a Confidential Annex of the EIAR for reference purposes of NPWS and relevant statutory or competent authorities only.

The IRSG also would like to state that the open disclosure of highly sensitive protected species data in a published/public forum is a breach of the Code of Professional Conduct of the Chartered Institute of Ecology and Environmental Management (CIEEM). The developers consultants have departed from the sound professional judgement expected as accredited Members of CIEEM and have failed to safeguard the confidentiality of sensitive protected species information.

The developer was given the opportunity to comment on the communicant’s submission and repeated the conclusion of the EIAR that no evidence of Hen Harrier breeding activity was recorded during the developer’s surveys which took place between 2015 and 2017. It made no comment on the allegations relating to the publication of NPWS data.

In her report, An Bord Pleanála’s inspector considered all the information on the file including public submissions. The communicant’s submission was noted including its offer to provide the precise locations of the breeding Hen Harrier. The inspector also noted the developer’s response to the

communicant's submission. The inspector's assessment of Hen Harrier noted the conclusion of the developer's EIAR but did not specifically allude to the communicant's conflicting submission. The inspector nevertheless framed her assessment in terms of the Hen Harrier having an historical association with the site rather than recent use for breeding and concluded that based on mitigation measures described in the EIAR and proposed conditions the development would not have any significant, adverse, long term or permanent impacts on the non-designated special protection area for Hen Harrier. The inspector noted the communicant's submission in relation to publication of sensitive data but did not otherwise address this point in her report⁶.

Apart from receiving its submission, An Bord Pleanála did not engage further with the communicant and did not seek to be provided with the detailed information which the communicant offered to provide on a confidential basis. Similarly, the communicant did not follow up with An Bord Pleanála to check whether it wished to receive the information about the precise locations of the breeding Hen Harrier.

In reaching its decision⁷ on 25 June 2018, An Bord Pleanála conducted an Environmental Impact Assessment and concluded that it was satisfied that the proposed mitigation measures for Hen Harrier were acceptable. In making this assessment it adopted the report and conclusions of the inspector in relation to Hen Harrier. An Bord Pleanála did not address the communicant's concerns regarding publication of sensitive data in the EIAR.

The communicant was granted leave on 29 August 2018 by the Irish High Court to bring judicial review proceedings challenging this decision. The challenge alleged that An Bord Pleanála had failed to identify, assess and describe the effects of the proposed development on Hen Harrier in breach of article 3 of Directive 2014/52/EU (the **EIA Directive**) and that the decision was taken in breach of articles 2 and 4 of Directive 2009/147/EC (the **Birds Directive**). A central aspect of the challenge was that An Bord Pleanála had failed to resolve the conflict between the conclusions of the developer's EIAR that there was no evidence of breeding activity on the site or within a 2km buffer between 2015 and 2017 on the one hand and the positive identification of two breeding pairs in this area by the communicant in 2017 on the other hand. Issues relating to publication of sensitive environmental information in the EIAR did not form part of the challenge since this aspect was not amenable to judicial review because it was not material to the decision under challenge.

Insofar as it was anticipated that the parties would take issue with the communicant's request to provide precise information on a confidential basis, the communicant in its written legal submissions relied on article 10 of the EIA Directive, article 4(2)(h) of the AIE Directive⁸ and article 6, paragraph 6 of the Convention which endorse the principle of confidentiality in relation to the location of rare species if it is necessary to protect the environment.

In response, An Bord Pleanála asserted that article 4(2)(h) of the AIE Directive and article 6, paragraph 6 of the Convention provide a basis for a refusal of **requests** for access to environmental information held by public authorities on grounds *inter alia* of confidentiality and that the communicant was not a public authority and An Bord Pleanála did not "hold" the information which the communicant never

⁶ See Annex 3a Inspector's report dated 24 May 2018

⁷ See Annex 3b Board's decision dated 25 June 2018

⁸ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>) – Annex 1(b)

passed to it. The Bord submitted that the communicant's interpretation of the AIE Directive and the Convention did not address its contention that section 146(5)⁹ of the Planning and Development Act 2000 (as amended) imposed an obligation on it to make all relevant information available; and (ii) it would be a breach of the developer's right to fair procedures if it was not given the opportunity to comment on or to cross-check the information against its survey data¹⁰.

When it came to the hearing before Mr Justice Simons in the High Court on 19 December 2018 it was immediately clear that the court considered the confidentiality issue to be central to the case. The judge had read the papers in advance and one of the first interventions made was the following observation: "*But you refuse to provide any information as to where [the Hen Harrier] are located*" the judge went on to ask how An Bord Pleanála could receive information on a confidential basis. The communicant's counsel submitted that the AIE Directive provided such a basis, but the judge stated that there was no equivalent under the EIA and that article 10 dealt only with commercial sensitivity. Counsel submitted that An Bord Pleanála had not responded to the communicant's offer to provide the information on a confidential basis. In response to this submission, the judge stated that the public participation process is not iterative.¹¹

The same issue was raised later in the hearing on 19 December 2018 and again the judge observed that An Bord Pleanála's procedure is not iterative and stated that it was probably prohibited from responding to the communicant's offer to provide the location of the Hen Harrier breeding sites on a confidential basis.

In its oral submissions which followed, An Bord Pleanála, reiterated its position that it could refuse a request for access to environmental information but as a matter of law "*nothing which would protect [An Bord Pleanála] from having to disclose material in response to an access to environmental information request allows the [communicant] to withhold material from [An Bord Pleanála] or give material to [An Board Pleanála] on the basis that it won't give it to the developer.*"

The oral submission went on to note that in the context of article 10 of the EIA Directive, not only did national law not impose a limitation on disclosure of information but it did the opposite, it imposed a requirement of fair procedures which might require the circulation of information to the developer.

At the conclusion of the first day of the hearing on Wednesday 19 December 2018, and without hearing the communicant's reply to the other parties submissions the judge indicated that he would deliver judgment at 2pm on the following Friday (21 December 2018). At that stage it was apparent, and the communicant was advised by two senior barristers, that it would almost certainly not succeed in its challenge because it had withheld (albeit for genuine reasons) the precise locations of the breeding Hen Harrier it had identified. The communicant was advised that the court would almost certainly decide that there was no legal basis for An Bord Pleanála to engage with it on how this information might be provided confidentially and as a matter of fair procedures and statute it could not treat this information as confidential, whether in terms of public dissemination or in terms of providing it to the developer and for that reason the court would find against the communicant and dismiss its challenge.

⁹ Annex 1

¹⁰ A copy of An Bord Pleanála's written legal submission can be provided if requested by the Committee or the Party concerned.

¹¹ Please note that transcript of the court hearing commissioned by An Bord Pleanála and the developer is available and can be provided to the Committee upon request.

It was also relevant that there was no right of appeal available to the communicant¹². The communicant merely had a statutory right to apply to the presiding judge for permission to appeal and a parallel constitutional right to apply to the Supreme Court in exceptional circumstances.

In terms of the statutory application, the judge (and it is always the same judge that hears the substantive case) can only grant such permission if that judge certifies that his or her decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken.

Similarly, a decision of the High Court may only be appealed to the Supreme Court in exceptional circumstances and with the pre-condition that the High Court decision must involve a matter of general public importance or it would be in the interests of justice¹³.

The communicant was advised that it would be highly unlikely to succeed in either application.

Based on this advice the communicant had no option other than to withdraw its challenge before the remainder of the hearing concluded.

Some time after the hearing concluded the communicant became aware of a planning application by Behy Renewables Limited for a 7-turbine windfarm in Co Donegal the developer included a confidential Hen Harrier Annex. The EIAR¹⁴, at paragraph 6.4.4 states:

“Hen Harrier

Due to the sensitive nature of this species, survey results including Figures (which highlight potential or confirmed nest/roost sites), have been disclosed within Confidential Appendix 6-7. Results summary tables are presented in Appendix 6-3.”

It is understood that the competent public authority in this case accepted and validated the planning application notwithstanding that it contained confidential annexes.

3. Relevant legal provisions

Article 4, paragraph 4 of the Convention provides

A request for environmental information may be refused if the disclosure would adversely affect:

...

(h) The environment to which the information relates, such as the breeding sites of rare species.

Article 5, paragraph 10 of the Aarhus Convention provides:

¹² Section 50A(7) of the Planning and Development Act 2000

¹³ Article 34.5.4° of the Irish Constitution

¹⁴ The planning documentation is rather lengthy but can be accessed online at http://www.donegalcdb.ie/epln/internetenquiry/rpt_querybysurforreclloc.asp (Reference 1851741)

Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 6, paragraph 6 of the Aarhus Convention provides in relevant part:

Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4.

The AIE Directive implements (at least in part) articles 4 and 5 of the Aarhus Convention. Article 4(2) of the AIE Directive provides

Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

...

(h) the protection of the environment to which such information relates, such as the location of rare species.

Article 7 of the AIE Directive concerns the obligation on Member States of the European Union to actively disseminate environmental information, however article 7(5) provides:

The exceptions in Article 4(1) and (2) may apply in relation to the duties imposed by this Article.

The AIE Regulations¹⁵ transpose the AIE Directive into Irish law, however article 4 of the AIE Regulations provides:

(1) These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations is required to be made available to the public, whether for inspection or otherwise.

(2) Notwithstanding—

(a) section 38 of the Planning and Development Act 2000 (No. 30 of 2000) and any regulations made thereunder,

...

environmental information held by, or on behalf of, a public authority shall be made available in accordance with these Regulations.

¹⁵ European Communities (Access to Information on the Environment) Regulations 2007 S.I 133 of 2007 (see attached consolidated version at Annex 1(c))

Article 10 of the EIA Directive provides in relevant part:

Without prejudice to Directive 2003/4/EC, the provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national laws, regulations and administrative provisions, and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.

V. Provisions of the Convention alleged to be in non-compliance

Article 5, paragraph 10

Article 6, paragraph 6

Article 6, paragraph 7

Article 9, paragraph 3

Article 3, paragraph 1

VI. Nature of alleged non-compliance

The communicant alleges a general failure to implement the provisions of the Convention listed in part V of this communication and that the facts and circumstances of its participation in Planree's development consent procedure and subsequent judicial review are illustrative of this non-compliance. The non-compliance, in essence, concerns the statutory provisions adopted by the Party concerned and it is primarily with reference to those provisions that the communicant alleges non-compliance.

1. No statutory basis to restrict publication in an EIAR of sensitive information which would adversely affect the environment

The communicant sets out in Annex 1 the relevant sections of the Planning and Development Regulations which concern the content of and making available of EIARs.

The developer in the instant case had obtained detailed information from the NPWS concerning the location of Hen Harrier in the vicinity of the development site. Subject to verification by the Party concerned, it seems to be the case that when making this sensitive information available to the developer the NPWS did not have regard to the provisions of the Convention or AIE Directive and it did not impose any conditions on how it might be used, in particular NPWS did not impose a condition that it be treated as confidential.

When the developer included this information in its EIAR An Bord Pleanála made it available for public inspection and even after the communicant took issue with this An Bord Pleanála took no steps to remove the sensitive information from its file or restrict access to it. As far as the communicant is aware this information remains available on An Bord Pleanála's file and continues to be available for public inspection.

The communicant notes that there is a strong public interest in publishing and making available for inspection all relevant information to ensure that the public concerned can participate in the decision-making process to the fullest extent possible¹⁶. In this regard the communicant acknowledges the

¹⁶ Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 32

Committees' findings and recommendations in previous cases that publication of EIARs should be the rule. It does note however that the findings and recommendations in communication ACCC/C/2004/3 acknowledge that information contained in an EIAR may, exceptionally, be withheld in an individual case where justified with regard to the exceptions in article 4. The communicant notes that the cases considered to date concern situations where a third party is seeking to withhold information on commercial grounds including the protection of intellectual property. In those cases, the Committee has been sceptical about whether the withholding of information is justified. However, in the instant case the justification is grounded in a concern for the protection of a rare species expressed by an eNGO with significant expertise and supported by international best practice. Its claim can, therefore, be distinguished from earlier Compliance Committee cases.

The communicant also notes that the Committee has previously found that there was no non-compliance with the Convention by the United Kingdom by withholding redacted information concerning the location of freshwater pearl mussels from environmental information provided to a requestor who wished to use that information to exercise its right of public participation in a procedure to approve a road scheme in Scotland¹⁷. These findings and recommendations illustrate that the Committee rightly considers access to information on the environment to be an important right enabling effective public participation, but it is not an end in itself and it is not an absolute right. In particular the Committee found that information may be withheld from publication, even where the recipient agrees to give an undertaking not to publish the information, if justified on the basis of environmental protection, in particular the protection of rare species.

By mandating in its legislation, the publication of the EIAR without exception, and in particular where it contains information which, if published, would adversely affect the environment including rare species the Party concerned is not in compliance with article 6, paragraph 6 of the Convention.

In addition, the Party concerned has not provided any administrative or judicial procedures to members of the public to challenge the publication of information in an EIAR on the grounds that such publication would have an adverse effect on the environment. The legislation¹⁸ from which An Bord Pleanála's procedures are derived contains no such provisions. The jurisdiction of the Commissioner for Environmental Information^{19,20} is limited to appeals against refusals by public authorities to release information on request. The lack of administrative or judicial review to challenge the decision to publish environmental information in an EIAR constitutes non-compliance with article 9, paragraph 3 of the Convention.

Therefore, the Party concerned has not complied with article 6, paragraph 6 and article 9, paragraph 3 of the Convention.

2. No statutory basis for confidential public submission of sensitive environmental information

¹⁷ United Kingdom ACCC/C/2009/38; ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 77

¹⁸ Planning and Development Act 2000
(<http://revisedacts.lawreform.ie/eli/2000/act/30/front/revised/en/html>)

¹⁹ www.ocei.ie

²⁰ See article 12 of the AIE Regulations

The communicant is unsure as to whether article 5, paragraph 10 or article 6, paragraph 6 is the relevant provision of the Convention or whether both are applicable in this regard. Nevertheless, the arguments it makes apply equally to these provisions of the Convention.

It is apparent from the facts and circumstances of the instant case that the Party concerned does not consider article 5, paragraph 10 or article 6, paragraph 6 (as implemented by article 7 of the AIE Directive and article 10 of the EIA Directive) to provide an overriding obligation to withhold environmental information whose publication would adversely affect the environment. It seems that the law of the Party concerned only allows this type of environmental information to be withheld in the context of a request for access to environmental information.

The relevant legislation²¹ adopted by the Party concerned requires that after a planning decision is made all of the information on the file must be published or made available for public inspection without any consideration as to whether such publication would have an adverse effect on the environment and in particular on the protection of rare species per article 4, paragraph 4(h) of the Convention. Although article 5, paragraph 10 of the Convention envisages the application of the exceptions in article 4 to active publication of environmental information by public authorities the Party concerned has not implemented this in national law. In fact, the Party concerned has expressly excluded publication of environmental information pursuant to legislative obligations from the scope of the AIE Regulations²² thereby excluding the application of the exceptions in article 4, paragraph 4 and the public interest factors that they protect.

It should be noted that the Convention does not expressly require the publication of information, including environmental information, submitted by the public as part of a procedure under article 6 of the Convention. In the Party concerned, while public submissions made to An Bord Pleanála are subject to limited disclosure (including the developer) during the procedure this information only become available for inspection by the wider public after a decision has been taken. Therefore, there is no issue with submission of confidential information affecting public participation rights.

There seems to be an issue in terms of the developer's right to fair procedures and its property rights and this issue was of significant concern to the judge in the communicant's judicial review. The communicant appreciates the developer has a right of fair procedure but doesn't fully understand what property rights are engaged since a developer has no right to develop a project without first being granted planning permission.

The right to fair procedures is not absolute and must always be balanced against other rights including the right to environmental protection. The communicant considers that the exceptions to the publication of environmental information provide a framework under which a balance can be struck between the developer's rights and the competing rights of environmental protection. The competent public authority (or another public authority) has a role to play in ensuring the appropriate balance is struck. In the communicant's view this is how articles 5 and 6 of the Convention must be interpreted. However, the Party concerned has not adopted legislation which allows a balance to be struck (whether by the competent public authority or another public authority) between these competing rights during public participation. As the Committee has previously found in case ACCC/C/2009/38 there are circumstances

²¹ See Annex 1(a) and 1(b) for relevant extracts from the Planning and Development Act 2000 (as amended up to 16 November 2018) and the Planning and Development Regulations 2001 to 2018 (updated to 26 July 2018)

²² Article 4(1)

which justify the redaction of the locations of rare species. The communicant submits that by not providing a facility for members of the public to submit confidential sensitive environmental information during public participation the Party concerned is in non-compliance with article 6, paragraph 7 of the Convention. A section of the public (including expert eNGOs that possess sensitive environmental information) that is apprehensive about the publication of sensitive environmental information is thereby prevented from exercising its right under article 6, paragraph 7 of the Convention.

The question arose in the litigation about why the communicant did not provide information to the developer when it was consulted in advance of the planning application being submitted. To that end the communicant first observes that while the Convention does place emphasis on early consultation between developers and the public it does not require the public to provide information to the developer and in any event, there is no guarantee that information provided at this time will be considered as part of the subsequent public participation. Second, the competent public authority has a special role to play in terms of information and public participation. Primarily it must ensure that all relevant information including the information listed in article 6, paragraph 6 is made available to the public concerned and that the public concerned is afforded the opportunity to make submissions. The competent public authority also must ensure that its decision takes due account of the outcome of public participation. Within this framework, the competent public authority is best placed to balance the competing rights of access to information and protection of the environment anticipated under article 4, paragraph 4(h) of the Convention and to decide which information should be published and to whom.

The communicant's apprehension about providing sensitive information about Hen Harrier breeding locations to the developer was fully justified given that the developer went on to include in its EIAR information of similar sensitivity which it had obtained from the NPWS. The communicant considers that there must be at least the possibility under the Convention for the competent public authority to consider information about the location of rare species which is not made available to the public or, if warranted, even to the developer. The developer's rights of fair procedure are not necessarily prejudiced if these locations are, for example, verified independently by the competent public authority.

In conclusion, the lack of a procedure for the public concerned to submit confidential information about the location of rare species to the competent public authority during public participation indicates non-compliance by the Party concerned with article 5, paragraph 10, article 6, paragraph 6 and article 6, paragraph 7 of the Convention.

The communicant concludes this part of the communication by observing that it was also denied its right to access a judicial remedy under article 9, paragraph 2 as a consequence of the non-compliance described in this section.

3. Consequential non-compliance

The communicant also submits that there is non-compliance by the Party concerned with article 3, paragraph 1 given that the non-compliance arises from statutory provisions that indicate that the Party concerned has not taken the necessary legislative measures to implement those articles of the Convention listed in part V of this communication.

VII. Use of domestic remedies

In terms of an objection to the publication of information contained in an EIAR the Party concerned has not provided an administrative or judicial remedy to challenge such publication. Publication is mandated by legislation and therefore not amenable to judicial review on the basis that the legislation is not in compliance with the Convention. Equally the Commissioner for Environmental Information only has jurisdiction to consider appeals against refusals by public authorities to provide access to environmental information on request. It cannot accept appeals concerning publication of information mandated by statute.

In terms of confidential submission of environmental information during public participation, the communicant had expected An Bord Pleanála to engage with it to discuss how the information it had gathered could be provided safely²³. It turns out An Bord Pleanála concluded it could not engage with a member of the public to arrange for confidential submissions and its position was accepted by the High Court which noted that its procedure is not iterative. The communicant believed that the AIE Directive read with the Convention provided a lawful basis for it to make confidential information available during public participation, however An Bord Pleanála does not share this view.

While it did seek a domestic judicial remedy, it did so on the basis that the costs of such a challenge were not-prohibitively expensive and relied on the Party concerned's special costs rules which provide no order for costs to an unsuccessful applicant but allow it to recover its costs to the extent that it succeeds. During the litigation it quickly became clear that the chances of success had diminished significantly thereby changing the economic justification for the challenge and rendering it prohibitively expensive. It also became clear that any future litigation concerning submission of confidential information would be equally likely to fail.

In that case the communicant has exhausted the domestic remedies available within the constraints imposed by the Party concerned's special costs rules and insofar as it has a remedy at all.

VIII. Use of other international procedures

No other international procedures have been used.

IX. Confidentiality

Confidentiality is not requested.

X. Supporting documentation (copies, not originals)

Annex 1 – Extracts from relevant legislation

- (a) Sections 38 and 146 of the Planning and Development Act 2000
- (b) Regulations 94,114,115 and Schedule 6 of the Planning and Development Regulations 2001 to 2018
- (c) AIE Directive
- (d) AIE Regulations

²³ For example, section 6 of the Planning and Development Act (2000) gives An Bord Pleanála “*all such powers of examination, investigation and survey as may be necessary for the performance of their functions*” additionally section 37F(1)(c) empowers An Bord Pleanála to “*request further submissions or observations from the applicant for permission, any person who made submissions or observations, or any other person who may, in the opinion of the Board, have information which is relevant to the determination of the application*”.

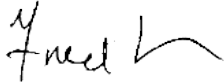
Annex 2 – “*Environmental Statements and Annexes of Environmentally Sensitive Bird Information – Guidance for Developers, Consultants and Consultees*” Version 2 (Scottish National Heritage, September 2016)

Annex 3 – An Bord Pleanála’s Inspector’s report in Planree’s application (24 May 2018)

Annex 4 – An Bord Pleanála’s decision in Planree’s application (25 June 2018)

XI. Signature

Sign and date the communication. If the communication is submitted by an organization, a person authorized to sign on behalf of that organization must sign it.



Fred LOGUE, Dublin, 25.1.2019

XII. Sending the communication

Send the communication by **e-mail and by registered post** to the following address:

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

E-mail: aarhus.compliance@unece.org

Clearly indicate:

“Communication to the Aarhus Convention Compliance Committee”