Roinn Cumarsáide, Gníomhaithe
ar son na hAeráide & Comhshaoil
Department of Communications,
Climate Action & Environment

Bóthar an Bhaile Nua, Loch Garman, Y35 AP90
Newtown Road, Wexford, Y35 AP90
T +353 1 678 2000 | Aoife.Joyce@DCCAE.gov.ie
www.dccae.gov.ie

WRITTEN SUBMISSIONS OF IRELAND
ON
COMMUNICATION ACCC/C/2019/164 IRELAND

I. INTRODUCTION AND BACKGROUND FACTS

1. This Communication arises out of the development consent process for the construction of a wind farm on lands located in the north west of Ireland, in County Donegal. Planree Limited ("the developer") applied for planning permission directly to An Bord Pleanála ("the Board"), pursuant to the provisions relating to Strategic Infrastructure Development ("SID") in the Planning and Development Act, 2000, as amended ("the PDA 2000"). As part of the development consent process, the Board carried out an Environmental Impact Assessment ("EIA") pursuant to the European Union's Environmental Impact Assessment Directive and national implementing legislation.

2. The communicant, an environmental NGO with a focus on birds of prey, participated in the planning application and EIA process, making a submission to the Board in which it objected to the planning application on the basis of concerns about the potential effects of the proposed wind farm on the hen harrier.

3. Neither the site of the proposed wind farm development, nor any part of the more general area of County Donegal in which it is to be located, has been designated as a Special Protection Area ("SPA") for the purposes of protecting the conservation interests of the hen harrier pursuant to the European Union's Birds Directive and Habitats Directive. While there are a number of SPAs so designated in Ireland for the protection of the hen harrier, the proposed development would not be located near to any such site.

4. However, it is acknowledged that Ireland's National Parks and Wildlife Service ("NPWS"), which has overall responsibility for protected species and habitats in the State, has recognised that the general area in which the proposed wind farm

development is to be located is of regional importance for the hen harrier. In this respect, it is noted that the Communicant's communication states that the area supports 7% of the national population of the hen harrier. For the avoidance of doubt, this figure of 7% does not relate to the site of the proposed development *per se*, but rather to a much wider area of "South Donegal" which is estimated at comprising of 243.3 square kilometres.

5. The communicant's concerns about the potential effects of the proposed development on the hen harrier were fully ventilated in the development consent and EIA process and taken into account by the competent authority, the Board. Indeed, on 23rd March 2016, the Board had refused a previous application by the same developer for planning permission for a larger wind farm on a site incorporating the site of the proposed development the subject of this Communication. As part of its reasons for refusal, the Board identified specific deficiencies in the methodology of the bird surveys and studies carried out by the ecologists retained by the developer and submitted with the planning application.

6. In respect of the planning application giving rise to the present Communication, the developer engaged in pre-application consultations with the Board during the period late 2016 to mid-2017. Arising from these pre-application consultations, the Board stressed the requirement for robust data in relation to the potential use of the site by hen harrier and requested the developer, before lodging its planning application, to compile survey data from an additional summer breeding season during Summer 2017.

7. The developer's ecologists also engaged with the NPWS prior to the submission of the planning application.

8. The application for planning permission was lodged with the Board on 15th December 2017 and was accompanied by an Environmental Impact Assessment Report ("EIAR") for the purposes of the EIA to be carried out by the Board. In respect of the hen harrier, the EIAR set out the results of surveys carried out from 2013 to 2017, including seasonal dawn and dusk bird surveys of the site and

surrounding area which had been carried out between April 2015 and September 2017 in accordance with the Scottish Natural Heritage Guidance (2014) and other relevant species-specific guidance. The EIAR indicated that there was circumstantial evidence to suggest that the hen harrier had probably nested within the site in 2015 and bred occasionally on the site in previous years, but no nests had been found within a 2 km radius during the survey years up to and including late 2017 (breeding hen harrier had been sighted 3 km from the boundary of the site and nesting hen harrier 2.2 km from the site boundary).

9. In its submission dated 14th February 2018, the communicant stated that it was "*aware through voluntary monitoring of hen harrier population in South Donegal that there were nesting Hen Harrier within the site boundary and a second breeding pair within 2 km of the proposed wind farm in 2017."* As explained in its Communication, the communicant did not provide supporting documentation in respect of this anecdotal report of nesting hen harrier within the site boundary and breeding hen harrier within 2km of the site. Of course, it should be reiterated immediately that the EIAR itself acknowledged that breeding hen harrier had been sighted within 3km of the development site and nesting hen harrier 2.2km from the site.

10. The default position under the provisions of the PDA 2000 governing the public participation in the development consent process, including in respect of SID, is that members of the public who wish to make submissions or observations on the planning application have one opportunity to do so and must therefore use that opportunity to make all of the arguments that they wish to make in respect of the planning application and submit all of the information that they wish to put before the decision-maker. The communicant's references to discussion at the High Court hearing of the fact that the statutory procedure is not intended to be "iterative" must be understood in this context. It is an important feature of the present Communication that the communicant did not provide the statutory decision-maker and competent authority, the Board, with the information which it states in its complaint could not be made public or shared with the applicant for planning permission, namely the precise locations of the sightings to which its submission

referred. Rather, the communicant unilaterally decided not to provide the competent authority, the Board, with the information that is the subject of this Communication.

11. In accordance with the statutory provisions of the PDA 2000, the Board appointed one of its Inspectors to prepare a report on the proposed development, taking account of all of the information submitted on behalf of the developer and all submissions received from other parties, including the NPWS (through the Development Applications Unit ("DAU") of the Department of Culture, Heritage and the Gaeltacht) and the communicant.

12. The Inspector herself walked over the site of the proposed development over three days, from 26th to 28th March 2018. Her report summarised the submission made by the communicant, including the anecdotal references to sighting of the nesting and breeding hen harrier, in some detail and contained an assessment of the potential effects of the proposed development on the species. She noted that the hen harrier has an historical association with the site of the proposed development and surrounding elevated peatland area. However, she stated that the character of the site and surrounding area had been significantly altered by commercial coniferous forestry plantation and that it no longer contained optimum habitat for the hen harrier. She considered the mitigation measures proposed and concluded that the proposed development would not have any adverse impacts on the hen harrier. However, significantly, having regard to the protected status of the species and the historic importance of the area for the species, she recommended that a specific monitoring programme should be put in place during the construction and operational phases and monitoring requirements were included in conditions attached by the Board to the planning permission.

13. The Inspector recommended a grant of planning permission. The Board agreed and granted permission for the proposed wind farm on 25th June 2018.

II. THE COMMUNICANT'S JUDICAL REVIEW PROCEEDINGS

14. The communicant subsequently brought an application for judicial review seeking to challenge the validity of the Board's decision to grant planning permission. One of the central arguments it made in its application for judicial review was that the Board had failed to conduct a proper EIA because it had not resolved what the communicant characterised as conflicting evidence in relation to the use of the site by the hen harrier.

15. However, in its defence of its decision, the Board argued that this argument was misconceived. The Board argued that the purpose of its EIA was not necessarily to resolve allegedly conflicting evidence, but, rather, to assess the likely effects of the proposed wind farm development on the environment, including its effects on the particular species with which the communicant was concerned. The Board pointed to the report of its Inspector to show that the potential effects of the proposed development on the hen harrier were fully considered and that the Board adopted a precautionary approach, such that, although the evidence was that the site no longer provided optimal habitat for the species, given its historical association for the hen harrier and the presence of the species in the wider area, mitigation measures and monitoring requirements should form part of the planning permission.

III. COMMUNICANT'S ARGUMENT ABOUT PUBLICATION OF INFORMATION IN THE EIAR

16. As the communicant acknowledges in its Communication, it did not raise in its judicial review proceedings any argument about the publication in the EIAR of information relating to the hen harrier that the Communicant considers ought to have been kept confidential.

17. This argument is raised for the first time in this Communication, but Ireland's ability to address same in these submissions is severely hindered by the fact that the communicant does not identify the information which it is concerned about. As the EIAR is already a published document, there can be no continuing confidentiality

concern which precludes the communicant from expressly identifying those portions of the EIAR which are the subject of this part of its complaint.

18. The communicant complains about the publication in the EIAR of confidential information shared by the NPWS with the developer's ecologist, but does not identify precisely what information it is referring to in this regard. In the absence of such information, Ireland submits in the first instance that the Committee simply cannot reach any conclusion on the communicant's allegations of non-compliance with the Aarhus Convention.

19. Without prejudice to that position, it is the case that during the preparation of the planning application, the ecologists engaged by the developer to carry out the relevant bird surveys liaised with the NPWS to ensure that those surveys were conducted on the basis of up-to-date information. However, the NPWS did not provide the ecologists with information as to the specific locations at which hen harrier had been sighted. The NPWS pointed the ecologists to the NPWS' own submission to the Board in respect of the developer's previous 2015 application for planning permission (which was refused), in which the NPWS referred to evidence from 2013 of confirmed hen harrier breeding in two 1 km grid squares, H07 88 and H07 87, located within 2 km of the wind farm proposed in that earlier application. Having made this submission to the Board in 2015 without raising any issue as to the placement of same on the Board's public planning file, the NPWS was clearly happy that this information was not sensitive and need not be treated confidentially. Insofar as the EIAR repeated this information, it was therefore simply repeating information that had been put into the public domain by the NPWS itself in its submission on the developer's previous planning application and which did not identify a specific location where hen harrier had been sighted nor where their nests were located.

20. More generally, the approach adopted in the present case is consistent with the general approach of the NPWS in the context of applications for planning permission, which is to provide information on the location of sensitive species in

such a manner that it can properly and meaningfully inform any environmental impact assessment process to be undertaken, while not identifying the exact location of the species. Providing information of such a nature on a confidential basis would mean that the assessment and decision of the competent authority would be based on information that was not available to the developer or to the public more generally therefore undermining public participation in environmental impact assessment and transparency in decision-making on applications for development consent, both of which are core values and objectives of the Aarhus Convention.

21. Of course, there are occasions where external bodies may require what the NPWS terms 'sensitive biodiversity data' held by the NPWS. 'Sensitive biodiversity data' is defined as any data that the NPWS does not wish to make publicly available, *e.g.* precise locations of endangered species. The NPWS has in place specific procedures for requesting sensitive or unpublished data from and guidelines on the use of same, if access is granted, including a prohibition on the making the information provided generally available, such as through inclusion of same in EIARs and Natura Impact Statements.

22. For completeness, on 15th May 2018, the NPWS, through the DAU, submitted observations to the Board on the application for planning permission the subject matter of this Communication. These observations did not specify the location of the hen harrier, but did refer to the map in Section 7.3.16 of the EIAR, which map reflected the locations of the proposed development as being within the hen harrier non-designated area of importance, South Donegal 1. The communicant's submission did not take issue with the NPWS observation or suggest that any of the material contained therein should be treated as confidential and no issue had been taken with the NPWS observation made on the earlier planning application in 2015.

IV. COMMUNICANT'S ARGUMENT ABOUT SUBMISSION OF CONFIDENTIAL INFORMATION BY MEMBERS OF THE PUBLIC PARTICIPATING IN DEVELOPMENT CONSENT AND EIA PROCESS

23. The second argument advanced by the communicant in this Communication concerns the contention that it ought to have been able to submit information to the Board as part of its observations on the planning application on the basis that that information would be kept confidential and would not be made public or shared with the developer.

24. The legal basis for such an argument by reference to the provisions of the Aarhus Convention is discussed further below.

25. However, from a factual perspective, Ireland wishes to reiterate that the communicant had a statutory entitlement to make a submission or observation to the Board and availed of that entitlement, but unilaterally decided not to include in that submission information that it considered relevant. In this Communication, the communicant in effect invites the Committee to sanction its approach, as a member of the public, in withholding information from the competent authority and decision-maker, and from the process as a whole.

26. As a general and preliminary observation, Ireland's position is that this would tend to undermine public participation in environmental impact assessment and transparency in decision-making on applications for development consent, both of which are core values and objectives of the Aarhus Convention.

V. FAILURE TO EXHAUST DOMESTIC REMEDIES

27. While the relevant ground for judicial review advanced by the communicant was framed as an alleged failure on the part of the Board, as part of its EIA, to resolve an alleged conflict of evidence, the question of the extent to which the Board could withhold information from the public file did arise for discussion from this ground at the hearing of the application for judicial review in the High Court.

28. However, the communicant withdrew its application for judicial review during the course of the hearing, thereby removing the possibility of having the High Court deliver a judgment addressing this issue.

29. Paragraph 21 of the Annex to Decision I/7 of the Aarhus Convention Compliance Committee provides:

> "21. The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."

30. While Ireland recognises that the Committee's decisions make clear that there is not a strict requirement that a communicant have exhausted domestic remedies before bringing a complaint to the Committee, (see paragraph 37 of the Report of the First Meeting, MP.PP/C.1/2003/2, and ACCC/C/2005/12, Albania, at paragraph 60), there have been a number of cases where the Committee has deemed a complaint, or part of a complaint, inadmissible on the ground, *inter alia,* that domestic remedies have not been adequately exhausted (see ACCC/C/2010/46, United Kingdom, para. 41, and ACCC/C/2010/53, United Kingdom, para. 71).

31. Ireland contends that the failure to exhaust domestic remedies in the present case is especially acute.

32. The communicant withdrew its application at the commencement of the second day of the High Court hearing, and, apparently, subsequent to discussions which had taken place overnight, after the first day of legal argument, between the communicant and the developer, which was a Notice Party to and participant in the judicial review proceedings.

33. As flagged in the hearing on the admissibility of this Communication, Ireland has a serious concern that the description and characterisation of the withdrawal of the communicant's judicial review proceedings contained in the Communication is misleading and incomplete.

34. In this respect, it is necessary to clarify some factual matters referred to in the Communication.

35. First, the communicant appears to suggest that the High Court Judge proposed to give judgment in respect of its judicial review proceedings without affording the communicant an opportunity to reply to the submissions of the other parties, the Board and the Notice Party developer, (such a right to reply is standard in Irish administrative law procedure). However, this is simply not true. At the conclusion of the day's hearing on Wednesday 19th December 2018, the High Court Judge indicated that he would hear the communicant's reply the following morning at 11am. When the Court convened the following morning to hear the communicant's reply, the communicant instead withdrew its proceedings. It therefore chose not to avail of its right of reply. As regards the fact that the High Court Judge indicated, at the end of the first day, that he would deliver judgment on Friday 21st December 2018, this was in ease of all the parties. Friday, 21st December 2018 was the last day of the legal term; the High Court would be on Christmas vacation thereafter for three weeks and would not sit again until Friday 11th January 2019.

36. Second, the Communication quotes questions put or observations made by the High Court Judge as providing a justification for its decision to withdraw the proceedings. However, it is important to understand that in Ireland's common law, adversarial legal system, Judges frequently ask questions and put propositions to parties to tease out their legal arguments. As the Irish Supreme Court stated in a case called *Callaghan v Mahon* [2008] 2 I.R. 514:

> "It is an inherent and invaluable part of the common law system of justice that open, sometimes even vigorous, argument takes place between bar and bench. Judges, on a daily basis, express opinions in the form of questions, statements or argument in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can, and frequently does, enable counsel to change the judge's mind. On other occasions, the weakness of an argument is exposed."

37. Bearing this in mind, at page 12 of the Communication, the communicant states that the Board's position that it could not accept a submission on the basis that it was confidential and would not be disclosed to the applicant for planning permission or the public "*was accepted by the High Court*." However, we do not know the view of the High Court - the communicant did not avail of its right to reply to the argument that had been made on behalf of the Board and deprived the High Court the opportunity of ruling on this issue by withdrawing its proceedings.

38. Third, when the communicant withdrew its proceedings on the morning of Thursday 20th December 2018, Counsel for the Board stated to the High Court that the proceedings were being withdrawn following discussions between the communicant and the developer overnight and said that her client, the Board, had not been a party to those discussions. The substance of those discussions and/or details of any agreement or accommodation reached between the parties are not known by Ireland.

39. Fourth, on page 6, the communicant suggests that it has no right of appeal from the High Court. Obviously, there was no right of appeal in circumstances where it withdrew its own proceedings. However, had it made its reply and pursued the proceedings to their conclusion, and lost (and we do not know what the outcome would have been), it would have had two opportunities to apply for an appeal. It could have applied to the High Court Judge for a certificate of leave to appeal to the Court of Appeal and, if a certificate were to be refused, it could also petition the Supreme Court directly for an appeal to it on the basis that the decision of the High Court involved a matter of general public importance or that it was necessary in the interests of justice that there be an appeal. Insofar as concerns the additional requirement of "exceptional circumstances" for a direct appeal from the High Court to the Supreme Court, the Supreme Court has indicated that where the High Court is required to grant leave for any appeal to the Court of Appeal but has refused an application in this regard, the fact that the appellant has no other option but to petition the Supreme Court for leave to appeal to it will generally be considered sufficient, in and of itself, to meet the 'exceptional circumstances'

criterion. Indeed, it has been a feature of the Supreme Court's recent jurisprudence that it has granted leave to appeal from the High Court directly to it in a significant number of environmental cases.

40. While it is acknowledged that there is not a strict requirement that a Communicant have exhausted its domestic remedies, the Committee must take into account the availability of any domestic remedy (paragraph 21 of the annex to Decision I/7) and has in the past deemed communications inadmissible on the basis that the possibility for judicial review has not been "adequately used" by a communicant (see ACCC/C/2010/46, United Kingdom).

41. In light of the foregoing, this is clearly a case where the communicant did not adequately exhaust its domestic remedies. Having regard both to the fact that the communicant abandoned its judicial review proceedings, and its inaccurate characterisation of the circumstances in which this occurred, Ireland submits that the Communication is manifestly unreasonable and that the Committee ought to revisit the question of its admissibility.

42. Two further points should be made in respect of the exhaustion of domestic remedies.

43. First, the communicant acknowledges that its complaint about the publication in the EIAR of information provided by the NPWS to the ecologists retained by the developer was not raised in its application for judicial review, but argues that it is a complaint that was not amenable to judicial review. However, insofar as the communicant is now suggesting that in making the EIAR available for public inspection, the Board somehow acted unlawfully, this was amenable to judicial review. Pursuant to Sections 50 and 50A of the PDA 2000, "any decision made or other act done" by the Board in the performance or purported performance of its functions under the PDA 2000 is amenable to challenge by way of application for judicial review. Furthermore, insofar as the communicant seeks to impugn the actions of the NPWS, the NPWS is a public authority, and its decisions and actions are also amenable to judicial review, not specifically pursuant to the PDA 2000, but

pursuant to the Rules of the Superior Courts, 1986, as amended, and Irish administrative law principles and jurisprudence.

44. Second, insofar as the communicant complains in this Communication about the absence of a statutory basis for restricting the publication of and public participation in respect of an EIAR and the absence of a statutory basis for the submission of information on a confidential basis to the Board, the communicant had the option of joining Ireland and the Attorney General as respondents to its judicial review proceedings but did not do so.

VI. ALLEGED NON-COMPLIANCE WITH THE AARHUS CONVENTION

45. The communicant alleges non-compliance by Ireland with Article 5, paragraph 10, Article 6, paragraphs 6 and 7, Article 9, paragraph 3 and Article 3 paragraph 1 of the Aarhus Convention. Section VI of the Communication sets out three bases for this allegation of non-compliance.

1 No statutory basis to restrict publication in an EIAR of sensitive information:- alleged non-compliance with Article 6, para. 6 and Article 9, para. 3

46. First, the communicant complains that "*it seems to be the case*" that the NPWS, in providing information to the ecologists retained by the developer, did not have regard to the provisions of the Aarhus Convention or the European Union Directive on Access to Environmental Information and did not impose any conditions on how the information provided might be used.

47. However, as already discussed above, the Communication simply does not present or establish any factual or evidential basis to support this claim. It has not identified those parts of the EIAR as published which, it says, ought to have been treated as confidential and the publication of which pose a threat to the hen harrier.

48. Moreover, and more generally, the communicant is incorrect in its assertions around the NPWS handling of access to sensitive biodiversity data. As explained above, the NPWS has in place procedures and guidelines on access to sensitive

biodiversity data, and these include that such data not be included in EIARs. As regards EIARs and the assessment of applications for development consent, NPWS considers that it is preferable that information on the location of sensitive species be provided in a manner that can inform any environmental impact assessment without disclosing the exact location of species. Such an approach, Ireland considers, is most in keeping with the overall principles of public participation and transparency which underpin the Aarhus Convention and the PDA 2000, as well as with the fair procedures entitlements of landowners.

49. Ireland also contends that the legal basis of this aspect of the communicant's complaint is unclear. At the end of Section VI 1 of the Communication, it is suggested that the matters complained of amount to non-compliance with Article 6, paragraph 6 and Article 9, paragraph 3 of the Convention.

50. Article 6, paragraph 6 provides as follows:

> 6. 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 relevant information shall include at least, and without prejudice to the provisions of article 4:
>
> (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
>
> (b) A description of the significant effects of the proposed activity on the environment;
>
> (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
>
> (d) A non-technical summary of the above;
>
> (e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above."

51. This provision of the Convention is directed at ensuring full and meaningful public participation in the development consent process for and environmental assessment of projects coming within the scope of Article 6 by ensuring that the public have access to the information relevant to the decision-making process. It is implemented in Ireland through the EIA Directive and the transposition thereof through the PDA 2000 and Regulations.

52. The communicant apparently seeks to construe Article 6, paragraph 6 as imposing an obligation on Member States to legislate for the redaction or non-publication of parts of an EIAR. However, this provision contains no such obligation.

53. Rather, paragraph 6 of Article 6 imposes a general obligation on the competent public *to give the public concerned access for examination to all information relevant to the assessment of applications for development consent* in respect of projects to which Article 6 applies, save that this is stated to be "*without prejudice to the right of parties to refuse to disclose certain information on those grounds which are identified in Article 4 paragraphs 3 and 4, as constituting a valid reason for refusing a request for access to environmental information.*" Article 4, paragraphs 3 and 4, in turn, provide exceptions to the obligations on public authorities to provide access to environmental information held by them when a request is made in this regard. These provisions are transposed into Irish law through the European Communities (Access to Information on the Environment) Regulations 2007, as amended. The exceptions include, at paragraph 4(h) of Article 4, provision that a request for access to environmental information may be refused if the disclosure would adversely affect the environment to which the information relates, such as the breeding sites of rare species.

54. Thus, the Convention affords State Parties a discretion to create an exemption from the general requirement of full public access to all information to be relied on in the decision-making process, in respect of, for example, information on the breeding sites

of rare species. Such an exemption was, for example, upheld as compliant with the Convention by the Committee in Case ACCC/C/2009/38 United Kingdom.

55. However, Article 6, paragraph 6 is framed as a discretion which Member States have to create an exception to the general principle of access (and which, it might be added, would have to be construed narrowly). It does not place any positive obligation on Member States to restrict access to information in any particular circumstances. By providing full access to information relevant to the assessment of applications for development consent, Ireland is not in non-compliance with the Aarhus Convention.

56. Insofar as concerns Article 9, paragraph 3, the communicant contends that there is a lack of an administrative or judicial review procedure "*to challenge the decision to publish environmental information in an EIAR*". However, insofar as the Board, as competent authority under the EIA Directive, decides to publish or directs the publication of information in an EIAR submitted to it, it is acting pursuant to the statutory provisions of the PDA 2000. Any such 'decision' is therefore a decision made or other act done by the Board in the performance or purported performance of its functions under the PDA 2000 and is amenable to judicial review in accordance with sections 50 and 50A of the PDA 2000. There is, accordingly, no want of compliance with Article 9, paragraph 3.

2. No statutory basis for confidential public submission of sensitive environmental information:– alleged non-compliance with Article 5, para. 10, Article 6, para. 6 & 7, and Article 9, para. 2

57. The second basis of the communicant's compliant is the absence of an express statutory basis for the submission of information to a decision-maker on a confidential basis. This did, to some extent, form part of the communicant's application for judicial review in respect of the decision of the Board to grant planning permission for the wind farm development. However, because the communicant withdrew its case whilst the matter was still at hearing, the Committee does not have the benefit of the views of the Irish courts on the legislation at issue.

58. However, it is the case that there is no express statutory provision allowing the Board to withhold information on which it intends to rely in determining an application for planning permission from the public and from the applicant for permission. Indeed, under Section 146(5) of the PDA 2000, the Board is under an obligation to make available for public inspection within three days following the making of a decision on any matter falling to be decided by it in the performance of a function under the PDA 2000 the documents relating to the matter (known colloquially as the Board's "public file"). The only exception to the above is for specified classes of proposed development by State Authorities for the purposes of public safety or order, national security or defence, or the administration of justice, which require approval by the Board if the proposed development is subject to EIA. The withholding of certain information, by either the State Authority or the Board, such as the details of internal arrangements on such developments is for security reasons only.

59. The communicant contends that Article 5, paragraph 10 and/or Article 6, paragraph 6 provide "*an overriding obligation to withhold environmental information whose publications would adversely affect the environment.*" However, neither of these provisions, nor any other provision of the Convention, places such a positive obligation on State Parties to legislate *for the restriction of public access* to the information to be taken into account by the competent authority as part of the EIA and development consent process.

60. The entire thrust of the Convention is towards transparency and access to the information that informs decisions on applications for development consent.

61. Article 5 is concerned with the collection and dissemination of environmental information by public authorities generally and is aimed at ensuring that environmental information can be accessed by a member of the public and that the manner in which such information can be accessed is transparent (paragraph 2). Article 5, paragraph 10, on which the communicant relies provides an exception to these general principles. It simply states:

> "10. 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".

62. In a similar vein, as already set out above, the qualification contained in Article 6, paragraph 6 is intended to provide an equivalent exception to the requirement of full access to the information which the decision-maker will take into account in determining an application for development consent, so that the public has the opportunity to comment on that information and participate meaningfully in the EIA and development consent process.

63. The exceptions in Article 5, paragraph 10 and Article 6, paragraph 6 are not framed as an "*overriding obligation to withhold environmental information from the public*". Rather, they provide that in particular circumstances State Parties can legislate for the withholding, by the competent public authorities, of certain sensitive information. That is a discretion open to State Parties as an exception to the general rule. It is not an obligation placed upon them.

64. Moreover, it is worth recalling that, on the facts, the exercise of such a discretion could never have arisen in the present case, in circumstances where the communicant never provided the information to the competent public authority, the Board, in the first place.

65. The communicant also invokes, at the end of Section VI 2 of the Communication, Article 6, paragraph 7. This provides:

> "7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity."

66. This obligation is thus intended to ensure that the public have an adequate opportunity to submit any comments, information, analysis or opinions that they consider relevant to the application for development consent. This obligation is fully complied with by the extensive provision for public participation in the PDA 2000 and implementing

regulations. In the present case, the communicant had a single but ample opportunity to submit all of the information it considered relevant to the Board. It unilaterally decided to omit certain information.

67. Moreover, Article 6, paragraph 7 has nothing to say about the possibility of the competent authorities of State Parties to withhold or redact certain information.

68. This is, as already discussed above, addressed in Article 6, paragraph 6. However, that provision merely provides a discretion to State Parties, in certain circumstances, to deviate from the principle of full access. Moreover, it is a decision for State Parties whether it is appropriate to invoke such discretion, and it is not for a member of the public unilaterally to make the determination as to what part of its observations can and cannot be made available to the public and the developer as the communicant sought to do in the present case.

69. Moreover, while Ireland maintains that Article 6, paragraph 6, merely accords a discretion to State Parties to legislate for an exception to the general principle of full access, any such exception would have to be narrowly construed and implemented in such a way as not to detract from or undermine public participation and transparency in decision-making and so as to be consistent with the constitutional rights of the landowner. Ireland contends that there is much merit in the NPWS' view, set out above, that it is better to provide the information in a way that can inform environmental assessment while not identifying the exact location of species, rather than to have the competent authority make decisions on the basis of information to which the public and the developer do not have access.

70. As regards the position of the developer and landowners, it is noted that the communicant states that it "*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*". It is entirely correct that the property rights guaranteed under the Irish Constitution do not equate to a constitutional right to develop one's land without planning permission. Further, permission will not be granted for a development until the competent authorities have fully considered the likely significant effects of any proposed

development on the environment and determined that it will not have unacceptable effects on any protected or sensitive habitats. However, one does clearly have a statutory entitlement to make an application for planning permission to develop one's land and that entitlement to apply for planning permission is an aspect of interest in property. Moreover, the decision on whether or not to grant such an application clearly affects the property of the landowner and it is well-established in Irish constitutional jurisprudence that a landowner is entitled to the constitutional guarantee of fair procedures and natural justice, including an opportunity to be heard, in respect of any decision affecting his or her property.

71. In summary, what the communicant is advocating in the present case that it, as a member of the public participating in an EIA and development consent process, can unilaterally decide that some of its information is not to be shared with the developer or made public. Such a regime would clearly be open to abuse and would allow for potentially erroneous statements to be made under the guise of confidentially, which the other parties, and the wider public, would never have the opportunity to verify, comment on or refute. This would, Ireland submits, be contrary to the overall scheme of the Aarhus Convention to the fair procedures rights guaranteed under the Irish Constitution.

72. Finally, the communicant contends under this heading, that there has been non-compliance with Article 9, paragraph 2 of the Convention because it was denied of right of access to a judicial remedy. This is simply not understood where the communicant availed of its entitlement to bring judicial review proceedings in respect of the decision to grant planning permission for the proposed wind farm, ventilated issues around the submission of information on a confidential basis during the hearing of those proceedings, but chose, after discussions with the developer and prior to the conclusion of the hearing, to withdraw its application for judicial review.

3. Consequential non-compliance:- alleged non-compliance with Article 4, paragraph 1

73. The third basis for alleged non-compliance with the Convention is described as 'consequential non-compliance'. It is suggested that Ireland is in breach of Article 3, paragraph 1 of the Convention in that it has failed to "*take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention*."

74. In circumstances where the communicant's complaint is founded on an alleged positive obligation to State Parties to legislate for the withholding of information in circumstances where no provision of the Convention provides for such a positive obligation, the alleged non-compliance with Article 3, paragraph 1 does not arise.

75. Indeed, it is worth highlighting the emphasis placed in Article 3, paragraph 1 of the need to have a "transparent" framework to implement the provisions of the Convention. The approach contended for by the communicant in this Communication is antithetical to the principle of transparency.

VII. CONCLUSION

76. For the reasons set out in these submission, Ireland contends (i) that this Communication should be declared inadmissible for the failure of the communicant to exhaust properly its domestic remedies and in the particular circumstances of its withdrawal of judicial review proceedings; (ii) that the Communication fails to establish any factual or evidential basis for the complaints advanced; and (iii) that there is no legal basis for the non-compliance with the Aarhus Convention alleged.