

# 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

(1) Right to Know CLG

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## II. Party concerned

Ireland

## III. Facts of the communication

### Introduction

1. This communication arises from a failure by Ireland to comply with Articles 5, (in particular 5(2), 5(2)(a), 5(3)(d)), 6(3), 9(4) and 3(9) of the Convention by:
  - a. failing to adopt general measures in compliance with Article 5. In particular it is alleged that the Irish legislation<sup>1</sup> giving general effect to Article 5 (including via transposition of Article 7 of the AIE Directive<sup>2</sup>) is incomplete since it doesn't oblige public authorities to actively publish environmental information on the internet or at all.
  - b. failing to ensure that environmental information relating to the regulation of development and land use is actively published on the internet in compliance with Article 5,
  - c. providing that time limits for public participation under Article 6 are calculated from the date of the application and not from the date when the public concerned is given notice and can effectively access the application file;

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<sup>1</sup> The European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (Official consolidated version - <https://revisedacts.lawreform.ie/eli/2007/si/133/revised/en/html>) (the **AIE Regulations**)

<sup>2</sup> Directive 2003/4/EC on Public access to environmental information (the **AIE Directive**)

- d. providing that the time limits to bring judicial review proceedings are calculated from the date of the decision and not from the date when the public and/or public concerned are given notice and/or can access all of the documents which contain the essence of the decision; and
  - e. discriminating based on domicile and for legal persons, their registered seat or an effective centre of its activities, by providing, in many cases, access only to paper copies of information in the offices of public authorities.
2. This communication relies principally on the Committee's findings with regard to non-compliance by the United Kingdom in Communication ACCC/C/2015/131<sup>3</sup>. It is submitted that the findings of non-compliance at paragraphs 174 (a), (b), (c) and (d) in the report of the Committee's findings and recommendations are particularly relevant. Although that communication concerned a particular application for planning permission in the United Kingdom, it will be shown in this communication that the same or similar non-compliance is in fact systemic in the Irish planning system.
  3. This communication additionally relies on (a) the text of the relevant Irish legislation which will be cited by hyperlink in the footnotes; (b) the results of a series of surveys of Irish planning authorities using the right of access to environmental information under Article 4 which are included as annexes; (c) other information included in the annexes which is in the public domain to illustrate the alleged non-compliance; and (d) the most recent Implementation Report submitted by Ireland<sup>4</sup>.
  4. While this communication is limited to issues arising from the Irish planning system, the communicants have no doubt that similar issues arise in other areas in Ireland, for example in forestry, waste management, wastewater, marine, enforcement etc.

### **Brief description of the Irish planning system**

5. Ireland consists of 31 local authorities<sup>5</sup> which are primarily responsible as planning authorities for the regulation of development and land use in their functional areas. Their functions include handling applications for development consent, enforcement of the terms of development consent, dealing with unauthorised development and so on.
6. In addition to the 31 local authorities, there is a national authority called An Bord Pleanála<sup>6</sup> which has a hybrid role. It acts as an administrative appeals body which handles applications for administrative reconsideration of decisions on applications for development consent and additionally it is the competent authority for applications for strategic infrastructure development consents.
7. The Planning and Development Act 2000<sup>7</sup> (**PDA2000**) is primary legislation which provides

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<sup>3</sup> [https://unece.org/sites/default/files/2021-11/ECE\\_MP.PP\\_C.1\\_2021\\_23-2113407E.pdf](https://unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_23-2113407E.pdf)

<sup>4</sup> <https://assets.gov.ie/194000/5b01a967-9f6c-4a9a-bbd0-44bfb814562f.pdf>

<sup>5</sup> See <https://www.gov.ie/en/publication/942f74-local-authorities/> for a list of local authorities

<sup>6</sup> [www.pleanala.ie](http://www.pleanala.ie)

<sup>7</sup> An official consolidated version is available here  
<https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html>

for the regulation of development and land use in Ireland. The Planning and Development Regulations 2001<sup>8</sup> (**PDR2001**) are secondary legislation providing primarily for procedural rules in this area.

8. Regulation 5 of the AIE Regulations sets out the general duties on public authorities in relation to environmental information. Regulation 4 excludes environmental information that is required to be made available under any other statutory provision from the scope of the AIE Regulations.
9. Historically, even prior to ratification of the Convention by Ireland or the EU, the PDA2000 provided for public participation on all applications for planning permission, regardless of the nature of the environmental effects or classification of the proposed project. In general, Ireland has substantially the same procedure for handling applications for development consent regardless of whether the development is likely to have a significant effect on the environment. Therefore, the allegations of non-compliance with Article 6 should be read as being limited to those applications for development consent which fall within Article 6 unless indicated otherwise, although in reality there is no material procedural distinction between those applications and applications which are not within the scope of Article 6.
10. It should also be noted that for development consent, Ireland generally carries out a single decision-making procedure where the consent decision and any associated screening determinations required under EU law are made at the same time as the overall decision on development consent in a hybrid decision.

#### **Active dissemination – incomplete legislation**

11. Ireland has not adopted any measures which ensure that generally there is effective access to environmental information and/or that environmental information progressively becomes available in electronic format. This can be seen from the text of Ireland's 2021 Implementation Report which does not identify any such general obligation.
12. While it is accepted that there may be specific legislation on active dissemination for certain categories of environmental information<sup>9</sup>, the general obligations imposed on public authorities fall far short of what is required by Article 5.
13. Article 5 of the Convention is primarily implemented via Directive 2003/4/EC on public access to environmental information. Article 7 of this directive provides:

Article 7

Dissemination of environmental information

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<sup>8</sup> An unofficial consolidated version is available here <https://assets.gov.ie/135619/1ef55833-465c-48da-afc0-592a164fdd1d.pdf>

<sup>9</sup> For example see Ireland's 2021 Implementation Report which lists some examples of active dissemination but it is clear that this is a limited and incomplete survey of all legislation requiring active dissemination.

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;

(d) the reports on the state of the environment referred to in paragraph 3;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;

(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

3. Without prejudice to any specific reporting obligations laid down by Community legislation, Member States shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.

4. Without prejudice to any specific obligation laid down by Community legislation, Member States shall take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities

which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay.

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

6. Member States may satisfy the requirements of this Article by creating links to Internet sites where the information can be found.

14. Regulation 5 of the AIE Regulations in purported implementation of Article 5 of the Convention, provides as follows:

General duties of public authority

5. (1) A public authority shall—

(a) inform the public of their rights under these Regulations and provide information and guidance on the exercise of those rights,

(b) make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means,

(c) ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable,

(d) maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found.

(2) The environmental information specified in *sub-article 5(1)(b)* shall include at least:

(a) the texts of international treaties, conventions or agreements and legislation pertaining to them,

(b) policies, plans and programmes,

(c) progress reports on the implementation of items specified in *sub-articles (a) and (b)*, where these have been prepared by the public authority or are held in electronic form by them, and

(d) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment,

where such information is directly relevant to the function of that public authority and is environmental information within the meaning of *article 3*.

(3) In the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, a public authority shall ensure that all information held by or for it, which could enable the public likely to be affected to take measures to prevent or mitigate harm, is disseminated immediately and without delay.

(4) Exceptions in *articles 7, 8 and 9* may apply in relation to the duties imposed by this article.

(5) Public authorities may satisfy the requirements of this article by creating links to internet sites where the information may be found.

15. This falls far short of what is required by Articles 5(2) and 5(3) of the Convention since it does not impose any general obligation on public authorities to make environmental information available to the public transparently or effectively or indeed at all and doesn't require the progressive making available of environmental information using electronic means on the internet other than enabling (rather than requiring) the satisfaction of the requirements of the article by creating links to internet sites where information may be found. In particular there is no general requirement under Article 5(3)(d) to ensure environmental information is available electronically to facilitate the application of national law implementing the Aarhus Convention.
16. As will be shown below, there are large amounts of environmental information on the planning register which are not available online and there is a distinct lack of transparency in relation to the dissemination of environmental information to the extent that even the public authorities themselves are unaware of what information they hold and disseminate. As will be shown below the planning register is a statutory register that is required to be maintained by planning authorities in relation to land within their functional areas with the categories of information to be entered on the register specified in legislation. It seems clear to the communicants that this register contains environmental information since it is information on land, which is an element of the environment and includes information on development which is an activity that affects the environment. A limited amount of information from this register is available through the MyPlan website identified by Ireland on page 24 of the 2021 Implementation Report but the entire register is not available online.

### **Active dissemination – Effectiveness and Transparency**

17. The communicants carried out a survey of all 31 planning authorities and An Bord Pleanála and asked them to provide copies of policies and procedures on dissemination of environmental information in fulfillment of the organisation's obligations under Article 7 of the AIE Directive and to identify the specific categories of environmental information that the organisation actually disseminates and where it can be accessed. The request was made pursuant to the communicants' national law right of access to environmental information which gives effect to Article 4 of the Convention.
18. A copy of the request is included at Annex 1 and a compilation of the responses at Annex 2. A summary of the responses is also included at Annex 3.
19. Regrettably 6 planning authorities failed to respond to the request.

20. Of the 26 public authorities that did respond not one had a documented policy on active dissemination of environmental information and none could provide a specific or comprehensive list of the categories of environmental information which the authority disseminated.
21. A large number of the responses appeared to confuse active dissemination with the public right to access environmental information on request.

### **Active dissemination – the Planning Portal**

22. Section 7 of the PDA2000 requires each planning authority to keep a register for the purposes of the Act in respect of all land within its functional area and sets out 30 categories of information to be kept on this register. In the communicants' view all of this information comes within the scope of Article 5(2)(b)(i) and 5(3)(d) of the Convention.
23. There is also a requirement to incorporate a map into the register for the purpose of tracing entries on the register. The register is required to be open for public inspection at the offices of the planning authority during office hours. The responsible Minister is empowered to prescribe additional requirements for public access to the register but has not done so to date.
24. Each planning authority maintains an online “planning portal” where selected information from the planning register is made available online<sup>10</sup>.
25. An Bord Pleanála does not maintain an equivalent of the “planning portal” but does publish some information on its website in relation to applications within the scope of Article 6 of the Convention as will be described further below.
26. The communicants submitted a request to all 31 local authorities asking them to identify which categories of information from the planning register were available online and where information was excluded either permanently or temporarily from online publication, documentation recording the legal basis for the exclusion. The communicants provided an Excel template to record the responses in a standard format. A copy of the request is included at Annex 4 and a spreadsheet summarizing the responses at Annex 5.
27. Regrettably five planning authorities refused to provide a response to the request at all.
28. An analysis of the information provided by those that did respond indicates that large numbers of the 30 categories of information required to be maintained on the planning register are not made available online and that where certain information is restricted, no legal basis under Article 4 has been identified for the limitation on what is published.
29. There are further issues with the way applications for development consent are made available.

### Certain information is withheld without notice

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<sup>10</sup> This link provides access to each planning authority's planning portal  
<https://www.gov.ie/en/service/planning-applications-in-your-local-authority/>

30. First it appears that there are internal guidelines produced by the Local Government Management Agency<sup>11</sup> which categorises the types of documents in planning applications. For the purposes of this communication, the critical aspect of these guidelines is the classification of planning application documents as either:
- a. Public - available to the public
  - b. Private – documents that are not available to the public until after a decision has been made; and
  - c. Confidential or internal – never made available to the public
31. There are number of issues with this approach.
32. First there is no requirement to identify all of the documents on the file whether public, private or confidential/internal. While the communicants agree that it is legitimate for some information to be withheld if so-justified under Article 5(10) – there is a requirement to provide an index to the entire file so that a member of the public may challenge the restriction on access to a particular document, based on specific public interest grounds.
33. Second, the classification of documents as private and/or confidential/internal is entirely arbitrary and makes no reference to the grounds set out in Article 4(3) and 4(4) which may give rise to a justification for refusing to provide access to a document.
34. Finally, this guidance document, as far as the communicants can ascertain, is not in the public domain which means the public is unaware of the fact that certain documents are routinely withheld from the planning file or are not made available until after the decision has been made.

#### Functionality issues

35. There is very limited functionality in the planning portals, for example
- a. There is no standard for how the documents are indexed or organised which makes it easy to miss a document.
  - b. Use is made of the non-standard DJVU file format<sup>12</sup>, not generally supported by most browsers, which requires third party plugins and a third party service to download documents and to convert them to pdf. Effectively accessing these files is beyond the capabilities of most of the public since it requires specialist IT skills.
  - c. Files are also uploaded in JPEG format with each page in an individual file. This makes it virtually impossible to make effective use of this format.
  - d. Often even where pdfs are made available they are scans of hard copy documents and are not searchable, thereby requiring the use of proprietary OCR functionality that is not generally available to the public.
  - e. The portals are very difficult to search, with only a limited number of fields that are searchable (see attached screenshot of the Meath planning portal)<sup>13</sup> There is no advanced search, and no way to search within an application file. All of the planning

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<sup>11</sup> Annex 6

<sup>12</sup> <https://en.wikipedia.org/wiki/DjVu>

<sup>13</sup> Annex 7 and <https://www.eplanning.ie/MeathCC/SearchExact>



portals have been configured to prevent indexation by commercial search engines such as Google.

- f. There is no way to follow a planning file, through the use of email or RSS alerts when a new document is placed on the file or there are other changes to its status (e.g. an appeal).
- g. There is no way to bulk download an entire file which is generally required by the public, in files with often 100s of documents, each document must be individually accessed and downloaded.
- h. There is no index of the file to identify documents which are being withheld from access
- i. There are other more localized issues,
  - i. Kerry County Council<sup>14</sup> makes the file available in a single un-indexed pdf in an unsearchable format. Large files can often run to thousands of pages and be several hundred megabytes in size.
  - ii. In Meath, withdrawn applications are removed from the online portal
  - iii. In Tipperary section 5 declarations as to whether planning permission is required are only placed online for eight weeks and are then removed.
  - iv. Galway City<sup>15</sup> - the files are stored as individual TIFFs of each page without an index, and no functionality allowing bulk download or search.

36. Taken as a whole, online access to planning applications is neither transparent or effective. The communicants are unaware of any planning authority or other public authority that has consulted with the public and sought views on how it should actively disseminate environmental information on the internet, in particular on how it should disseminate information through its planning portal. The accumulation of a lot of very sub-optimal functionality combines to create a system that is difficult to use and that complies with neither the letter nor spirit of Article 5 of the Convention.

### **Active dissemination – compliance with planning conditions and planning enforcement**

37. The communicants carried out a further survey which was targeted at specific information that each planning authority is required to hold, namely information about compliance submissions to satisfy conditions of development consent and details of planning enforcement.

38. So called compliance submissions concern aspects of a development which, as a condition of the grant of permission, must be agreed with the planning authority before development can commence. These are important records since a member of the public may wish to examine them to ensure that they are satisfactory. The public has a right to issue judicial review proceedings to challenge any such agreement between the planning authority and the developer<sup>16</sup>. Any development which takes place before these conditions are agreed is unauthorised development and therefore unlawful<sup>17</sup> and the identification of such developments

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<sup>14</sup> <https://www.eplanning.ie/KerryCC/SearchExact>

<sup>15</sup> <https://geo.galwaycity.ie/ePlan5/searchtypes?AspxAutoDetectCookieSupport=1>

<sup>16</sup> *Krikke v An Bord Pleanála* [2022] IESC 41, Woulfe J, para 69 [https://courts.ie/view/judgments/d2ba2d04-ceb4-453a-8b7b-abd8f930a815/7c150415-7dd4-42ad-8641-4f5ac09d5cc1/2022\\_IESC\\_41\\_%28Woulfe+J.%29.pdf/pdf](https://courts.ie/view/judgments/d2ba2d04-ceb4-453a-8b7b-abd8f930a815/7c150415-7dd4-42ad-8641-4f5ac09d5cc1/2022_IESC_41_%28Woulfe+J.%29.pdf/pdf)

<sup>17</sup> *Jennings v An Bord Pleanála* [2022] IEHC 11 [https://courts.ie/view/judgments/6845a0f2-181f-4400-8f79-af3e4e16dd09/eb0c6e79-2c4e-4c90-b290-08f6033a2b19/2022\\_IEHC\\_11.pdf/pdf](https://courts.ie/view/judgments/6845a0f2-181f-4400-8f79-af3e4e16dd09/eb0c6e79-2c4e-4c90-b290-08f6033a2b19/2022_IEHC_11.pdf/pdf)

is important to enable the public to exercise judicial enforcement rights under Section 160 PDA2000.

39. The second category of information concerns planning enforcement whereby the planning authority is asked to enforce planning legislation requiring prior development consent or to enforce compliance with the terms of granted development consents. This is important information since it is through this information that members of the public can check compliance with planning permission, whether another person has made a complaint and whether the planning authority is taking action on foot of complaints and the results of that action.
40. The request for this information and the individual responses are included in Annex 8 and 9 and a summary of the responses is included in Annex 10.
41. Regrettably three planning authorities refused to provide the information requested.
42. Of those that did respond two confirmed that details of compliance submissions are not published online and in almost every case planning enforcement files are not available online.
43. It should also be noted that the planning authorities are not transparent about what is published online, a member of the public cannot identify whether information exists through an online query since planning authorities do not provide details of the format in which they publish information. Therefore, for example, there is no easy way for a member of the public to identify a file with no information as opposed to a file which has information but the information is available in hard copy only.

#### **Applications for development consent – procedure and provision of information**

44. The relevant steps in a typical planning application for development consent are set out in Part 4 of the PDR2001, Regulation 16 additionally requires compliance with Part 10 for applications which are accompanied by an EIAR (in other words applications which are likely to have a significant effect on the environment within the scope of the EIA Directive<sup>18</sup>). A simplified table of the steps and timelines generated by the communicants is included as Annex 11
45. The first step in the procedure is for the applicant to give advance notice of an intention to make an application within the following two weeks by publishing a newspaper notice and erecting a notice at the site of the proposed development<sup>19</sup>.
46. The Irish system generally requires the submission of hard copy paper documents but gives planning authorities discretion to consent to the making of a planning application in electronic format<sup>20</sup>. However, it is mandatory for the EIAR to also be submitted in searchable electronic format alongside the paper copies<sup>21</sup>.

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<sup>18</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of certain public and private projects on the environment

<sup>19</sup> Regulations 17, 18, 19 and 98 of PDR2001

<sup>20</sup> Regulation 22(3) PDR2001

<sup>21</sup> Regulation 97 PDR2001

47. Following receipt of a planning application, the planning authority reviews the documents and date-stamps them if they comply with Regulations 18, 19(1)(a), 22 and as appropriate 24 or 25<sup>22</sup>. This is the date of receipt of the planning application and at this point the five-week period when the public concerned may submit comments begins; the date of receipt is included in this period<sup>23</sup> (in other words, a planning application may be deemed received at 5pm on a particular day yet this day is included within the time period during which the public may comment.)
48. However, at this point the application is not fully validated since the planning authority must also carry out a site visit to ensure compliance with the site notice requirements and may also check the substantive content of the application. If there is lack of compliance, the application may still be invalidated, even though the time period for public consultation is running. There is no obligation on a planning authority to validate a planning application within a particular time limit.
49. It is the practice of planning authorities to mark planning applications as “pre-validation” for long periods of time while all of the checks are being carried out notwithstanding that the application has been accepted and date stamped and that the period for public comments has commenced.
50. As can be seen from the attached<sup>24</sup> screen shot from the Meath County Council planning portal (see paragraph 24 above), files can remain as “pre-validation” for several weeks following the date of receipt. As shown in this screenshot taken on 1 September 2022, there is one file received on 8 August 2022 which remains “pre-validation”. The last date for comments on this file was 10 September 2022, in other words with only 9 days to go in the 34 day consultation period the planning authority had yet to decide whether a valid application had been made.
51. The requirement for making available of the planning documents online on the “planning portal” is triggered by the validation of the application and not its receipt<sup>25</sup>. This means there is an indeterminate time between the commencement of the public consultation period and the obligation to make the file available electronically and it is legally possible for the file to be made available online, after the consultation period has closed.
52. Official notice of the receipt of a planning application is made by way of the “weekly list” on the planning authority website<sup>26</sup>. This list contains, *inter alia*, particulars of planning applications received each week, including the date of receipt. The High Court has held that the weekly list is a primary source of information and enables members of the public to participate in the planning process<sup>27</sup>. An application is required to be published in the weekly list not later

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<sup>22</sup> Regulation 26(2) PDR2001

<sup>23</sup> Regulation 29(1)(a) PDR2001

<sup>24</sup> Annex 12

<sup>25</sup> Regulation 1(4) of SI 180 of 2020 defines a “Planning Application” as one which the planning authority is satisfied is valid. It is only at this point does the obligation to publish the file online within 5 working days come into effect (<https://www.irishstatutebook.ie/eli/2020/si/180/made/en/print>)

<sup>26</sup> Regulation 27 PDR2001

<sup>27</sup> *Linehan v Cork County Council* [2008] IEHC 79 “The statutory scheme envisages that the register maintained by a planning authority pursuant to s. 7 of the Act of 2000 and the Weekly Lists required by article 27 of the

than five working days following a particular week. What this means in practice is that notice of applications made on a Monday in a particular week is not given until the Friday of the following week or the second following Monday if there is an intervening public holiday. It should also be noted that public holidays (with the exception of nine-days over Christmas) are not excluded from the period when an application is open for public comments even though they are excluded from the deadline for publication of the weekly list. An exception to this is when the deadline for filing submissions and observations falls on a day when the office of the planning authority is closed, the time period is extended to the next working day<sup>28</sup>.

53. In general, there is an asymmetry in how public holidays are taken into account when determining time limits. Where a time limit applies to the planning authority the time limit is calculated by reference to working days (i.e. public holidays are excluded) whereas where a time limit applies to the public, it is based on calendar days with the exception of a deadline which falls on a day when the planning authority office is closed.
54. The upshot of these rules is that it can take up to two weeks for the public to be notified of the making of a planning application following receipt, but this period of time is within the five-week period for public comments on the application. The availability of the publication information online can be even more delayed even until after the consultation period has closed.
55. As noted above, planning authorities are required to make application files available on their websites within five working days<sup>29</sup> or where exceptional circumstances exist as soon as practicable after that. As already described, Regulation 4, however, defines “planning application” as one which the planning authority is satisfied that it complies with Regulations 18, 22 19(1)(a), and 24 or 25 PDR2001, in other words, the obligation to publish only arises following validation. As pointed out above, the time limits for public comments are already running at this stage. These provisions apply to all decisions within Article 6 other than those which come within the EIA Directive (for example applications which may have a significant effect on a habitat protected by the Habitats Directive but which does not require and EIAR).
56. There is a particular obligation in relation to applications accompanied by an EIAR which requires (a) publication of the application online upon receipt, (b) an obligation to make physical copies of submissions and observations available on receipt but only a discretion to publish them online; and (c) reports, the decision, notifications and details of financial contributions are to be published online within three working days of the decision<sup>30</sup>.
57. A first-instance planning decision is notified in two ways. The planning authority writes to the

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*2001 Regulations be the primary source of information in relation to planning applications made and received by a planning authority. The scheme requires that the latter, in particular, be widely available and expressly facilitates the Weekly Lists being made available in electronic form. That is clearly for the purpose of enabling members of the public to ascertain whether a planning application has been received by a planning authority and, if so, on what date the application was received in order that they may, if they wish, exercise their right to make a submission or observation on the application.”* [https://courts.ie/view/judgments/43dc4838-4d94-4df1-a6c8-008acdf0caeb/472b83e7-0eee-4d41-a77c-bbed219767b2/2008\\_IHC\\_76\\_1.pdf/pdf](https://courts.ie/view/judgments/43dc4838-4d94-4df1-a6c8-008acdf0caeb/472b83e7-0eee-4d41-a77c-bbed219767b2/2008_IHC_76_1.pdf/pdf)

<sup>28</sup> Regulation 29A PDR2001

<sup>29</sup> Planning and Development Act 2000 (Section 38) Regulations 2020 (SI 180 of 2020)

<https://www.irishstatutebook.ie/eli/2020/si/180/made/en/print>

<sup>30</sup> Section 38(3)(b) PDA2001

applicant and anyone who made a submission within three working days giving notice of the decision<sup>31</sup>. The notice is generally served in hard copy by registered post which can take up to two working days to arrive. The general public is notified through a weekly list as described above<sup>32</sup> and therefore it may take up to two weeks for the general public (including non-participating eNGOs) to be given notice of the planning authority decision. These periods take place within the four-week appeal period described in paragraph 59 below.

58. There is a statutory requirement to make a hard copy of the planning file available within three working days of a decision with a discretion to make the file available electronically<sup>33</sup>.
59. Irish procedure provides a right of administrative appeal to the applicant for permission, any person who made a submission or observation, and in the context of permissions subject to Environmental Impact Assessment, environmental NGOs meeting certain criteria (regardless of whether they made a submission<sup>34</sup>). The appeal must be made to An Bord Pleanála within a period of four weeks beginning on the date of the decision and includes the date of the decision.
60. Receipt of an appeal by An Bord Pleanála is again notified in several ways. First the planning authority is sent a copy of the appeal and it then writes to the first-instance participants using registered post to give notice of the appeal and enclosing a copy of the appeal submission<sup>35</sup>. Second, notice of the appeal is included in the planning authority weekly list<sup>36</sup>. Third, An Bord Pleanála produces a weekly list similar to the planning authority weekly list save that it is produced within three working days of the end of the week to which it relates<sup>37</sup>. The High Court has held that, similarly to the planning authority weekly list, the Board is obliged to publish the list and it plays an important role in giving the public notice of appeals<sup>38</sup>.
61. Members of the public (including first-instance participants) are entitled to make observations on any appeal with a further period of four weeks from the date of receipt by An Bord Pleanála of the last appeal but again the period during which notification takes place is within this four-week period.
62. In relation to appeals, the Board requests and is given a hard copy of the planning authority's file, it does not make use of the planning portal for the purpose of taking an electronic copy of the file. It then creates its own paper file which will have additional information over and above

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<sup>31</sup> Regulation 31 PDR2001

<sup>32</sup> Regulation 32 PDR2001

<sup>33</sup> Section 38(1) PDA2000

<sup>34</sup> Section 37 PDA2000

<sup>35</sup> Regulations 68 and 69 PDR2001

<sup>36</sup> Regulation 70 PDR2001

<sup>37</sup> Regulation 72 PDR2001

<sup>38</sup> *Sweetman v An Bord Pleanála* [2020] IEHC 39, para 43, "I cannot avoid the conclusion that the failure to include the appeal in this case in the weekly list published on 28th February, 2018 was a substantial failure to comply with the Board's obligations under Regulation 72 (1). The failure had serious consequences in that any member of the public (including the applicant) who happened to read the weekly list on 28th February, 2018 would not be aware that an appeal had been taken against the decision to grant permission for this extensive solar farm development in County Cork. This had very serious implications for the right of public participation and in particular the right available under s. 130 of the 2000 Act."

[https://courts.ie/view/judgments/53a163a0-ce58-4435-bfed-2561e3ea9b86/fa794cf5-b5ba-49ab-8d63-bc38df90c825/2020\\_IEHC\\_39.pdf/pdf](https://courts.ie/view/judgments/53a163a0-ce58-4435-bfed-2561e3ea9b86/fa794cf5-b5ba-49ab-8d63-bc38df90c825/2020_IEHC_39.pdf/pdf)

that of the planning authority, for example further observations, consultations and reports from statutory bodies, internal reports etc. The Board does not publish its file online and does not make it available during the appeal procedure in any format. The Board's file is not mirrored on the planning portal and is generally only available in hard copy format in An Bord Pleanála's offices after the decision has been made.

63. When it makes a decision, the Board notifies the parties to the appeal by post within three working days and publishes only its inspectors report, direction and order on its website. The remainder of the file must be accessed in hard copy in the Board's office in Dublin regardless of the location of the development. It is important to bear in mind that An Bord Pleanála is the appeals body for all of the 31 Planning Authorities, and it is also the decision-maker of first instance for major strategic infrastructural developments across the entire country. In practice it can take over a week to access a file since the Board archives its files offsite immediately once a decision is made and they must be retrieved manually, files are occasionally lost<sup>39</sup>.
64. The eight-week period for judicially reviewing a Board decision begins on the day of the decision and includes that day<sup>40</sup> it does not take account of the delay in notifying the decision or accessing the file. It is important to stress that under Irish law the reasons for the decision can be found anywhere in the file therefore a planning decision cannot be understood without access to the full file, which can run to thousands of pages.

#### **IV. Provisions of the Convention with which non-compliance is alleged**

65. 3(9), 5(2), 5(2)(a), 5(3)(d), 6(3), and 9(4)

#### **V. Nature of alleged non-compliance**

66. It is alleged that there is non-compliance with **Articles 5(2) and 5(2)(a)** since the facts set out above indicate that
  - a. Information is not "effectively accessible", as required in the first paragraph of article 5(2), since the periods for participation and judicial review begin before information is made available and in the case of planning applications even before the application has been validated. It is implicit in the concept of effective access to information that access is provided to all necessary information that is available before or at least at the same time as time periods begin in relation to public participation, administrative appeals and access to justice.
  - b. Planning authorities and An Bord Pleanála do not provide "sufficient information" about the scope and type of environmental information held by them, the terms and conditions under which it is available and the process by which it can be obtained. It is clear that none of the planning authorities or An Board Pleanála have documented policies or procedures in relation to compliance with Article 5(2)(a). While it is accepted that there is no express requirement to have a documented policy, the communicants believe that it is implicit in the concepts of transparency and effectiveness that public authorities will have documented their active dissemination

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<sup>39</sup> See attached survey of how long it has taken the communicants' lawyer to gain access to files following a request for file inspection – Annex 13

<sup>40</sup> Section 50(6) PDA2000

measures and furthermore they will have consulted the public at regular intervals to check that their policies are transparent and effective since transparency and effectiveness are concepts that must be understood at the very least by reference to the public.

- c. Planning authorities and the Board when making information available on the planning portal impose temporary restrictions on access to private documents and permanent restrictions on confidential/internal documents without identifying that these documents have been restricted and without making the public aware of the restrictions or the basis for them either generally or specifically. These restrictions are therefore not transparent. Furthermore, these restrictions are not based on the exceptions permitted under Article 4(3) or 4(4) of the Convention.
67. It is alleged that there is non-compliance with **Article 5(3)(d)** since the facts set out above show that large parts of the planning register and all of An Bord Pleanála's files (which are already available in electronic format) are not made available online. Active dissemination of this information facilitates the application of national law implementing the convention as follows:
- a. The information on the planning register in most part concerns decisions which may be challenged under Article 9(3) and/or relates to enforcement or other compliance functions of planning authorities in respect of acts and omissions which may also be subject to challenge under Article 9(3)
  - b. In the case of An Bord Pleanála its decisions may also be challenged under Article 9(2) and 9(3) where the activity is captured by participatory requirements of Article 6 of the Convention and/or under Irish and EU law.
  - c. Access to information on the planning register and the Board's files is also required to facilitate public participation under Article 6 generally.
68. It is alleged that there is non-compliance with **Article 5(3)(d)** since certain environmental information within the scope of Article 5(2)(b)(i) is not easily accessible in electronic format:
- a. In the case of planning authorities, although they have created online planning portals for dissemination of information on the planning register, there are many categories of information on the planning register which are not made available through these portals as set out in Annex 5; and
  - b. In the case of An Bord Pleanála none of its files are available online and the only way of effectively accessing them is through physical inspection at its offices in Dublin which is not even the location where the files are actually stored.
69. It is alleged that there is non-compliance with **Article 6(3)** because reasonable time-frames are not provided for the different phases of the public participation procedure. This is because the time-frames provided under Irish law include time within which the public concerned are either unaware that their participation rights are activated and/or during which they don't have access to all of the information needed in order to effectively participate because:
- a. the planning authority have still yet to validate an application, and to make all of the information required under Article 6(6) available electronically; and
  - b. the planning authority and An Bord Pleanála are to give notice of receipt of an application or an appeal.

Therefore the time-frames begin to run at a point in time when the public-concerned has yet to

be given notice of the application or decision and/or when all of the information has yet to be provided. In practice the time-frames depend on arbitrary factors such as the day of the week on which a decision is made, the length of time it takes to validate an application, delays in the postal system and so on.

70. It is alleged that there is non-compliance with **Article 9(4)** since the time limit to bring judicial review proceedings under Article 9(2) and 9(3) is not fair since it is calculated from the date of the decision rather than from the later of the date when the decision is actually made known to the public and the date on which access to all of the required information is provided.
71. It is alleged that there is a breach of **Article 3(9)** since hard copy only access discriminates based on domicile and/or the location of activities for legal persons. It is easier for persons who are located close to the office of a planning authority to access relevant information held in hard copy only. The fact that planning authorities do not publish indexes to the planning register means that the public must travel even to establish the existence of information. The issue is particularly acute with An Bord Pleanála since its hard copy only policy discriminates particularly against persons located outside of Dublin and especially persons located outside of Ireland.

## **VI. Use of domestic remedies**

72. Given that this communication concerns an alleged general and systemic failure by Ireland to comply with Articles 5, 6 and 9 of the Convention, with examples covering 32 public authorities and 10s of thousands of decision-making procedures, there is no appropriate remedy available to the communicants. In particular it should be noted that although the communicants have administrative and judicial remedies in relation to Article 4 requests for access to environmental information, no such remedies are specifically made available in relation to active dissemination<sup>41</sup>.
73. In relation to issues concerning time limits, the Irish Courts adopt a strict approach and have consistently upheld time limits and refused to extend them unless the delay was due to matters outside the applicant's control<sup>42</sup>. The allegation is that it is unfair for time limits to include periods during which the public authorities are arranging to give notice and/or publish information during which time the public are either unaware of the procedure or have no way of effectively preparing. There is no meaningful way of challenging this situation without creating a deliberate default in which case the Irish Courts will simply rule against the applicant.

## **VII. Use of other international procedures**

74. None

## **VIII. Confidentiality**

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<sup>41</sup> See decision of the Commissioner for Environmental Information decision in case OCE-109717-K5Y2Z9 Dr Fred Logue and Department of Public Expenditure and Reform <https://www.ocei.ie/decisions/dr-fred-logue-and-departm/index.xml>

<sup>42</sup> For example *Reidy v An Bord Pleanála* [2020] IEHC 423 (and case law cited)



75. Not requested

**IX. Supporting documentation (copies, not originals)**

76. See attached Annexes (13 in total)

**X. Signature**

A handwritten signature in black ink, appearing to read 'Fred', with a stylized flourish at the end.

Dublin, 3 February 2023

**XI. Sending the communication**

1. Send the communication by email to the Secretary to the Compliance Committee at the following address:

[aarhus.compliance@un.org](mailto:aarhus.compliance@un.org)

2. In the exceptional case that you do not receive an acknowledgement of receipt from the secretariat by email within one week, send the communication 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

<b>Annex</b>	<b>Description</b>	<b>Para</b>
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