Submission	
Submitter:	Mr. David Malone
Organisation Name:	Environmental Action Alliance - Ireland
Submission Title:	Mr. David Malone
Submission Reference No.:	S011656
Submission Received:	25 July 2024
Application	
Applicant:	GCHL LIMITED
Reg. No.:	W0298-01

See below for Submission details.

Attachments are displayed on the following page(s).

60 St. Joseph's Terrace,
Portarlington,
County Offaly.

Environmental Protection Agency,
PO Box 3000,
Johnstown Castle Estate,
Wexford. 10 May 2024

25 July 2024

***Re:** GCHL Ltd Waste License Application Ref: W0298-01*

Introduction

In my role as a Eurolaw Environmental Consultant with over 35 years of experience, I have filed multiple complaints with the European Commission concerning Ireland's non-compliance with European Directives. I have submitted four complaints (SG (2000) A/00138, SG (2000) A/10892, SG (2002) A/02671, and SG (2003) A/01946) related to the EIA Directive and three complaints (Pl 999/5112; Pl 997/4792, and Pl 999/4351) related to the European Waste Directive.

This submission will reference relevant Court of Justice of the European Union (CJEU) judgments, including Cases C-50/09 and C-215/06 on infringements of the EIA Directive and the Public Participation Directive 2003/35/EC, as well as Case C-494/01 on infringements of the European Waste Directive 75/442/EEC, as amended by Directive 91/156/EEC.

The submission will refer to Irish case law that has upheld the CJEU judgements and explain why the waste license application should be processed in accordance with EU procedural law. It will explain why the Agency must adhere to the legislation adopted by the EU institutions under Article 288 of the Treaty on the Functioning of the European Union (TFEU), to give effect to the codified EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU and the Public Participation Directive 2003/35/EC following the CJEU judgments in Cases C-50/09, C-215/06.

Additionally, it will refer to the legislation adopted by the EU institutions regarding the application of the Waste Management Acts 1996 to 2003 following the judgment in Case C-494/01.

***Note:** While some judgements were taken by the European Court of Justice (ECJ) for convenience, this submission will refer to all cases as taken by the Court of Justice of the European Union (CJEU).*

The Legal Status of the Waste Licence Application

On 17 September 2004, An Bord Pleanála (the Board) granted planning permission (Ref: PL09.205039) to GCHL Ltd (the company) subject to 24 conditions. That said, the company did not comply with conditions 1, 2, 4, and 12. In March 2016, Kildare County Council (the Council) brought a High Court case under Section 160 of the Planning and Development Acts, 2000, regarding unauthorized developments at the Ballinderry site.

High Court Order No: 2015/383MCA (Item 2) states that any unauthorised use of the property, including excavation and processing of quarry materials, as well as the importation of subsoil and inert material, must cease immediately. This action should remain pending until the company, their successors, and assigns receive the necessary Article 27 permission, license, permit, authorization, approval, or consent as required by the Agency.

On 7 March 2017, the Council issued the Company with a section 55 Notice (Ref: 47/2017) in accordance with the provisions of the Waste Management Act 1996, as amended. The waste material must be removed by an authorised contractor and shall be taken to a waste facility authorised to accept such waste materials and documentary proof that this measure has been complied with shall be submitted to the Council.

On March 16, 2017, Colm Lynch, Executive Engineer with the Council, prepared an Affidavit regarding High Court Case Record No. 2017/2085P. In this case, the Company filed a High Court Case against three concerned residents. Mr. Lynch's Affidavit stated that, based on his observations, he believed that the Court Order was not being followed. He noted that waste material was being brought onto the lands without the appropriate permission, license, permit, or authorization.

The company's waste license application stated that the High Court Order has directed the completion of restoration in accordance with the appropriate waste authorisation to comply with Condition 12 of PL 09.205039. This is incorrect as the Council's Section 160 did not pursue an order to ensure compliance with Condition 12.

The High Court did not issue an order for compliance with Condition 12, as it would violate the judgments of the Court of Justice of the European Union in Cases C-50/09, C-215/06, and C-494/01.

On 4 August 2021, the Agency wrote to the Company stating that it believed that the Court Order does not permit the proposed works mentioned in the license application. If this is the case, there would be no direct planning oversight of the proposed development, and the Agency cannot replace the role of a planning authority.

Section 42(1C) of the 1996 Act prevents the Agency from considering an application where the requirements under Section 42(1B) have not been met.

In October 2018, the Agency sent the Board a notification under section 42 of the Waste Management Act 1996, as amended, requesting to state whether the activity to which the licence application relates is permitted by the grant of permission PL.09.205039.

On 13 September 2018, the Board replied, stating that the EIS submitted with the licence application appeared not to be the same as that submitted to the Board under planning appeal reference number PLO9.205039.

On 3 September 2021, the Agency wrote to the Company stating that it had not received the further information requested on 4 August 2021. The Agency stated that, to advance this application for determination, the above information should be submitted to the EPA no later than 30 September 2021.

On 12 January 2022, the Agency informed the Company that, as outlined in previous correspondence, it sought confirmation from you under Section 42(1B) of the Waste Management Act 1996.

The Agency notified the Company on 12 January 2022 that they are aware of a waste license application submitted in compliance with a Court Order. In all events, the proposed activity does not match the details specified in the Court Order. According to Section 42(1C) of the 1996 Act, the Agency cannot review an application if the conditions under Section 42(1B) have not been fulfilled.

Section 42 (1B) of the Waste Management Act 1996, as amended, requires that an application for a licence to the Agency **shall include confirmation** in writing from a planning authority or An Bord Pleanála, that an application for permission for a licence relates, is under consideration by the planning authority concerned or An Bord Pleanála.

Section 42 (1C) of the Act 1996 requires that where an application for a licence is made to the Agency, but the applicant has not complied with subsection (1B), the Agency **shall refuse to consider the application and shall inform the applicant accordingly**.

Section 87(1C) of the EPA Act, now provides that where an application for a licence is made to the Agency in respect of an activity that involves development or proposed development for which a grant of permission is required but the applicant has not complied with subsection (1B) the Agency **shall refuse to consider the application and shall inform the applicant accordingly**

In Harte Peat Ltd v. EPA, Ms Justice Siobhán Phelan states that section 87(1C) obliged the Agency to refuse to consider an application that does not comply with section 87(1B). The Court found that the Agency was correct in its conclusion **that it could not consider the application under section 87(1C) of the EPA Act 1992 without any evidence of planning permission**.

The CJEU judgment in Case C-50/09 ruled that the Agency's processing of a waste licence application before the applicant submitted a planning application **to the relevant planning authority** was an infringement of Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35/EC.

On 6 March 2014, the Commission informed me of the new legislation transposed into Irish law to implement the judgment in Case C-50/09. The letter states that in 2012 Ireland adopted legislative amendments to the Waste Management Act 1996, the Planning and Development Act 2000 and the EPA Act 1992. The letter states that **the new provisions now require that a planning application must precede an application for a license with the Agency**

On 30 June 2017, the European Commission, concerning my complaint CHAP (2015) 1424, that Chapter 2 of Part 2 of the Planning and Development (Housing) and Residential Tenancies Act 2016 amended the Planning and Development Act 2000, as amended, by inserting new sections 176A to 176C into that Act.

The Chapter provides for a determination, before and separate to making a planning application, as to whether an EIA is required for a proposed development of a class specified in regulations made under section 176 of the 2000 Act. Finally, the Irish authorities noted that it also provides for EIA screening and screening in respect of appropriate assessment to be carried out together.

Article 17 of the TEU, states that Member States must not only incorporate the provisions of European Directives into their National law, but they must also ensure that these provisions are complied with by the emanations of the state.

Article 291 (1) of the Treaty on the Functioning of the European Union (TFEU) states that *"Member States shall adopt all measures of national law necessary to implement legally binding Union acts.* Article 19 (1) of the TEU, states: *'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*.'

Article 11 of the TFEU states that: *"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."*

Article 191 of the TFEU environmental policy is based on the precautionary principle and states that environmental effects should be considered at the earliest stage of all technical planning and decision-making processes.

Article 10 TEU provides that *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community"*

Despite this, the Agency is processing the waste license application without adhering to the above provisions of EU law. This action contradicts the right to good administration as outlined in Article 41 of the ECHR, Article 2 TEU on democracy, human rights, and the rule of law, and the principle of 'sincere cooperation' under Article 4(3) TEU.

Consistent Interpretation

The submission concerns the issue of consistent interpretation which is particularly relevant for directives.[1] The submission also concerns administrative authorities in which CJEU case law on the duty of consistent interpretation also covers administrative authorities [2] The submission will consider the implications of the Agency's membership in the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL).

The CJEU has stated that national law must be interpreted in conformity with the general principles of EU law. The duty of consistent interpretation is the primary tool for ensuring the effect of directives in the Member States' legal orders.[3]

The Von Colson and Kamann judgment referred to Articles 288 TFEU and 4(3) Treaty of European Union (TEU) as the legal basis for the duty of consistent interpretation. According to these judgments, Articles 288 TFEU and 4(3) TEU, both binding on the Member States, provide the legal basis for the duty of consistent interpretation. The former contains the obligation to implement directives, and the latter provides for the principle of sincere cooperation.

The duty of consistent interpretation contributes to the fulfilment of the Member State's obligation to correctly implement directives into national law and is described as '*an extension of the implementation obligation*'.[4] Some might argue that supremacy is inherent to Article 288 TFEU, simply because it is a binding provision of EU law.

Barrett J.'s considerations in EPA v. Harte Peat Ltd that the requirement of adopting a consistent interpretation is to be treated as enjoying priority, if the national provisions have their genesis in EU law.[5] The judgment, although the structural priority the judgment conferred on consistent interpretation, provided a clear example of supremacy of the duty of consistent interpretation

Judge Barrett J. made two contentions. First, for national provisions that have their genesis in EU law, the starting point for interpretation must be the requirements of EU law, with all other national interpretative rules being subject to those requirements.

Secondly, regarding the relationship between the duty of consistent interpretation and the literal approach, this means that '*when it comes to measures that derive from European Union law*', the former enjoys supremacy, and if the latter produces an incompatible result, the courts must seek an alternative meaning to be ascribed to the relevant provision.

The company's waste license application must comply with several EU laws, including the EIA Directive 2011/92/EU as amended by Directive 2014/52/EU, the European Waste Directive 75/442/EEC as amended by Directive 91/156/EEC, and the Public Participation Directive 2003/35/EC.

[1] Case C-282/10 Dominguez, ECLI:EU:C:2012:33, paras. 43-4
[2] Case C-105/03 Pupino, ECLI:EU:C:2005:386, para. 43.
[3] U. Everling, 'Zur Auslegung des durch EG-Richtlinien angeglichenen Rechts' (1992/3); Wissink (n. 12), p. 49; Betlem (n. 57), p. 399
[4] M. Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect' (2006/5) CMLRev, p. 1261.
[5] High Court 30 May 2014 EPA v Harte Peat Ltd [2015] 1 IR 462 at paras. 12, 26.

The High Court's judgment in Murphy v An Bord Telecom Éireann was the first time that the duty of consistent interpretation was considered by an Irish superior court. The judgment established that a legal basis derived from either the supremacy of EU law or a presumption that the Oireachtas cannot have intended to legislate in a manner that would violate EU law obligations.[6]

The Irish superior courts recognise that the duty of consistent interpretation has its legal basis in EU law, more specifically Articles 288 TFEU and 4(3) TEU, while, as far as the provisions were adopted by the legislature to implement the directive, the Irish courts needed to apply the duty of consistent interpretation in relation to implementing legislation so that the objectives of the directive and the intention of the Oireachtas coincided.

Edwards J. implied in his judgment in EPA v. Neiphin Trading Ltd that the introduction of the Interpretation Act 2005 may have removed the flexibility of the interpretative rules at common law, previously used by the Irish superior courts to depart from a literal interpretation in favour of a consistent interpretation.[7] The CJEU also used the term *'conforming interpretation'* because it is a requirement to interpret national law in a way which is compatible with EU law

The conforming interpretation of the directives mentioned above and the intentions of the Oireachtas are closely linked. This is because the Oireachtas transposed legislation into Irish law under Section 3 of the European Communities Act 1972 to comply with CJEU judgments against Ireland in Cases C-50/09, C-215/06, and C-494/01.

The Irish superior courts refer to Articles 288 TFEU and 4(3) TEU as the legal basis for the duty of consistent interpretation, it must not be overlooked that, notwithstanding Ireland's benevolent constitutional accommodation of EU law, its smooth operation is in the end enabled by and subject to these constitutional arrangements and EU law provisions only become effective on the basis of the European Communities Act 1972.

Article 291(1) of the TFEU requires Member States to enact national laws to enforce legally binding decisions made by the European Union. In line with this requirement, the Oireachtas passed laws, in accordance with Article 15.2.1° of the Constitution of Ireland, to implement the CJEU judgements in Cases C-50/09, 215/06, and C-494/01.

The EU's "constitutional charter," specifically the TEU and Article 29.4.6° of the Constitution of Ireland's second exclusion clause, states that no provision of the Constitution can prevent measures adopted by European institutions from having the force of law in the State.

Accordingly, the Agency must apply consistent interpretation when processing GCHL waste license applications. It must conform with the legislation adopted by the EU institutions under Article 288 of the TFEU to implement the codified EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU, and the Public Participation Directive 2003/35/EC, in line with the CJEU judgments in Cases C-50/09, C-215/06, and C-494/01.

[6] High Court 11 April 1988 Murphy v An Bord Telecom Éireann [1989] ILRM 53 at 59-60.
[7] High Court 3 March 2011 EPA v Neiphin Trading Ltd [2011] 2 IR 575 at para. 67

The Agency is Infringing European Directives

European case law has ruled many times that the provisions of a Directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required to satisfy the need for legal certainty, which requires that, in the case of a Directive intended to confer rights on individuals, the persons concerned must be enabled to determine the full extent of their rights.

The CJEU referred to the Agency 32 times in its judgment of Case C-50/09. The Court ruled that Ireland had failed to meet its obligations under the EIA Directive when both the Irish planning authorities and the Agency held decision-making powers over a project. They failed to fully comply with Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35/EC.

In case C-50/09, the CJEU ruled that the Irish planning authorities and the Agency did not fully comply with Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35/EC when they have decision-making powers over a project. Furthermore, in response to the findings of the Aarhus Convention Compliance Committee complaint Ref: ACCC/C/2010/54, Article 9(2) of the Aarhus Convention was also incorporated into Irish law through the Public Participation Directive 2003/35/EC.

In paragraph 119 of the High Court judgment in Harte Peat Ltd v. EPA [2022] IEHC 148, Ms Justice Siobhán Phelan states:

> *"With respect, the obligation to transpose a Directive is to do so in clear and precise terms. This point has previously been made in the specific context of the EIA Directive by the CJEU in Case C-50/09, Commission v. Ireland."*

The CJEU judgment in Case C-50/09, ruled that:

> *"It is therefore not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Articles 2 to 4 of Directive 85/337." (Para 81)*
>
> *"The Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement."* (Para 78)

The Agency is processing the GCHL waste licence application without complying with the CJEU judgements in Case C-50/09 or the High Court judgment in Harte Peat Ltd v. EPA. Ireland's legal system is a common law system, meaning that CJEU judgements play a significant role. Under Article 29.4.3 of the Constitution of Ireland, common law enjoys supremacy over national law.

The agency is processing the GCHL waste license application without following the principles of supremacy, direct effect, or consistent interpretation. It has ignored EU primary legislation that was necessary as part of the obligations of EU membership according to Article 29.4.6° of the Constitution of Ireland.

In May 2024, I sought "***Clarification of Supremacy of EU law***" from the European Commission. The Commission's reply on 28 May 2024 stated that following the CJEU judgment in Case C-50/09, Ireland amended its national legislation transposing the EIA Directive to remedy the breach found. As a result, the decision-making process involving multiple authorities under the EIA Directive should comply with EU law.

The European Commission also stated that the amendments introduced by EIA Directive 2014/52/EU have taken on board the abovementioned case law. However, if there is evidence that the national regime currently in place in Ireland is not conforming with the judgment in case C-50/09, it would be grateful to receive details of the breach you have identified. *(copy of European Commission reply attached)*

The GCHL waste licence application was submitted to the Agency in 2018 by the Company to dispose of 400,000 tonnes of waste annually. The Agency, in accepting and processing this waste licence application, violated the CJEU judgment in Case C-50/09, which ruled that Ireland had failed to ensure that, where Irish planning authorities and the Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35.

In this sense, I sent the Commission a copy of the letter from the Agency, dated August 9, 2023. The letter states that the Agency did not conduct a screening to ensure compliance with section 87(1B) of the EPA Act 1992, as amended, and section 42(1B) of the Waste Management Act 1996, as amended. This shows that the Agency is not conforming with the CJEU judgment in Case C-50/09 and is again infringing Articles 2-4 of the EIA Directive 2014/52/EU.

In case C-50/09, the CJEU ruled that Ireland failed to implement Article 3 of the EIA Directive. As a result, the Agency is breaching Article 3 of the EIA Directive 2014/52/EU by processing the waste license for PL. 09.226718

Accordingly, I forwarded a response from An Bord Pleanála to the Commission, indicating that no Environmental Impact Assessment (EIA) was conducted under Article 3 of the EIA Directive and no Natura Impact Assessment was carried out in accordance with Article 6 of the Habitats Directive for PL.09.226718.

The waste license application has been processed by the Agency for over 5 years without conducting the required screening as mandated by Section 87(1B) of the EPA Act 1992, as amended, and/or Section 42(1B) of the Waste Management Act 1996, as amended.

The CJEU Grand Chamber Case C-494/01 declared at Paragraph 179 that:

> *"Article 8 of the Directive, which inter alia implements the principle that preventive action should be taken, provides that the Member States have the task of ensuring that*

any holder of waste has it handled by a private or public waste collector or by an undertaking which carries out waste disposal and recovery operations, or recovers or disposes of it himself in accordance with the provisions of the Directive (Lirussi and Bizzaro, cited above, paragraph 52)."

The Agency, as a member of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), is in violation of the judgment in Case C-494/0. Rather than ensuring that the waste, which was illegally disposed of by the applicant in breach of the Waste Management Act of 1996, as amended, is properly dealt with, the Agency is processing a waste license application.

The CJEU Grand Chamber judgment in Case C-494/01declared at Paragraph 179 that:

"Article 8 of the Directive, which inter alia implements the principle that preventive action should be taken, provides that the Member States have the task of ensuring that any holder of waste has it handled by a private or public waste collector or by an undertaking which carries out waste disposal and recovery operations, or recovers or disposes of it himself in accordance with the provisions of the Directive (Lirussi and Bizzaro, cited above, paragraph 52)."

Despite this, for over 5 years, the Agency has been processing the GCHL waste licence application while the company is continuing to carry out unauthorised developments. Under EU law, the processing of a waste license application for unauthorised developments before submitting a remedial environmental impact is an infringement of Articles 2 to 4 of the codified EIA Directive 2011/92/EU as amended by Directive 2014/52/EU. It violates the CJEU Grand Chamber judgment in Case C-494/01.

The CJEU, in Case C-215/06, removed the provision in Irish planning legislation that facilitated the retention of unauthorised developments. The ruling, however, did allow for the regularisation of developments requiring EIA in exceptional circumstances. The Court concluded that Ireland had violated Articles 2(1), 4(1), and 4(2) of the EIA Directive by granting permission for the retention of projects that require an Environmental Impact Assessment without establishing exceptional circumstances.

The Supreme Court judgment on 7 November 2018 in An Taisce v McTigue Quarries Ltd & Ors [2018] lESC 54, Mr Justice John MacMenamin states:

"The PD (A) A 2010 did set out pathways of regularisation of unauthorised developments which required an EIA, screening for an EIA, or an AA, under the Habitats Directive, but always subject to the caveats laid down by the CJEU in relation to exceptional circumstances, and for achieving substitute consent.

One of these is to be found in section l 77C (2) (b), which allows a person who has carried out a development where there should have been an EIA, screening for an EIA, or an AA under the Habitats Directive, to apply to the Board for leave to seek substitute consent in respect of the development, where the applicant is of the opinion that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development through substitute consent." (Par 44)

The new Part XA of the Planning & Development Act 2000, which was added by Section 57 of the Planning & Development (Amendment) Act 2010, allows for a substitute consent process to legalise certain developments that fall under the scope of Environmental Impact Assessment (EIA) or Appropriate Assessment.

In any event, the company has not applied to the Board to determine, under Section 177 D (2) of the 2010 Act, if they qualify for exceptional circumstances to submit a remedial environmental impact statement to seek substitute consent from the Board.

In conclusion, the Agency is processing the GCHL waste license application without complying with the legislation adopted by the EU institutions under Article 288 of the TFEU to implement the EIA Directive as amended by the Public Participation Directive, following the CJEU judgments in Cases C-50/09, C-215/06, and C-494/01.

Yours sincerely,

David Malone

David Malone
Eurolaw Environmental Consultant

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EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT
Directorate E – Compliance, Governance & Support to Member States
The Director (acting)

Brussels
ENV.E.3/SG

Mr David Malone
Davidmalone12@gmail.com

Subject: Clarification of Supremacy of EU law

Dear Mr Malone,

Your email of 17 March 2024 addressed to Commissioner McGuinness has been passed to my Directorate for reply.

In your email, you ask about the legal landscape in Ireland following the judgment of the Court of Justice of European Union on 3 March 2011 in Case C-50/09, *Commission v. Ireland*. Following that judgment, Ireland amended its national legislation transposing the EIA Directive to remedy the breach found. As a result, the decision-making process involving multiple authorities under the EIA Directive should be compliant with EU law. In addition, the amendments introduced by Directive 2014/52/EU ([1]) have taken on board the abovementioned case-law.

It should not therefore be necessary for an Irish citizen to have to rely on the rule of consistent interpretation in a case where the EIA Directive applies to a project undergoing development consent. However, if there is evidence that the national regime currently in place in Ireland is not conform with the judgment in case C-50/09, we would be grateful to receive details of the breach you have identified.

Yours faithfully,

Paul Speight

([1]) Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399014880090&uri=CELEX:32014L0052).

Electronically signed on 28/05/2024 12:39 (UTC+02) in accordance with Article 11 of Commission Decision (EU) 2021/2121