



**THE SUPREME COURT**

**Supreme Court Record No. 2019/13**

**High Court Record No. 2017/884 JR**

**Clarke C.J.  
Irvine P.  
O'Donnell J.  
McKechnie J.  
Baker J.**

**BETWEEN /**

**PAT FITZPATRICK  
AND  
MICHAEL FLANNERY**

**APPLICANTS / APPELLANTS**

**-AND-**

**MINISTER FOR AGRICULTURE, FOOD AND THE MARINE AND  
THE SEA FISHERIES PROTECTION AUTHORITY**

**RESPONDENTS / RESPONDENTS**

**JUDGMENT of Mr. Justice William M. McKechnie delivered on the 31st day of July, 2020**

**Introduction**

1. As will be well known, fisheries law is subject to detailed regulation and overview at European Union level. One of the fundamental goals of the Common Fisheries Policy ("the CFP") is to ensure the sustainability of the fishing resources of Community waters, in addition to sharing that resource between Member States. In order to protect the sustainability of the resource, controls over the exploitation of the collective stock are provided for by Union law which may need to be transposed into, and supplemented where necessary, by national law. Given that, outside the territorial sea of individual States, the Exclusive Economic Zone ("EEZ") of each State contains resources shared with fishers from other Member States, a uniform regime, in the version applying, applies to the regulation and use of such exploitation. That regime is established by Council Regulation (EC) No 1224/2009 ("the Control Regulation"), introduced to establish 'a Community control system for ensuring compliance with the rules of the common fisheries policy', and is also supported, inter alia, by the Commission's Implementing Regulation (EU) No. 404/2011.
2. Under the CFP, an overall limit is set each year as to the amount of each type of fish which may be caught in a particular area. Within this limit, each Member State with an interest in fishing the same, is allocated a national quota in accordance with the principle of relative stability and must regulate and supervise the exploitation of that fishery, such that the utilisation of same does not exceed the allocated quota. The CFP, the Control

Regulation and the Commission Regulation (along with other measures) manage the exploitation of Community fisheries by means of imposing limitations (or quotas) using two means to that end: control of "fishing outtake" and control of "fishing effort". The method of calculating the former is at the heart of this appeal. The European measures in issue have been implemented in Irish law by the Sea Fisheries and Maritime Jurisdiction Act, 2006, as amended (hereinafter "the 2006 Act") the relevant provisions of which are later set out and also, *inter alia*, by the Sea-Fisheries (Community Control System) Regulations 2016 (S.I. 54/2016 as subsequently amended by the amending Regulation S.I. 78/2017).

3. *Nephrops norvegicus* is a slim, orange-pink crustacean which grows up to 25 cm (10 in) long and is more commonly known commercially by various names such as the "Norway lobster", "Dublin Bay prawns", "prawns" and "scampi"; they will be referred to as "Nephrops" for the purposes of this judgment. Nephrops are an important commercial product and can be found in the north-eastern Atlantic Ocean and parts of the Mediterranean Sea. The Nephrops fishery is, according to the affidavit evidence on behalf of the Minister for Agriculture, Food and the Marine ("the Minister"), worth an estimated €70 million landing value and at that time was the second most valuable fisheries resource available to the State.
4. An area of the Irish EEZ off the west coast of Ireland known as the Porcupine Bank is an important component of the Nephrops fishery. The Nephrops from this area fetch a better price on the market, as they are typically larger than those found elsewhere. The Nephrops stock in this area was severely depleted around 2008 and 2009; as a result, owing to concerns relating to the sustainability of this fishery a decision was taken under the provisions of the CFP to create a separate sub-area within the relevant sea area (ICES VII or "Area VII": for ICES see para. 47 below) so that distinct management measures might be adopted for the Nephrops fished on the Porcupine Bank. This sub-area is known as Functional Area 16 (hereafter "FU16") and straddles a number of sub-sectors of the more general fishing area known as Area VII; it is approximately 68,000 sq. km. in size. Certain steps were taken to protect the Nephrops stock in FU16, including a requirement for a seasonal closure for the month of May in order to protect the spawning period. A second important step was the imposition of an outtake or catch limit within this sub-area. Thus Ireland, like a number of other Member States, has a national quota for Nephrops in area ICES VII and a more limited quota within FU16. Effectively, it has a national quota, expressed as the Total Allowable Catch ("TAC"), "of which" a particular tonnage could be caught in FU16. In 2017 Ireland was allocated a TAC of Nephrops in Area VII of 9352 tonnes, of which only 1124 tonnes could be caught in FU16. The core of the dispute between the parties relates to the lawfulness of the methodology employed by the Sea Fisheries Protection Authority ("the Authority" or "the second respondent") in calculating the amount of Nephrops said to have been caught in FU16, rather than the greater area, ICES VII, for the first seven months of 2017.
5. Whilst the geographical area of FU16 can be delineated by rhumb lines sequentially joining certain identifiable points of longitude and latitude, nevertheless as expected it is

otherwise unmarked at sea. Therefore, at a practical level fishers can enter and leave the area freely. In 2017 fishers were not limited to fishing solely FU16 on any one trip (as applies now) but could also fish elsewhere in Area VII. It is to impute no misconduct to any fisherman in particular, to say that one can only but agree with the respondents' suggestion that there was therefore a temptation for fishers to misreport their FU16 catch/outtake as having been caught elsewhere in Area VII, perhaps on the way to or from FU16. This could not be checked on landing because it was very difficult to differentiate at that stage between Nephrops caught within and outside FU16.

6. The applicants/appellants are fishermen who operate off the west coast of Ireland, including in the region of the Porcupine Bank. As they explained in their evidence to the High Court (see paras 42 and 45, *infra*), the Nephrops fishery in FU16 forms a very important part of their fishing activity.
7. The Minister has responsibility under Part 2 Chapter 2 of the 2006 Act (sections 8-15 inclusive) for allocating among Irish fishers the annual Nephrops quota granted to Ireland under the CFP. He does this by what are known as Fishery Management Notices (section 12 of the Act) and by granting authorisations to qualifying fishing vessels (section 13 of the Act). (para. 28 below). Pursuant to section 43 of the Act, the Authority has responsibility, *inter alia*, for the day to day collation of data relating to, and for the supervision of, the exploitation of fishing opportunity (para. 28 below).
8. One of the requirements imposed by the Control Regulation is that each fishing vessel over 10 metres is required to maintain an electronic fishing logbook. It should be clarified at the outset that, despite its title, the information recorded in this logbook is in fact manually inputted by the human hand: it is thereafter electronically stored and capable of electronic transmission. The electronic system does not itself count or record the fishing catch; a human must count the fish and thereafter information is inputted into the electronic system (para. 21 below).
9. In July 2017, for reasons that are set out in detail below (see paras 30-33 and 50, *infra*), the Authority came to have serious doubts about the veracity and accuracy of the figures contained in the electronic fishing logbooks concerning the volume of Nephrops caught in FU16 during the first half of that year. Going by the figures notified by the Masters of Irish vessels via their logbooks, the reported catch of Nephrops in FU16, for that period was 733 tonnes. The Authority, however, took the view that there had been widespread and significant underreporting of the true quantity of Nephrops being caught in FU16 – its view was that such area was being substantially over-fished and that Nephrops caught in FU16 were being falsely reported as having been caught elsewhere. Using the methodology which is at the centre of these proceedings (see paras 52-53, *infra*), the Authority concluded that 1991 tonnes of Nephrops had already been fished in FU16, by the end of July 2017 – thus exceeding Ireland's TAC for that area for the entire year. The way by which it calculated this figure was according to a "time spent" methodology – this in short involved re-allocating the total yield over an entire trip so as to attribute catch to FU16 based on time spent fishing in that area, as opposed to being based on what the

logbook showed as having been caught in that area. In other words, if 75% of the total fishing time of a trip was spent in FU16, then 75% of the Nephrops catch was determined to have been caught in that area.

10. The Authority communicated this figure of 1991 tonnes to the Minister. In light of the information received and accepted, the Minister issued a number of "Fishery Management Notices" pursuant, *inter alia*, to section 12 of the 2006 Act, refusing to assign a quota for Nephrops in FU16 for October to December 2017; this on the basis that the national quota had already been exceeded. Thus, the practical effect of this was the closure of the Porcupine Bank to Irish Nephrops fishermen, a step which the Minister was obliged to take under Article 35 of the Control Regulation. Parallel to this, the Authority communicated to the European Commission the exhaustion of the national quota for Nephrops in FU16 for 2017. After this notification was made, the EU Commission issued a closure notice on the 2nd November, 2017, with the result that the area in question was off limits to fisherman from all Member States, from that date onwards (para. 23 below). For completeness, I should state that no fishing for this stock took place in FU16 for August and September of that year (para. 36 *infra*).
11. The applicants thereafter instituted the within proceedings seeking, in essence, to impugn the Authority's decision to communicate to the Minister the figures calculated using the "time spent" methodology and the Minister's consequent decision, in reliance thereon, to refuse to permit the continued fishing of Nephrops in FU16 for the last three months of that year. Although a number of issues were canvassed during the hearing, the matter of continuing relevance, in addition to standing, is the argument that the Authority was not legally entitled to calculate the relevant outtake figures using this methodology and that it should have accepted the figures, as contained in the electronic logbooks and reported accordingly. They maintain that if the Authority has concerns about the accuracy of these figures, there are other means of addressing this under the Control Regulation (such as powers of investigation), but that the Authority could not unilaterally introduce the "time spent" methodology that it had in fact employed. In a nutshell, the legal issue at the core of these proceedings is whether there was a valid legal basis for the Authority's method of calculation. The applicants were unsuccessful in the High Court, with Ní Raifeartaigh J refusing the reliefs sought ([2018] IEHC 772).
12. By determination dated the 12th June, 2019 ([2019] IESCDET 120) this Court permitted an appeal directly to it from the decision of the High Court, with the respondents accepting that the constitutional threshold had been met. The legal issues for the Court concern the *locus standi* of the applicants, the lawfulness of the "time spent" methodology, the issue of whether a reference should be made to the Court of Justice of the European Union ("CJEU") pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") and if so, at what stage of the proceedings should that occur. Before exploring the background, chronology, procedural history and evidence more fully, it may be helpful to first set out the relevant legal provisions whose interpretation is central to the major issue before the Court on this appeal.

## **Relevant European and Domestic Provisions**

### **European legal context**

#### The Treaty on the Functioning of the European Union

13. Article 3(1)(d) of the Treaty on the Functioning of the European Union ("TFEU"), which is contained in Title I TFEU ("Categories and Areas of Union Competence"), provides as follows:

"Article 3

1. The Union shall have exclusive competence in the following areas:

(a) ...

(d) the conservation of marine biological resources under the common fisheries policy;"

14. Article 4(1) TFEU provides that "*The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.*" Pursuant to Article 4(2)(d) TFEU, shared competence between the Union and the Members States applies in the area of agriculture and fisheries, excluding the conservation of marine biological resources.

15. Article 43(2) TFEU states as follows:

"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy."

#### The Common Fisheries Policy

16. The Common Fisheries Policy is contained in Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013. The objectives of the CFP are set out in Article 2 thereof, which provides, inter alia, as follows:

"Article 2

Objectives

1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.
2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.

3. The CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.
4. The CFP shall contribute to the collection of scientific data.
5. The CFP shall, in particular:
  - (a) ...
  - (c) provide conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity;
  - (d) ...
  - (e) promote the development of sustainable Union aquaculture activities to contribute to food supplies and security and employment;
  - (f) contribute to a fair standard of living for those who depend on fishing activities, bearing in mind coastal fisheries and socio-economic aspects;
  - (g) contribute to an efficient and transparent internal market for fisheries and aquaculture products and contribute to ensuring a level-playing field for fisheries and aquaculture products marketed in the Union;
  - (h) ...”
17. In short, the CFP aims to manage common fisheries resources and give European fishing fleets equal access to EU waters and fishing grounds. As mentioned above and as further elaborated below, one of the methods by which this is done is through the mechanism of Total Allowable Catches, which are shared between EU countries in the form of national quotas. These quotas may be swapped or exchanged between Member States. As succinctly explained by Ní Raifeartaigh J in the High Court ([2018] IEHC 77):
  - “11. The individual member states have the responsibility for managing the national quotas and ensuring that the quotas are not overfished. When all the available quota of a stock is fished, the member state must close the fishery. If national quotas are exceeded in a particular year, deductions are applied in the following year involving a multiplying factor where the overfishing exceeds 10%. Under the Sea Fisheries and Maritime Jurisdiction Act, 2006, the Minister may, under s. 12 of the Act, set down catch limits for the whitefish fisheries by means of Fisheries Management Notices. These notices are used to open and close fisheries as well as to set catch limits in certain fisheries for Irish vessels.”

### The Control Regulation

18. The Community control system for ensuring compliance with the rules of the CFP is set out in Council Regulation (EC) No 1224/2009 of 20 November 2009 ("the Control Regulation"). The recitals thereto confirm that the objective of the policy is to facilitate exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. The Control Regulation acknowledges that the success of the CFP involves implementing an effective system of control; to that end, the measures provided for in the Regulation "*seek to establish a Community system for control, inspection, and enforcement with a global and integrated approach in accordance with the principle of proportionality, so as to ensure compliance with all the rules of the common fisheries policy in order to provide for the sustainable exploitation of living aquatic resources by covering all aspects of this policy*" (Recital 2). Recitals 9 and 10 provide as follows:

"(9) A new, common approach to fisheries control should be introduced that includes comprehensive monitoring of catches, with a view to ensuring a level playing field for the fishing sector that takes into account the differences across the segments of the fleet. To this end common criteria for the implementation of fisheries control and in particular standardised and coordinated inspection procedures at sea, on land and throughout the market chain should be established. As part of the new approach the respective responsibilities of the Member States, the Commission and the Community Fisheries Control Agency should be clarified.

(10) Management of fishery resources at Community level is based in particular on total allowable catches (TACs), quotas, effort regimes and technical measures. Appropriate steps should be taken to ensure that Member States adopt the necessary measures to implement these management measures in an effective manner."

Recital 14 states, *inter alia*, that in order to ensure effective control, Member States should operate a vessel monitoring system ("V.M.S.") and fishing vessels of 12 metres' length overall or more should be equipped with a device allowing Member States to automatically locate and identify those vessels. Pursuant to Recital 22, "*[s]ince the management of fishing resources is based on fishing opportunities it should be ensured that catches and deployed effort are correctly recorded and that the catches and deployed effort are charged against the quotas and effort allocations of the flag Member State. Fisheries should be closed if the available quota or effort allocation have been exhausted.*"

Recital 26 acknowledges that special rules should apply to fishing restricted areas and that the procedure for the establishment and lifting of real time closures for fishing grounds, should be clearly established.

19. Regard must be had to the provisions of the Control Regulation, which are of considerable importance to the appellants' submissions on this appeal. While many were referred to in the course of argument, the following appear to be the most important. Article 1 provides that the Regulation establishes a Community system for control, inspection and enforcement (a "Community control system") to ensure compliance with the rules of the

CFP. Article 2 states that the Regulation applies to all activities covered by the CFP carried out on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag Member State, by nationals of Member States. Certain definitions are provided for in Article 4, which states that “‘control’ means monitoring and surveillance”; ‘inspection’ is defined as meaning “any check which is carried out by officials regarding compliance with the rules of the common fisheries policy and which is noted in an inspection report”, while ‘enforcement’ “means any actions taken to ensure compliance with the rules of the common fisheries policy”. Article 5, headed “General principles”, provides, inter alia, as follows:

- “1. Member States shall control the activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters under their sovereignty or jurisdiction, in particular fishing activities, transshipments, transfer of fish to cages or aquaculture installations including fattening installations, landing, import, transport, processing, marketing and storage of fisheries and aquaculture products.
2. ....
3. Member States shall adopt appropriate measures, allocate adequate financial, human and technical resources and set up all administrative and technical structures necessary for ensuring control, inspection and enforcement of activities carried out within the scope of the common fisheries policy. They shall make available to their competent authorities and officials all adequate means to enable them to carry out their tasks.
4. ...
5. In each Member State, a single authority shall coordinate the control activities of all national control authorities. It shall also be responsible for coordinating the collection, treatment and certification of information on fishing activities and for reporting to, cooperating with and ensuring the transmission of information to the Commission, the Community Fisheries Control Agency established in accordance with Regulation (EC) No 768/2005, other Member States and, where appropriate, third countries.
6. ...”

In Ireland, the “single authority” referred to in Article 5(5) is the second respondent, the Sea Fisheries Protection Authority (Regulation 3 of S.I. No. 54/2016: para. 2 above).

20. Title III deals with general conditions for access to waters and resources; it covers such matters as fishing licences (Article 6), fishing authorisations (Article 7), marking of fishing gear (Article 8), the installation of vessel monitoring systems (Article 9), automatic identification systems (Article 10), vessel detection systems (Article 11), transmission of data for surveillance operations (Article 12) and new technologies (Article 13).

21. Title IV covers the control of fisheries. Central to this is Article 14, headed "Completion and submission of the fishing logbook". Article 14(1) provides that masters of Community fishing vessels of 10 metres' length overall or more shall keep a fishing logbook of their operations, indicating specifically all quantities of each species caught and kept on board above 50 kg of live-weight equivalent. The Article thereafter sets out detailed provisions in respect of what should be in the logbook and how it should be maintained. Article 14(9) provides that the accuracy of the data recorded in the fishing logbook shall be the responsibility of the vessel master (para. 29 below). Under Article 15, the information shall be sent by electronic means to the competent authority of the flag member state at least once a day.
22. Also significant for present purposes is Article 33, contained in Section 3 ("Recording and exchange of data by Member States") of Title IV. It provides in relevant part as follows:
- "Article 33
- Recording of catches and fishing effort
1. Each flag Member State shall record all relevant data, in particular data referred to in Articles 14, 21, 23, 28 and 62, on fishing opportunities as referred to in this Chapter, expressed both in terms of landings and, where appropriate, fishing effort, and shall keep the originals of those data for a period of three years or longer in accordance with national rules.
  2. Without prejudice to specific rules laid down in Community legislation, before the 15th of each month, each flag Member State shall notify the Commission or the body designated by it, by computer transmission of the aggregated data:
    - (a) for the quantities of each stock or group of stocks subject to TACs or quotas landed during the preceding month; and
    - (b) ...
  3. ..."
23. Pursuant to Article 34(a), a Member State shall inform the Commission, without delay, when it establishes that the catches of a stock or group of stocks subject to a quota made by the fishing vessels flying its flag, are deemed to have exhausted 80% of that quota. In accordance with Article 35(1)(a), each Member State shall establish the date from which the catches of a stock or group of stocks subject to a quota, made by the fishing vessels flying its flag shall be deemed to have exhausted that quota. Article 35(2) provides that from that date, the Member State concerned shall prohibit fishing either for the stock or group of stocks whose quota has been exhausted; such decision must be made public and immediately communicated to the Commission and must be published in the official journal of the European Union and on the public website of the Commission (Article 35(3)).

24. Title VI relates to surveillance. It obliges Member States to carry out surveillance in Community waters under their sovereignty or jurisdiction based on (i) sightings of fishing vessels by inspection vessels or surveillance aircrafts; (ii) a vessel monitoring system; or (iii) any other detection and identification methods. Title VII covers inspection and proceedings. Title VIII covers "Enforcement". Article 89(1) provides that Member States shall ensure that appropriate measures are systematically taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons suspected of a breach of any of the rules of the common fisheries policy. The overall level of sanctions is to be calculated in such way as to make sure that they effectively deprive those responsible of the economic benefit derived from their infringement without prejudice to the legitimate right to exercise their profession (Article 89(2)). Article 92 provides for the imposition of a penalty point system for serious infringements.
25. Title XI is headed "Measures to Ensure Compliance by Member States with Common Fisheries Policy Objectives". Article 103 provides for the suspension and cancellation of Community financial assistance; Article 104 covers the closure of fisheries for failure to comply with the CFP objectives. Article 105(1) provides that when the Commission has established that a Member State has exceeded the quotas which have been allocated to it, the Commission shall operate deductions from future quotas of that Member State. Article 105(2) provides a table indicating the relevant deductions. Article 107 covers the deduction of quotas for failure to comply with the rules of the common fisheries policy.
26. Title XII covers "Data and Information". Article 109(1) states that Member States shall set up a computerised database for the purpose of validation of data recorded in accordance with the Control Regulation and a validation system. Sub-paragraph (2) provides that:
- "2. Member States shall ensure that all data recorded in accordance with this Regulation are accurate, complete and submitted within deadlines laid down in the common fisheries policy. In particular:
- (a) Member States shall perform cross-checking, analyses and verifications of the following data through automated computerised algorithms and mechanisms:
    - (i) vessel monitoring system data;
    - (ii) fishing activities data, in particular the fishing logbook, the landing declaration, the transshipment declaration and prior notification;
    - (iii) data from take-over declarations, transport documents and sales notes;
    - (iv) data from fishing licences and fishing authorisations;
    - (v) data from inspection reports;
    - (vi) data on engine power;
  - (b) the following data shall also be cross-checked, analysed and verified where applicable:

- (i) vessel detection system data;
- (ii) data on sightings;
- (iii) data relating to international fisheries agreements;
- (iv) data on entries into and exits from fishing areas, maritime areas where specific rules on access to waters and resources apply, regulatory areas of regional fisheries management organisations and similar organisations and waters of a third country;
- (v) automatic identification system data.”

#### Further EU Law Provisions

27. Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 lays down detailed rules for the implementation of the Control Regulation (see, in particular, Title III, “Control of Fisheries”, establishing detailed requirements in respect of the fishing logbook). Further reference should also be made, to Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (“the IUU Regulation”) and in particular to Article 43 thereof, which states as follows:

“Immediate enforcement measures

1. Where a natural person is suspected of having committed or is caught in the act while committing a serious infringement or a legal person is suspected of being held liable for such an infringement, Member States shall start a full investigation of the infringement and, in conformity with their national law and depending on the gravity of the infringement, take immediate enforcement measures such as in particular:
  - (a) the immediate cessation of fishing activities;
  - (b) the rerouting to port of the fishing vessel;
  - (c) the rerouting of the transport vehicle to another location for inspection;
  - (d) the ordering of a bond;
  - (e) the seizure of fishing gear, catches or fisheries products;
  - (f) the temporary immobilisation of the fishing vessel or transport vehicle concerned;
  - (g) the suspension of the authorisation to fish.
2. The enforcement measures shall be of such nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete its investigation.”

#### **National legal context**

28. The Sea Fisheries and Maritime Jurisdiction Act 2006 (“the 2006 Act”) established the second respondent, the Sea Fisheries Protection Authority. The principal functions of the Authority are set out as follows at section 43(1) of the Act:

- “(a) to secure efficient and effective enforcement of sea-fisheries law and food safety law,

- (b) to promote compliance with and deter contraventions of sea-fisheries law and food safety law,
- (c) to detect contraventions of sea-fisheries law and food safety law,
- (d) to provide information to the sea-fisheries and seafood sectors on sea-fisheries law and food safety law and relevant matters within the remit of the Authority, through the Consultative Committee established under section 48 or by any other means it considers appropriate,
- (e) to advise the Minister in relation to policy on effective implementation of sea-fisheries law and food safety law: the Minister shall consider any such advice for the purposes of Chapter 2,
- (f) to provide assistance and information to the Minister in relation to the remit of the Authority,
- (g) to collect and report data in relation to sea-fisheries and food safety as required by the Minister and under Community law,
- (h) to represent or assist in the representation of the State at national, Community and international fora as requested by the Minister, and
- (i) to engage in any other activities relating to the functions of the Authority as may be approved of by the Minister."

By s. 42 of the Act, the Authority "shall be independent in the exercise of its functions".

Also relevant are sections 12(1) and 13(1) of the Act, which provide, respectively, as follows:

"12.— (1) The Minister may, for the proper management and conservation and rational exploitation of the State's fishing quota and fishing effort under the common fisheries policy, issue notices to be complied with by the owners or masters of Irish sea-fishing boats and persons on board them with regard to prohibitions or restrictions on the catching of fish or the quantity of fish which may be caught in a specified area.

13.— (1) The Minister may, for the proper and effective management and conservation and rational exploitation of fishing opportunities and fishing effort for Irish sea-fishing boats under the common fisheries policy, at his or her discretion—

(a) upon—

- (i) the application from, in such form as the Minister decides, or
- (ii) the Minister's own initiative in respect of any person who—

(I) is the owner of an Irish sea-fishing boat which is entered in the Register of Fishing Boats, and

(II) to whom a sea-fishing boat licence has been granted,

and

(b) upon the person giving to the Minister such information as the Minister may reasonably require in relation to the application or the fishing capacity or operation of the boat concerned,

grant to the person an authorisation ("authorisation") in respect of the boat, authorising, subject to this section, the utilisation of the boat's fishing effort for the capture and retention on board of a specified fish stock ("stock") or group of fish stocks ("stocks") from the boat in a specified area mentioned in the authorisation and the landing or trans-shipment of the specified stock or stocks taken in that area during such period as is specified in the authorisation."

29. Reference must also be made to the earlier Sea-Fisheries (Common Fisheries Policy Community Control System) Regulations 2011 (S.I. No. 490 of 2011), which were designed to implement the EU regime: the version currently in force is referred to at para. 2 above. Regulation 3 provides that a person shall not operate a Community fishing vessel unless he or she has a valid fishing licence; Regulation 4 requires those operating relevant fishing vessels to install a vessel monitoring system. Regulation 5 states as follows:

"Completion and submission of the fishing logbook

5. (1) A master of a Community fishing vessel to which Article 14(1) of the Council Regulation relates shall complete a fishing logbook and submit it to the Minister or the competent authority in the Member State where the landing has taken place in accordance with Article 14 (1), (2), (3), (4), (5), (6), (7) and (9) of the Council Regulation and Articles 29, 30, 31, 32, 33, 34, 35, 48, 49, 50 and 51 of the Commission Regulation.

(2) A master of a fishing vessel shall complete a fishing logbook in accordance with Article 14 (8) of the Council Regulation."

As above stated, the single authority for the purposes of Article 5(5) of the Control Regulation shall be the Sea Fisheries Protection Authority (para. 19 supra).

### **Background**

30. A full chronology of the events leading to the instituting of these proceedings is set out at paras. 29-40 of the judgment of Ní Raifeartaigh J on the interlocutory injunction application (see *Fitzpatrick v. The Minister for Agriculture, Food and the Marine* [2018] IEHC 77). Reference should be made to that judgment for a detailed account of the circumstances pertaining in 2017 and the correspondence passing between the parties. The learned High Court judge took a letter from the Authority to the Minister on the 14th July, 2017, as the starting point, and so that is where this judgment will also begin. On that date Mr. Micheál O'Mahony, Authority member, wrote to the Minister. The subject of

the letter was described as: "Significant widespread catch area misdeclaration, Porcupine prawns". The view of the Authority is captured by the stark opening which he penned :

"...The informed expert opinion of SFPA is that national policy around prawn fishing from waters west of Ireland is currently being systematically and repeatedly circumvented by the Irish fishing industry.

It is our view that there is a widespread practice of prawn fishing in FU 16 (Porcupine area) with these catches mis-declared as caught elsewhere in Area VII. The immediate issue is that the prawn stock on the Porcupine Bank is being fished far in excess of the monthly limits set down in policy, bringing Ireland rapidly closer to national quota exhaustion for FU 16. The fishery outtake data derived from fishermen declarations which are supplied by SFPA to DAFM, therefore become incorrect and wholly unreliable, with outtake data for FU 16 (Porcupine area) dramatically underestimated, and outtake for the remainder of Area VII dramatically overestimated..."

31. The letter goes on to explain that the quota allocation model gives "dramatically different" quotas to fishers within the FU16 part of Area VII (three tonnes per month) compared to other parts of that area (twenty tonnes per month). He points out that there is an inevitable compliance risk any time fishing vessels have different entitlements on different sides of a notional sea line, given the potential for catches taken from the lower-quota area to be logged as taken from the higher-quota area in order to legitimise illegal catches from the former area.
32. He continues; that the available data streams reveal disproportionately long periods spent at fishing speed on the low-quota side of the notional line, with remarkably low catches logged, and disproportionately short periods of time spent on the high-quota side of the line, with remarkably large catches logged. The letter expresses the view that this was currently happening on a widespread and repeated scale by "most Irish fishers of these stocks": in short, vessels were spending most of their time in FU16 but logging most of their Nephrops catches in other parts of Area VII. However, the vessel movement patterns were much more consistent with the bulk of the catches being caught in the low-quota area, FU16 and then being mis-declared as caught in the high-quota area, elsewhere in Area VII. Referring to the index of notional individual boat catch rates, the letter sets out that the expected yield for these vessels is around 50kgs per hour of fishing activity; however, many trips were logging catch rates as high as 400kgs per hour in Area VII outside of FU16 (including some outliers of up to 2000kgs per hour), whereas catch rates in the more distant FU16 grounds are logged at a rate of less than 10kgs per hour. The letter notes that it makes no business sense that vessels would spend so little time in extraordinarily productive grounds close to shore and then, with additional fuel costs, motor to low-yielding grounds much further distant, and spend the majority of their time there. The letter states that UK vessels were typically logging catches in the order of 50kgs per hour spent in FU16, a relatively normal commercial catch rate. Further analyses, which are set out in the letter, are said to support the Authority's conclusion in

respect of the exceedingly low likelihood of logged events having in fact occurred, and the much higher likelihood of the reported catches having taken place elsewhere.

33. Mr O'Mahony speaks of the Authority's role in securing compliance with all sea fisheries legislation and reflects on the fact that the one sanctioning option for non-compliance is criminal prosecution, which in his view has inherent limitations. He then refers to a vessel detained earlier that week and found to be flouting the logging requirements, and states that the likely scale of noncompliance points to potential catches rapidly approaching the trigger levels for closure of the fishery. The letter states that the Authority would be notifying the individual vessel owners of their intent to invoke the provisions of Article 43 of the IUU Regulation to direct apparently non-compliant vessels to cease fishing and return to port for investigation. It concludes with a paragraph setting out "Potential policy alternatives"; two options are listed:
- (1) *One function area per trip.* With this option fishers would continue to get separate monthly quotas for FU16 and the remainder of Area VII but could only exploit these on separate trips and not both on the same trip.
  - (2) *Effort-based disaggregation of catches.* With this option fishers would get a combined prawn quota for all of Area VII, and their total catches could be disaggregated retrospectively according to effort in each area, e.g. a five-day trip with four days spent in FU 16 would result in 80% of the catch being attributed to FU 16.

The letter does not recommend the closure of FU16 in respect of Nephrops fishing.

34. Following this letter, several meetings took place between representatives of the fishing industry, the Minister and the Authority. The Quota Management Advisory Committee, which advises the Minister on fishing quotas and which relies on data supplied by the Authority, met on the 20th July, the 23rd August, and the 21st September, 2017. At the first such meeting, the industry representatives were informed of the potential for quota exhaustion of FU16 and they agreed to close the area for the month of August; Mr Fitzpatrick, the first appellant, has averred that this was agreed for pricing reasons (it being more lucrative to fish Nephrops later in the year) rather than any agreement from industry representatives as to the Authority's assessment of quota exhaustion. At the second meeting, it was agreed that the area would remain closed for September. At the third meeting, the Authority's consultative committee declared that the annual quota had been overshot. This meeting was adjourned so that the industry could meet with the Authority separately on the 22nd September to discuss this issue; and it was at this time that industry representatives advocated re-opening FU16 for November and December 2017. They further stated that they would not make recommendations to the Minister until he accepted that the logbook data would be relied upon rather than the information provided by the Authority.
35. By letter dated the 5th October 2017, Dr. Susan Steele, Chair of the Authority, wrote to the Minister. She stated, *inter alia*, as follows:

“In relation to the question of data for the outtake of Nephrops from the FU 16 from January 2017 until its closure at the end of July, the total provisional figure from the fishermen’s logbook records is 733 tonnes. It is the opinion of the SFPA that this figure is unreliable and the more accurate figure of outtake is 1991 tonnes of Nephrops. That figure of 1991 tonnes is based upon our assessment of the vessels that fishes FU 16 Nephrops during the course of a trip, 89% of the operational time reported was in FU 16 itself and only 11% outside. As per the letter of the 14th July, 2017, the SFPA have formed the expert opinion that the current policy in relation to allocation of quota is not leading to effective implementation of sea fisheries law. The SFPA will report the figure of 1991 tonnes to the EU Commission”. (Emphasis added)

It appears from an affidavit filed on behalf of the Authority that this figure of 1991 tonnes was communicated to the European Commission on the 17th October, 2017, although there seems to have been some disagreement in the court below as to that precise date.

*The Fishery Management Notices, July to November 2017*

36. Fisheries’ Management Notice No. 39 of 2017 from the Department of Food, Agriculture and the Marine, which concerned the period from the 1st July to the 1st August, 2017, provided that the quota for Nephrops within FU16 was 3 tonnes. This is to be compared with the subsequent notices, for August through to November, each of which provided that the quota for Nephrops within FU16 was 0 tonnes.

**High Court Proceedings**

Reliefs Sought

37. After some correspondence between solicitors, the first named applicant was granted leave to bring the present proceedings on the 17th November, 2017. On the first day of the interlocutory hearing in December 2017 (para. 41 *infra*), the Court gave liberty to join Mr. Flannery to the proceedings. Collectively, they sought the following reliefs as against the Minister:

- (1) An order of *certiorari* quashing the decision of the Minister, made on or before the 17th October, 2017 by which he refused to permit the fishing of Nephrops in FU16 on the grounds that the decision was ultra vires his powers under domestic and European law and in breach of natural justice and fair procedures;
- (2) An order of *certiorari* quashing the refusal of the Minister by which he refused to exercise his statutory competence and discretion in making a decision not to permit the fishing of Nephrops in the fishing ground known as FU16 by unlawfully derogating his functions to the Authority;
- (3) An order of *certiorari* quashing all the fisheries management notices issued by the Minister prohibiting the fishing of Nephrops in the fishing grounds known as FU16 made on foot of or in connection with his decision of the 17th October, 2017, on the

grounds that this was unlawful and *ultra vires* his powers under domestic and European law and in breach of natural justice and fair procedures;

- (4) A declaration that the Minister acted *ultra vires* and otherwise unlawfully under the regime provided for by European law under the CFP and the implementing Irish legislation by refusing to grant the relevant authorisation or allocation of a quota and by refusing to reopen FU16 in October and November 2017 and months thereafter;
- (5) A declaration that the applicants have been deprived of the right to be heard in advance of an adverse decision being made against them, of their right to a defence, of their right to good administration and/or in the absence of an appeal on the merits, that they have been deprived of their right to an effective remedy, all in contravention of their rights under European Union law;
- (6) An order of *mandamus* directing the Minister to perform his statutory functions under sections 12 and 13 of the 2006 Act, and Articles 34 and 35 of the Control Regulation by analysing all relevant data, including the manner of the collection of the data, prior to exercising his competencies under the legislation, in particular the assignment of the monthly quota allocation for FU16;
- (7) Damages in respect of losses suffered by the applicants as a result of the Minister's action and inaction together with interest under the Courts Act.

38. As against the Authority, the appellants sought:

- (1) An order of *certiorari* quashing the decision of the Authority of the 5th October, 2017, by which it advised the Minister not to open the fishing grounds for Nephrops known as FU16, using a methodology which was *ultra vires* its power, unlawful and in breach of principles of natural justice and fair procedures;
- (2) An order of *certiorari* quashing the decision of the Authority to report to the European Commission figures for the exploitation of the fishing opportunities in FU16 from the 1st January, 2017 to September 2017 in circumstances where monthly figures had already been reported to the Commission in exercise of the Authority's functions by reason of which the decision was unlawful;
- (3) A declaration that the Authority acted *ultra vires* its powers and functions and otherwise unlawfully/in breach of natural justice and fair procedures under the legislative regime created by the CFP in the manner in which it performed its functions as regards the methodology used in calculating fish outtake or catch from FU16 between July 2017 and the initiation of the proceedings and in the advice given by way of letter dated the 5th October, 2017 to the Minister;
- (4) A declaration that the applicants had been deprived of the right to be heard in advance of an adverse decision being made against them, of their right to a defence, of their right to good administration and/or in the absence of an appeal on

the merits, that they have been deprived of their right to an effective remedy, all in contravention of their rights under European Union law;

(5) An order of *mandamus* directing the Authority to perform its statutory functions under section 43 of the 2006 Act and Article 5(5) of the Control Regulation in accordance with European and domestic law and not in an arbitrary or irrational fashion.

39. Being mindful of the potentially damaging consequences for their businesses if FU16 was to remain closed for Nephrops fishing for the remainder of the year, the appellants also sought as against the Minister a series of interlocutory orders by way of an injunction or stay (i) suspending his decision by which he had refused to permit the exploitation of FU16 by the applicants; (ii) requiring the Minister to reopen or make a quota allocation for FU16 based on the data for fish outtake or catch as disclosed in the fishing logbooks prepared in accordance with Article 14 of the Control Regulation pending the determination of the proceedings; and (iii) restraining the Minister from relying on the methodology employed by the Authority and the advice provided by them by way of letter dated the 5th October, 2017 or otherwise, regarding the calculation of fish outtake from FU16 between July 2017 and the initiation of these proceedings.
40. In respect of the second named respondent, the appellants sought an interlocutory order/injunction (i) preventing the Authority from communicating its conclusions to the European Commission in respect of the exploitation of the fishing opportunities in FU16 during the currency of these proceedings and (ii) requiring the Authority to base its report to the Commission on the data contained in the fishing logbooks until the proceedings had been determined.

#### *Evidence in the High Court*

41. The hearing proceeded by way of affidavit evidence; some affidavits used were sworn for the interlocutory application, whereas others were sworn after that had concluded. The evidence as summarised here is the totality of the evidence and represented the state of play upon which the substantive hearing was based. Further detail of the evidence can be found at paras. 41-51 of the interlocutory application judgment ([2018] IEHC 77) and paras. 22-44 of the substantive judgment ([2018] IEHC 772).

#### *Evidence of the appellants*

42. Mr Fitzpatrick, the first named appellant, stated that he has been a fisherman for 30 years, is the beneficial owner (*via* a company structure) of a fishing vessel, the *Shauna Ann*, which is the subject of a mortgage to secure its purchase, has six men who work for him on the vessel and that there is a further fifteen to twenty persons onshore, who are reliant on his business. He averred that the Nephrops fishery in FU16 "*formed a very important part*" of his enterprise without which he would be under severe economic pressure which could force him to cease fishing or to relocate his vessel to other TAC species; adding that his livelihood and profession were in great danger. He clarified in a later affidavit that while FU16 was a regular fishing ground of his over the past twenty years, he had not yet fished it for Nephrops in 2017: it was his intention to do so in the

latter part of the year, given the seasonal rise in prices. If an interlocutory order was not granted he would lose his sole means to earn a living, as would those who work with him on the boat and on shore; in addition, his continuing "ownership" of the vessel would be seriously jeopardised.

43. Mr Fitzpatrick complained that the methodology used by the Authority was erroneous, fundamentally flawed, opaque, irrational, and was not the practice in other European jurisdictions. He said that there may be many reasons, other than overfishing, for variations in yields between areas: the density of Nephrops in certain areas, the nature of the seabed, the equipment used, the weather and tide etc. He said that as the Authority had not given the details of its analysis or stated what other variables may have been factored in, it was "facile" for it to decide that 80% of a vessel's time spent in one area should deliver an equal yield to 80% of a vessel's time spent in another. In relation to the comparative analysis conducted on foreign and Irish vessels, Mr. Fitzpatrick averred that this analysis lacked vital information (e.g. number of vessels and log sheets studied, whether the same gear was employed by both, whether vessels were of the same type, size and engine power etc.) which could explain the difference between the two cohorts' catch rates. He stated that there was nothing suspicious about vessels spending large quantities of time in FU16 with low yields: it is a unique ecosystem, with deeper water than surrounding areas and a particular tidal cycle which can make Nephrops more difficult to catch. They are also found in lower density there and there is an increased presence of predators in that area, all of which mandate spending lengthier periods fishing in FU16.
44. In a further affidavit Mr Fitzpatrick exhibited a report detailing the "catchability" of Nephrops in the Bantry Bay fishery, showing that the concentration of that species fluctuates from area to area. He also exhibited a report from the Irish Council for the Exploration of the Sea showing, that despite a slight decline in the abundance of Nephrops stock in FU16 in 2017, the quantity of stock remained above average; facts which he claimed were inconsistent with the Authority's conclusion that "dramatic overfishing" had taken place.
45. The evidence of Mr. Flannery, the second applicant, regarding his vessel, (*Cú na Mara*), very much echoed that evidence of Mr. Fitzpatrick as regards the mortgage on the vessel, the number of people who depend on him, and the importance of FU16 Nephrops fishing to his business, without which his entire livelihood would be in serious danger. To support the financial implications involved he pointed out that his catch of Nephrops in 2016 had a potential value of €976,195 and for 2017 a potential €697,743.75: these earnings showed how vital his catch from FU16 was, given the higher price commanded by Nephrops from that area (it should be observed that these figures were disputed by the Authority which claimed that the figures related to a much larger area than FU16, of which FU16 was a part). He referred to the catastrophic consequences for his business as a result of the closure of FU16 and the likelihood that his business will fail, resulting in the loss of his vessel and significant personal debt. In a later affidavit Mr Flannery averred that the State possessed the resources and technology to track fishing vessels in real time using VMS in

order to counter overfishing in FU16 and joined the first applicant's criticisms of the Authority for instead inventing the "time spent" methodology.

46. It should be noted that the learned trial judge pointed out at para. 44 of her substantive judgment that the applicants did not put any scientific evidence before the Court.

*Evidence of the Authority*

47. The Authority relied upon affidavits from Mr. Micheál O'Mahony, Authority member; Dr. Susan Coughlan, a Sea Fisheries Protection Officer who works in the Statistic Unit of the Authority; and Dr. Colm Lordan of the Fisheries Ecosystems Advisory Services (FEAS) of the Marine Institute in Galway, which assesses and advises on the sustainable exploitation of the Irish marine fisheries resources and is charged with meeting Ireland's obligations under the EU Data Collection Framework, and who also works for the International Council for the Exploration of the Sea ("ICES").
48. Mr O'Mahony gave details of the data sources employed by the Authority in arriving at their conclusions with regard to Nephrops fishing in 2017. He said that while logbook data is important, there are other data streams with contribute to the Authority's task. These include fishing licences, fishing authorisations, vessel monitoring systems data (VMS data), landing declarations, sale notes and transport documents. He said that there is an "obvious risk" that Nephrops caught in FU16 could be logged as caught elsewhere, which is why it is necessary to crosscheck the logbook entries against the other data streams, including VMS, to ensure reliability. His evidence was that the logbook data for Nephrops catch in FU16 was undermined by the very long periods over which very small catches were attributed to that area of sea, while "incredibly large" catches were logged by the same vessel during short periods when they were fishing outside of FU16.
49. He noted that while the applicants had adduced evidence from fishermen's organisations in other Member States, these merely spoke to how fishermen record their catch and that there is more to calculating fishing outtake than blind reliance on logbook data. Mr O'Mahony stated that the Authority would be failing in its role under Article 5(5) of the Control Regulation if it limited itself to reporting information based solely on those data streams. He gave examples, *inter alia*, of situations in Scotland (in 2005-07) and France (in 2007-08) where examinations had been carried out in order to look behind the logbook figures. He also pointed to the striking fact that the data showed that in June/July 2017 UK vessels in FU16 had Nephrops catch rates up to ten times higher than their Irish counterparts.
50. His evidence was that the Authority's opinion regarding widespread misreporting was based not simply on the vessels having spent more time in FU16 but also on a combination of other factors including (i) the relative quotas between FU16 and the wider Area VII; (ii) the financial motivation to under-report Nephrops caught inside FU16 and over-report Nephrops caught outside FU16, arising from a combination of the relative quotas for those areas and the better marketability of FU16 Nephrops; (iii) the implausibly high catch rate outside FU16, which had not previously occurred and which ceased when FU16 closed; (iv) the repeated returns to the FU16 area, notwithstanding

the low catch rate there; (v) the late log sheet data entry of catches, frequently modified retrospectively; (vi) the great disparity between the recorded catches within FU16 as between Irish and English fishermen (1:10); (vii) the information about historical Nephrops catches in the area suggested that the logbook figures could not be true; and (viii) the commercial implausibility of vessels leaving seemingly remarkably high yielding fisheries close to port (after a very short time there) in order to spend very long periods fishing on a low yielding ground distant from port.

51. Mr O'Mahony averred to the measures put in place to ensure compliance with the FU16 quota (including inspections and data crosschecks) but noted that FU16 is a 68,000-square kilometre area of sea in the North Atlantic and that it would be necessary to have a full fleet to effectively patrol its perimeter at all times. He then referred to a number of sea inspections and three detentions which have led to prosecutions on indictment, as well as to forty other investigations initiated by the Authority. He said that VMS does not provide constant information on a vessel's position but rather the information is generally provided every two hours, and that it cannot provide information on when a vessel is fishing or when it intends to enter or depart FU16. In a further affidavit, Mr O'Mahony referred to the phenomenon of "disappearing fisheries": the fact that in the months following the closure of FU16, the reported yield of prawns from the areas surrounding FU16 dropped drastically. The figures furnished to the Court indicated that from January-July 2017, 1,407,757kg of Nephrops were reported to have been caught in the areas outside of FU16, whereas from August-December that yield fell to 32,366 kg. This underlined that vessels had been reporting yields actually caught *within* FU16 as having been caught *outside* FU16.
52. Two affidavits were sworn by Dr. Coughlan in which she set out the basis of the time spent methodology. She explained that the method involves using some of the information provided by the fishermen themselves, namely, the figures concerning (i) time spent in a particular area and (ii) total catch. She stated that the method assumes that the time spent in an area is a better indicator of the location of the catch rather than its location as reported by the fishermen. The example given in the High Court judgment is that if a vessel remains in FU16 for 3 days and outside FU16 for 1 day, it is considered that 75% of the total catch is from within FU16. On this basis she calculated that Irish vessels in 2017 spent a total of 89% of their fishing time in FU16 – and 89% of the total catch yielded a figure of 1991 tonnes. She explained that a subsequent revision of her analysis in light of late landing declarations had resulted in a downwards adjustment of the figure from 1991 tonnes to 1979 tonnes, which revised figure was communicated to the Commission on the 15th February, 2018.
53. In her second affidavit Dr. Coughlan exhibited a detailed spreadsheet containing the figures for each and all of the relevant vessels fishing in FU16 during 2017 and showing the manner in which she had arrived at her conclusions using the above method. The spreadsheet has 12 columns and 388 rows representing 338 fishing trips. It is difficult to reproduce the relevant data in full in a written judgment, so I propose to rely on the same extract as did the learned High Court judge (using the same adjustments as explained by

her at para. 38 of her judgment). The following is an extract which includes the following columns of data: Column 1 (fishing trip number, from 1 to 338); Column 4 (percentage figure of reported time spent by the vessel outside FU16); Column 5 (percentage figure of time spent by the vessel inside FU16); Column 6 (reported kg weight of Nephrops reported by the vessel as caught outside FU16); Column 7 (reported kg weight of Nephrops reported by the vessel as caught inside FU16); Column 8 ("total catch"); and Column 12 (the "new" catch figure for Nephrops caught within FU16 calculated by Dr. Coughlan using the "time spent" figures and the total figure of Nephrops caught).

<b>1</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>12</b>
<b>Fishing Trip number</b>	<b>Time Spent Outside FU16 During Trip</b>	<b>Time Spent in FU16 During Trip</b>	<b>Logged Catch outside FU16 (kg)</b>	<b>Logged Catch inside of FU16 (kg)</b>	<b>Total Catch According to Landing Declaration</b>	<b>Estimated weight actually Caught in FU16 (kg)</b>
59	2.3%	97.7%	1755	1719	3474	3395
99	10.4%	89.6%	3627	1197	4824	4323
120	35.3%	64.7%	5643	738	5463	3539
128	21.5%	78.5%	4086	1719	5805	4559
134	7.9%	92.1%	4086	1818	5904	5440
151	5.5%	94.5%	4896	1359	6255	5913
180	1.9%	98.1%	4761	2358	7119	6987
197	3.2%	96.7%	4212	3384	7596	7346
203	2.7%	97.3%	5148	2565	7713	7506
220	5.5%	94.5%	6957	1521	8478	8016
234	2.5%	97.5%	7500	1890	9255	9028
235	3.2%	96.8%	5319	3951	9270	8982
241	5.7%	94.3%	6921	2979	9636	9089
247	5.5%	94.5%	8568	1656	10224	9665
251	3.7%	96.3%	8730	1989	10413	10037

267	4.1%	95.9%	7983	3744	11727	11256
281	5.7%	94.3%	11664	2430	14181	13373
282	4.9%	95.1%	11628	2772	14400	13696
284	2.3%	97.7%	12420	2331	14751	14420
288	4.1%	95.9%	12564	2952	15516	14885
289	4.4%	95.6%	13194	2340	15534	14855

54. Finally, there was the affidavit evidence of Dr Lordan. He stated that during his career he had developed scientific sampling programmes and scientific surveys for Nephrops on the Porcupine Bank, and that since 2003 his responsibilities included submitting data on these to the ICES. He explained that in 2009/10 the sustainability of the Porcupine Bank Nephrops stock was a major concern and that measures were taken to address this, with surveys being carried out on fishing vessels in the followings years and a new methodology being developed to estimate catches in FU16 more accurately. He said that it is quite common for the ICES to adjust catch information when there is suspected area misreporting, as a failure to do so would lead to inaccurate advice being given. This has previously been done in relation to cod off the west coast of Scotland and sandeel in the North Sea. He averred that in 2013 the ICES carried out a survey of the Porcupine Nephrops stock and developed a revised algorithm in order to produce a scientific estimate of mis-reported catch in the area. He exhibited ICES working group reports which described this methodology in detail. He noted that since 2011, reported catches of Nephrops by Irish vessels in ICES rectangle 32D4 had increased significantly, whereas in his view this area was in fact too deep for Nephrops to occur in significant quantities. He noted that prior to 2011, there were either zero or very minor landings reported from that rectangle; whereas, for example, in 2016, over 170 tonnes were reported as having been caught there.
55. Dr Lordan commented on the "time spent" methodology used by Dr Coughlan; he noted that while it was different to that used by the Marine Institute, he averred that this method was, in his expert opinion, a "*scientifically valid means of analysing the available data*" and "*likely to be more reliable than a blind reliance on the log book declaration figures as to FU16 outtake*".

*Submissions of the Parties in the High Court*

56. The case made by the applicants was that the Minister should not have relied upon the information furnished by the Authority in deciding to close the fisheries for Nephrops in FU16 in the latter months of 2017, and that the Authority should not have employed the methodology that it did employ in arriving at its estimated quantity of Nephrops caught, which informed the Minister's decision to close the fishery. On the case as made in the

High Court, there were two broad components to the applicants' claim. In short, they argued, first, that the Control Regulation prescribes the methods by which fish catch may be recorded and calculated and does not permit of the use of the methodology employed by the Authority in arriving at its estimate of 1991 tonnes ("the methodology point"). Second, they submitted that the decisions taken by the respondents were in breach of fair procedures under both the Constitution and the Charter of Fundamental Rights of the European Union ("the fair procedures point"). It is only the methodology point which is of continuing relevance to this appeal and accordingly little will be said about the fair procedures point in this judgment; indeed, as noted at para. 66 of the substantive judgment, this ground of complaint "did not loom large" even in the High Court.

57. The specific details and legal submissions underlying the methodology point are set out in full below (para. 86 *et seq.*, *infra*). The issue at the core of this point concerned the precise method by which the Authority is entitled to calculate the information and data which it is required to report to the EU Commission. The applicants argued, essentially, that the Control Regulation and related measures set out a comprehensive and exhaustive EU-wide regime in respect of the fishing industry and that the reporting of the logbook figures is central to this regime and cannot be supplanted by some other method, such as that issue in this case. Accordingly, they submitted that the Authority must accept the figures contained in the electronic logbooks and could not depart from those, even if it has a reasonable basis for believing that the same were inaccurate. They suggested that if the Authority had concerns about the accuracy of those figures, there were other means under the Control Regulation by which this could be addressed (such as the power to investigate the unreliability of such figures in respect of individual vessels), but that the Authority could not unilaterally introduce the "time spent" methodology they had in fact employed.
58. As regards their "fair procedures" argument, the applicants submitted that each of the respondents, in doing what they did, had acted in breach of natural justice, irrationally, arbitrarily and without jurisdiction; in so doing they had breached the applicants' rights and had acted contrary EU law. It was said that their unilateral adjustment of the data recordings for the individual vessels in FU16 was in breach of the applicants' right to be heard in advance of an adverse determination being made against them, and this deprived them of their defence rights, and their rights to good administration and to an effective remedy. In short, they contended that the Authority was acting on the basis that all data reported by fishermen in respect of FU16 was false, without offering the persons concerned any opportunity to make representations or to address that assumed position. What it should have done was to identify individual instances of illegal fishing and then, if necessary, correct that particular data. Its indiscriminate approach was therefore unlawful.
59. The Minister raised preliminary points concerning mootness and delay. He argued that the applicants were in effect seeking to force him to authorise illegal fishing, which would leave the State open to various adverse measures by the EU. The Authority also raised a mootness objection. The arguments of the respondents in respect of the methodology

point were very much the same as those now maintained on appeal (see para. 99 *et seq.*, *infra*), and so need not be set out in detail here. In brief, the Authority maintained that it was entitled to consider a number of information sources, and not merely the electronic logbook, when calculating the figures. It argued that all of its obligations to furnish figures under the European and domestic regimes, contained an implicit requirement that, in its view, such figures be accurate, and that it is precluded from simply relying on the electronic logbooks where it had reached a conclusion that the figures so contained are inaccurate and unreliable. It said that it was obliged to advise the Minister and the EU Commission (pursuant to Article 34 of the Control Regulation) of its expert opinion, regarding the Nephrops catch, which it had formed *bona fide*.

### **The Judgments of the High Court**

#### *The Interlocutory Injunction Decision*

60. The judgment of Ní Raifeartaigh J on the interlocutory injunction application was delivered on the 11th January, 2018 ([2018] IEHC 77). While regard should be had to that decision insofar as it sets out in considerable detail the chronology of the proceedings and the respective positions of the parties, the legal issues which arose on the application are not the subject of this appeal and so the learned judge's conclusions may be stated most briefly. She was satisfied that the matter was not moot and having regard, *inter alia*, to the test propounded by this Court (Clarke J, as he then was) in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at para. 104, she ultimately came to the conclusion that (i) as the relief sought was in the nature of a mandatory order the test was that of a "strong" case" rather than an "arguable" case; (ii) the appellants had on the methodology point an arguable rather than a strong case; and (iii) "*the Authority is not precluded from using other methods [for] calculating an estimate it considers to be useful where it suspects, on grounds which are reasonable, that there is large-scale under-reporting*" (para. 72). The learned judge reached a similar conclusion in respect of the fair procedures point; she was satisfied that the applicants had an arguable case, but not that they had a strong case, within the meaning of the jurisprudence (para. 73).
61. While on one view this may have disposed of matters, the learned judge went on to consider whether the greatest risk of injustice would lie in granting or not granting the interlocutory reliefs sought. In so doing she had regard to (i) the public interest in the orderly operation of the fishing quota regime, a factor which she considered to have considerable weight in this context; (ii) whether damages would be an adequate remedy. While she accepted that fishing for Nephrops in FU16 is a valuable part of the business of each of the applicants and that its continuing loss would represent a serious blow to them, she did not feel that the evidence furnished on their behalf went so far as to establish that they would be likely to become insolvent if interlocutory relief was withheld. She therefore took the view that damages would be an adequate remedy and, in the process declined to simply assume that the applicants would not be entitled to recover damages if they were ultimately successful with their challenge (paras. 79-87 for her discussion on this point). The learned judge therefore concluded that more injustice would be done to the respondents if the injunctions were granted than would be done, on the balance of probabilities and having regard to the evidence adduced, to the applicants if

they were refused. As such, both Mr. Fitzpatrick and Mr. Flannery failed on both the “strong case” test and the “risk of injustice” test and the Court refused to grant the interlocutory reliefs sought (para. 90).

62. Further, the learned judge adverted to the fact that the applicants had contended that an Article 267 reference to the CJEU may be necessary, but had not seriously pushed for any such move: in any event, in her view a reference at that stage of the proceedings would have been premature, even if the opinion of the CJEU may be required at some point in the future (see paras. 88-89).

*The Decision on the Substantive Application for Judicial Review*

63. Ní Raifeartaigh J delivered judgment on the substantive application for judicial review, the judgment under appeal, on the 30th October, 2018 ([2018] IEHC 772). She first addressed the preliminary issue of *locus standi* and was satisfied that “sufficient interest” had been established (paras. 11-17); this finding is the subject of a cross-appeal by the Minister. The learned judge also addressed the issue of delay (paras. 18-20), finding that the applicants were not statute barred for two essential reasons; firstly, that the relevant date from which time had started to run was the 26th September, 2017, the first date on which it became manifestly clear that the Authority’s approach to the figures was going to prevail against the opposing view of the industry and secondly, this was also the date of Fisheries Management Notice No. 57 of 2017, setting the FU16 Nephrops quota as zero for the month of October 2017. As the leave application was brought on the 17th November, 2017, the proceedings were within the requisite three-month time-limit. This finding is not the subject of any appeal.
64. While it is no longer a live issue on this appeal, it is nonetheless informative to briefly set out at this stage the learned judge’s conclusions on the “fair procedures” argument, which is addressed at paras. 65-76 of the judgment. The applicants’ contentions, in this regard (para. 58, *supra*) were rejected by Ní Raifeartaigh J. In her view, the only decision which was under challenge was that of the Authority to rely on a particular methodology for calculating the volume of Nephrops caught in FU16. That being so, the key question was whether a decision of this type fell within the category of decision making which requires that individual fishermen have the right to fair procedures in advance of any decision being made, and a right of appeal thereafter. In her view, it was not: “[t]he decision to use the “time spent” methodology by the Authority was a decision to use a general method of calculating figures for the purpose of an overall fishing quota and I am not persuaded that it consisted of a determination, adjudication or exercise of a discretion within the meaning of those terms as employed within the judicial review authorities” (para. 70). She noted that the case law cited in support of this argument involved decisions or determinations affecting individuals, rather than being of a general nature.
65. The learned judge further rejected the suggestion that the employment of the “time spent” methodology involved the Authority making implicit determinations of unlawful and criminal conduct in respect of all fishers who accessed FU16 for Nephrops (para. 72). In this regard, it was important to keep in mind the particular circumstances in which the

Authority was conducting this exercise: those being that it was the agency responsible for reporting figures to State and EU bodies at a macro-level in the overall context of quota management (para. 74). For these reasons, the learned judge was not persuaded that the decision complained of was of a nature to attract the individual rights to fair procedures contended for by the applicants. Finally, Ní Raifeartaigh J observed that there was in fact a consultation process between the Authority and the fishermen's organisation between July/September 2017, during which strong objections were expressed on behalf of the industry. She did not consider that anything more than that was essential, even if some level of fair procedures were required as a matter of law.

66. The major issue of concern to this Court is of course the learned judge's analysis and conclusions in respect of the methodology point. This issue is addressed at paras. 21-64 of the judgment under appeal where the relevant evidence offered by all parties is outlined. She also set out the relevant legal provisions, including Articles 33(2)(a) and 34(a) of the Control Regulation and section 43(1)(g) of the 2006 Act (see paras. 22, 23 and 28, *supra*, respectively).
67. At para. 51, the trial court observed that, having regard to the evidence, she could readily see why the Authority was extremely concerned about the disparity between the information provided by the logbooks and that obtainable from other sources. The legal question, however, was not whether the Authority reasonably and genuinely had a concern as to the accuracy of the figures, but rather whether it was legally entitled to deal with its concern in the particular manner in which it did, namely by reference to 'time spent' in FU16. Having set out the various submissions of the applicants, the learned judge stated as follows at para. 57 of her judgment:

"I have no doubt that the electronic logbooks are intended to be a central part of the system envisaged and required by the Control Regulation, and that in the normal course, figures furnished by the Authority to the Commission or the Minister would consist of or be based upon figures contained in the electronic logbooks. However, having regard to the figures set out by the Authority in the proceedings before me, and the matters referred to above at para. 25, it seems to me that the situation presenting by July 2017 was very far from a normal situation. What the figures set out in Dr. Coughlan's spreadsheet suggest is that there was a remarkable and extraordinary disparity between the recorded catch figures and the 'time spent' figures. This was not merely a disparity of a minor or even a moderate nature. I am not persuaded that these disparities could be explained away by such matters as those referred to by Mr. Fitzpatrick in his affidavit, such as fishermen's expert knowledge of regularly fished fishing grounds, a greater density of prawns in certain grounds, the nature of the sea bed, the type of fishing equipment employed, the skill and knowledge of the captain, or and the weather and tide generally. Such matters might explain *some* disparity between the recorded catch figures and the 'time spent' figures, but not the level of disparity actually shown." (Emphasis in original)

68. The learned judge then used some figures from Dr. Coughlan's spreadsheet to juxtapose the estimated amount of total Nephrops catch logged as caught in FU16 against the approximate time spent in FU16 on that fishing trip. Her calculations are set out at para. 57 of her judgment. To take but three of the more striking examples, the figures show that on Fishing Trip No. 284, 97.7% of the total time was spent in FU16, but only 15.8% of the total catch was logged as caught in that area (all percentages are approximate). In respect of Fishing Trip No. 289, 95.6% of the total trip time was spent in FU16, resulting in 15.0% of the total catch being logged as caught in that area. For Fishing Trip No. 247, those percentages were 94.5% and 16.1%, respectively.
69. Ní Raifeartaigh J noted that the second named respondent did not have to show that the Nephrops stocks in FU16 were actually in jeopardy: the issue was the narrower one of whether the quota had been exceeded. She observed that, in the circumstances, the Authority had a dilemma: should it rely on, and furnish onwards to the Minister and the EU Commission, figures which it believed (and, in the learned judge's view, believed on reasonable grounds) to be seriously incorrect? Or was it entitled to employ some other reasonable method in arriving at a figure which it could stand over? The learned judge was satisfied that the latter was the correct position. She was not persuaded by the argument, based on a linguistic parsing of the Regulations, that the obligation on the Authority to report "data" excludes the "time spent" methodology utilised by it. She did not accept that the term "data" was intended as a term of art which was restricted to the specific and narrow meaning contended for on behalf of the applicants, *i.e.* that the obligation on the Authority to collect and report data was restricted to what is referred to in Article 14(2), 15 and 34 of the Control Regulation (para. 58). In her view, it would be in fundamental conflict with the objectives of the CFP if the national authority responsible for reporting figures to the Commission was forced to rely on information which, on reasonable grounds it believed to be grossly inaccurate. Very clear language would be required to favour this interpretation, which would constrain the Authority to act in a mechanistic way and not to exercise its independence and expertise in the area.
70. In response to the criticism that the "time spent" methodology is not scientifically grounded, Ní Raifeartaigh J observed that entries in the electronic logbooks are simply the figures entered manually by individual fishermen and so the logbooks are only as accurate as the individual fisherman is honest. Thus, in her view, those entries in themselves are not 'scientific' in any way. She was unclear therefore where the suggested requirement for a scientifically grounded methodology was derived from. Instead, in her view, the legal obligation placed upon the Authority, having regard to its role within the European and domestic regimes, "*must be an obligation to report figures that it believes, on reasonable grounds, to be reasonably accurate*" (para. 59). That being so, the Authority must have a number of possible ways of dealing with the matter, provided they are not irrational or unreasonable and in any event the evidence of Dr. Lordan was to the effect that the methodology employed by the Authority was a scientifically respectable one. This, the learned judge stated, seemed to be a reasonable alternative to the logbook figures in circumstances where the latter were, for good reason, suspected to be unreliable.

71. As regards the applicants' submission that the State ought to have used other weapons in its enforcement arsenal (such as boardings and checks, investigations and prosecutions, penalty points *etc.*) rather than utilising the new methodology, the learned judge considered that such alternatives could not, in any realistic or practical way, deal with the problem faced by the Authority in this case. Both the quota exhaustion and the obligation to report were time-specific. While investigations could serve a useful deterrent, it would have been impractical, given the scale of the misreporting apprehended, to suggest that such methods could realistically have been used to arrive at the global figures needed, to discharge the Authority's data-collection obligations within the necessary time-frames. Furthermore, she observed that while the "one fishing area per fishing trip" method may have much to commend it as a method for ensuring reporting accuracy, the fact that there is an alternative approach which would ensure the accuracy of logbook entries in the future did not necessarily render illegal the Authority's employment of the "time spent" methodology in the circumstances presenting at the time (para. 60).
72. The learned judge further rejected the applicants' submission that the departure from the electronic logbook entries by the Authority would create an uneven playing field for Irish fishing vessels *vis-à-vis* vessels from other Member States, given that this could only be so if one makes the assumption that vessels from other Member States are engaged in false reporting (in which case the remedy lies in lobbying the Commission with proposals to address the situation) and that, in any event, the evidence presented by the applicants said nothing about the view or practice of the national authorities of other Member States as to how they would or do deal with the recorded figures when reporting to domestic or EU authorities in circumstances where they believe the electronic logbook figures to be inaccurate (para. 61).
73. For these reasons, the learned judge took the view that the Authority did not act otherwise than in accordance with the Control Regulation and related measures in employing the "time spent" methodology for calculating the figures of Nephrops caught in FU16 by July 2017. It therefore followed that the Minister did not act *ultra vires* in accepting that information as furnished by the Authority and in making the follow-on decision, to issue the Fisheries Managements Notices in question. Accordingly, the reliefs sought were refused.
74. Finally, and of some relevance, it should be noted that Ní Raifeartaigh J. observed at para. 77 of her judgment that she "was not requested at the trial of the action to make a reference to the CJEU pursuant to article 267 of the TFEU" and that although this potential course of action had been mentioned during the interlocutory application, it was not pursued at the hearing of the action.

### **Appeal**

75. The appellants sought leave to appeal the substantive judgment of the High Court directly to this Court pursuant to Article 34.5.4° of the Constitution. They contended that the respondents' new methodology of calculating fishing outtake is not in line with the Control Regulation and is therefore in breach of Ireland's obligations under EU law. The applicants

further argued that should leave be granted, both a priority hearing and a reference to the CJEU would be required, summarising the questions to be referred as follows:

- a) Whether a body such as the Authority, under Article 5(5) of the Control Regulation, is entitled to disregard the data recorded and transmitted under Articles 14, 15 and 33, supplanting this with data generated through its own methodology for calculating fish outtake for the relevant area?
  - b) Whether the terms "data" and "information" in Articles 14, 15 and 33 include information that a body such as the Authority considers more accurate, despite not complying with the Control Regulation?
  - c) Whether a member state is entitled to, or obliged to, accept the methodology of a body such as the Authority when exercising its functions under the Control Regulation, particularly when reporting the data to the Commission?
76. The respondents did not oppose the application, but argued that no Article 267 reference is necessary in order to determine the issues before the Court. They further submitted that if such a reference is considered appropriate, the true question for the CJEU is whether, when the fishers' logbook figures are reasonably suspected to be unreliable, the Authority is entitled to employ "reasonable, scientifically valid methods to determine and report the most accurate outtake figures".
77. By determination dated the 12th June, 2019 ([2019] IESCDET 120), the appellants were granted leave to appeal to this Court. The Court was satisfied that these proceedings raise issues of general public importance and that "exceptional circumstances" exist in light of the urgency of the appeal, the impact that the decision may have on other cases, the fact that an intermediate appeal to the Court of Appeal would be unlikely to narrow the issues, the potential for the new catch methodology to be applied to other waters beyond FU16, and the effect that the new methodology may have on the business of fishers in FU16 and the Irish economy more broadly.

### **Submissions**

78. The Court received helpful written and oral submissions from the appellants, the Minister and the Authority, for which it is most grateful to the solicitors and counsel. These submissions are summarised over the following paragraphs, with the Court's substantive engagement therewith following in the "Discussion/Decision" section of this judgment.

#### *Submissions of the Appellants*

79. The appellants do not challenge the trial judge's findings of fact, save for what they describe as certain mixed findings of fact and law as identified in their notice of appeal. They say that the trial judge correctly identified the essential issue in the case as relating to the methodology used by the Authority to report the exploitation of fishing outtake for Nephrops in FU16 which led to the closure of that area in the latter part of 2017. The appellants challenge the learned trial judge's finding (at para. 58) that the methodology used by the second respondent and relied upon by the Minister was valid, and the specific

finding that the proper interpretation of the term "data" and "information" in the provisions of Articles 14, 15 and 34 of the Control Regulation was not intended as a term of art which was to be restricted in the manner contended for but rather that the term should be defined in a manner guaranteeing its effectiveness having regard to the fundamental objectives of the CFP (para. 69 above). They have confirmed that they are not pursuing the issue concerning the alleged breach of fair procedures on appeal.

80. The appellants have identified three procedural issues and three substantive issues which they say require resolution by this Court. The procedural issues are as follows:

- (i) Whether a reference to the CJEU is required for a preliminary ruling.
- (ii) If so, at what stage is such a reference required?
- (iii) If a reference is made, what question/s should be referred?

The substantive issues which they say arise in these proceedings are the following:

- (iv) Whether the Appellants had *locus standi*.
- (v) What is the correct definition for "data" in Articles 14, 15, 33 and 34 of the Control Regulation?
- (vi) Was the methodology used by the Authority for the calculation of fishing outtake in FU16 lawful under the provisions of the Control Regulation?

81. In respect of issue (i), the appellants submit that a reference to the CJEU is necessary in circumstances where the matter required to be decided by this Court relates to the correct interpretation of "information" and "data" as used in the Control Regulation, and the permissible methods for the collation and analysis of the information to be remitted to the Commission on the exploitation of fishing outtake. It is said that the issues cannot be resolved without a decision as to the correct interpretation of, *inter alia*, Articles 14, 15 and 34 of the Control Regulation. They submit that the requirement for a uniform interpretation of these provisions is of considerable public importance across all Member States and that such a decision is materially necessary for the resolution of the questions raised in this appeal. Further, it is said that there is a procedural need for a reference, given that this is the court of final instance and that the CJEU has not previously ruled on the point. In this respect reference is made to the decision of Finlay C.J. in *Kerry Co-operative Creameries Ltd v. An Bord Bainne Co-operative Ltd* [1991] I.L.R.M. 851. None of the exceptions identified by the CJEU in CILFIT apply here. It is further contended that the respondents, in relying on the "precautionary principle" and the doctrine of "effet utile" in their submissions, are implicitly recognising the need for a preliminary reference.

As to issue (ii), it is submitted that the challenge to the conclusions of the trial judge will necessarily turn on the correct construction of certain measures of the Control Regulation and thus, should a reference be made there will be little left to decide once that court gives its opinion. It is said that the interpretation of the Regulation is fundamental and

that the reliefs sought are contingent on the answer. Having regard to the proper use of court time and resources, the impact on the litigants and other fishers and the delay involved in a reference, it is suggested that the case is procedurally in a position to be referred to the CJEU now, and that a reference should be made at this stage of the proceedings.

83. As regards issue (iii), the appellants suggest, in their supplemental submissions on this point, framing two questions for the CJEU along the following lines:

- (a) Are the terms “*data*” and “*information*” to which Articles 33 and 34 of the Control Regulation refer for the calculation of the exploitation of fishing opportunity, confined to the information inputted in accordance with Articles 14 and 15 of the said Regulation as verified by the control mechanisms provided for by that Regulation, or may the national authorities substitute this information with information which they consider more reliable using methodologies adopted by those authorities without reference to the control mechanisms contained in the Control Regulation?
- (b) In circumstances where the national authority considers that the information furnished pursuant to Articles 14 and 15 of the Control Regulation is unreliable, does European Union law and in particular the Control Regulation permit the substitution of the above information sources provided for by the Control Regulation, for ones which the national authorities consider more reliable?

The above questions were slightly differently framed in the appellants’ initial submissions to the Court.

84. Turning to the substantive issues and the matter of *locus standi* (issue (iv)), the appellants submit that no grounds exist for overturning the finding of the High Court that they have standing to bring this case, particularly as *locus standi* is interpreted generously in judicial review proceedings. They say that the relevant test is whether the applicant has a “sufficient interest” to mount the proceedings (Order 84, Rule 20(5) RSC). The fact that the impugned act impinges upon an applicant’s interest is enough to give standing to challenge the same. They further submit that it is in any event clear from the books, records and documentation exhibited on affidavit that they have suffered a direct injury to their interests. They are therefore “affected” by the decisions in question (per *Dellway Investments Limited v. NAMA and ors* [2011] 4 I.R. 1 at [301]). They further rely on the public interest dimension of the litigation (per *Mulcreevy v Minister for the Environment* [2004] IESC 5, [2004] 1 I.R. 72) and submit that they have a legitimate interest in the proper management and regulation of fishing opportunities in FU16. Finally in this regard, the appellants point to the EU aspect of the litigation: the Control Regulation has, as an objective, the creation of a level playing field for fishers throughout the EU and that such objective must be capable of being given effect to (see Case C-379/04 *Dahms*).

85. Issue (v) concerns the correct definition of the terms “data” and “information”. The appellants submit that the substantive issue in the case concerns what information the national authority can and must use in order to calculate fishing outtake with a view to performing its functions under the Control Regulation. They point to the objectives of the Regulation as outlined in Recital 4 thereto, the importance attached to the use of technology for specific verification of information (Recital 8) and the need for a common approach to fisheries control (Recital 9). Central to their submission is that the Regulation clearly contemplates the importance of the information contained in the fishing logbook (Recital 22). They submit that the Authority has sought to characterise its role under the Irish legislation as being advisory in nature, but that it is clear that Article 5(5) of the Control Regulation imposes mandatory duties on the Authority. They point to section 43(1)(g) of the 2006 Act (see para. 28, *supra*) and submit that while “data” is not defined in the 2006 Act or 2011 Regulations, it is clearly defined in this context in Article 14(2) of the Control Regulation (para. 21, *supra*). In the appellants’ submission, that is the data in this context that the Authority is required by Section 43(1)(g) of the 2006 Act to collect and report as required under Community law. They further point out that the Authority has a role under the Control Regulation in ensuring compliance with fisheries legislation and that it is its failure to correctly exercise this function, through risk analysis and control of reporting of catches, that has led the Authority to depart from the Community system for measurement of fishing “outtake” provided for in the Control Regulation. The appellants submit that the principle of *effet utile* cannot be used to undermine other fundamental principles of the rule of law such as that a law be given the meaning and effect as may be clearly implied from the same and that the trial judge too readily embarked on an extensive interpretation of the terms “data” and “information”.
86. The sixth and final issue concerns the methodology used by the Authority for the calculation of fishing outtake in FU16. The appellants stress the central importance of the electronic fishing logbook to the regime established by the Regulation and highlight the level of detail therein contained, underscoring the point that the regime is intended to be comprehensive and all embracing. They submit that the collection of fishing outtake data is automated due to the system of electronic logbooks mandated by Articles 14 and 15 combined. Each midnight, relevant vessels must upload their data, which is automatically loaded onto a database and is the primary source mandated by law upon which fishing outtake is to be measured. Recital 17 of the Control Regulation refers to this as facilitating “effective monitoring” of the activities of fishing vessels. This outtake can be adjusted or corrected when landing declarations become available. The appellants’ core contention on this point is that in this case the Authority has not transmitted “data” as prescribed by Articles 5(5) and 33(1) to the European Commission, but rather “*a confexion of information based on a methodology simply not provided for by European Union or Irish law and which might be better described as a desk-bound ‘guesstimate’*”. This information has been produced by a hypothetical exercise applying an arbitrary formula which seeks to ascribe fishing outtake mathematically in proportion to time spent fishing in an area. While the learned trial judge may have found that there is a reasonable scientific basis for this approach, the appellants submit that there is no legal basis for it. The trial judge erred in implying such a legal basis for this methodology from “*the*

*fundamental objectives of the CFP*” as opposed to applying the clear provisions of the Regulation itself.

87. The appellants do not suggest that the respondents must accept the logbook data as entirely conclusive: however, where it is to be challenged, this must be done in accordance with the processes and procedures provided for by law. The respondents have effectively decided that every Nephrops fisher in FU16 is altering their outtake record; rather than using their powers and technology to investigate the situation and identify misreporting, they have instead come up with an entirely new methodology for calculating outtake which visits the sins of those fishers who do not comply with the quotas, on all those exploiting the fishery. This new regime is at variance with that used in the rest of Europe. Noting the terms of Article 109(4), the appellants accept that no objection could be taken to the correction of reported outtake where the accuracy of the data coming from the said vessel had been investigated and found to be incorrect, but this is not what the Authority has done. The Regulation does not permit the Authority to supplant the uniform, EU-wide system with its “expert opinion”. This is an erroneous interpretation of its functions under the 2006 Act and under EU law, including Article 46 of Commission Implementing Regulation 404/2011. It is accepted that the respondents cannot simply just take logbook data at face value and report it: they have a duty to verify and ensure the reliability of this data and has extensive powers to do so. They point to Commission Implementing Regulation (EU) No 185/2013 of 5 March 2013 (concerning the Spanish mackerel quota) as an example of the exercise being carried out lawfully. However, nowhere in the Control Regulation is the Authority authorised to reinvent and substitute an entirely new method for calculating fishing outtake. The appellants say that they have a right to be subject to exactly the same supervisory regime as other fishers throughout the EU and a right to demand that the respondents enforce compliance with the Regulation by all fishers under their jurisdiction, such that those who fish illegally do not gain an unfair advantage. Here, the Authority is compensating for its own failures in applying the lawful mechanisms available to it to ensure the accuracy of fishing outtake, thereby visiting the negative effects of its omission on the innocent fishers who exploit FU16 in accordance with the law.
88. The appellants submit that even if, as suggested a “force-majeure” situation were to be entertained by the Court as a possibility, the fact that the problem could have been addressed by a Fishing Management Notice providing for “single-trip” visits to FU16 is relevant, to any consideration of a situation of necessity. There was no basis in law to repudiate the management system required by the Control Regulation: the Authority is obliged to report *data* to the Commission, not its expert opinion based on its analysis of the data. By re-interpreting the figures as they have, the Authority has unilaterally changed the regime established in EU law, from being a TAC based area to a hybrid form of fishing effort regime. This has resulted from an apparent perception that it is too difficult to properly apply the policies and law established as the control regime by EU law.

89. The appellants therefore seek an early preliminary reference to the CJEU, consequent upon which they will seek certain orders of certiorari, mandamus and other declaratory reliefs.

*Submissions of the Minister*

90. In respect of issue (i) and the need for a preliminary reference, the Minister does not agree that a reference is necessary. He refers to the judgment of this Court in *Minister for Justice v. O'Connor* [2018] IESC 3 (para. 3.4) and the *CILFIT* case and submits that the issues of European law involved in this appeal are *acte clair*. The Minister points to Articles 5(5), 16(6) and 17 of the Control Regulation and sections 12, 13, 43(1)(e) and 43(1)(g) of the 2006 Act and says that he was clearly entitled to rely on the advice furnished to him by the Authority. The Minister's decisions were made using objective and transparent criteria, following consultation with fishing industry representatives and on foot of information supplied by the Authority. While noting that submissions on the lawfulness of the "time spent" methodology are more properly a matter for the Authority, the Minister says that nowhere in the Control Regulation or the Commission Regulation is it stated that the competent authority is limited in the exercise of its powers of information gathering, as suggested by the appellants. The methods of information-gathering are not prescribed exclusively. It is submitted that as a matter of law the Authority was entitled to employ the time spent methodology. The Minister claims that there is no legal basis for defining the terms "data" and "information" in the restrictive manner contended for. To do so would breach the precautionary principle. Accordingly, the first named respondent submits that the issue is *acte clair* and a reference is not required.
91. As for issue (ii) and when a reference should be made, the Minister submits that if the Court feels that a reference is necessary the same should not be made until after the issue of locus standi has been determined since a finding against the appellants on that point would end the proceedings. He refers to the judgment of Clarke C.J. in *O'Connor*, where it was stated that the resolution of other issues in a case might result in the question of European law falling away. It is said that the *locus standi* point is an issue of this nature.
92. If a reference is to be made, the Minister suggests framing it in the following terms:
- (a) Is the information referred to in Article 14(2) the only relevant data which a Member State may have regard to for the purposes of recording and exchanging data in section 3 of Chapter 1, Title IV of the Control Regulation?
  - (b) Does the Control Regulation permit and/or require a National Authority to substitute or vary the information furnished under Articles 14 and 15 of the Control Regulation if it considers that information to be unreliable?
93. As regards issue (iv) and *locus standi*, the Minister submits that the trial judge erred in the conclusion which she reached, pointing out that the relevant licences and the ownership of the vessels in question are in the name of a limited company. which is a

separate legal entity from the appellants. In lifting the corporate veil so as to permit the bringing of these proceedings, the trial judge has breached the principle in *Salomon v. Salomon* [1897] A.C. 22. The Minister disputes that the appellants' livelihoods depend on the income paid to them by these companies. Order 84, Rule 20(5) RSC requires an applicant for judicial review to have a "sufficient interest" in the proceedings. The Minister refers to *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10 (paras. 5.4 and 5.7) and *Construction Industry Federation v. Dublin City Council* [2005] IESC 16, [2005] 2 I.R. 496. In the latter case the Supreme Court held that an unincorporated trade association representing the interests of parties in the construction sector did not have standing to challenge a development contribution scheme drawn up by the Council as there was no evidence that, in the absence of a challenge by CIF, there would have been no other challenger. Finally on this point, the Minister submits that his impugned actions did not involve the adjudication or determination of any individual rights and did not give rise to any decision which affected the appellants or to which the appellants are entitled to appeal or otherwise entitled to a remedy. The appellants do not have standing as their companies could have taken the cases.

94. Where the Minister has made submissions on the substantive interpretive issues in the case they are largely the same as those of the Authority, set out below.

#### *Submissions of the Authority*

95. The Authority agrees that the issues in the case are those as identified by the appellants (para. 80, *supra*). Unlike the Minister, it has not appealed the judge's finding in respect of *locus standi* and so makes no submissions in relation on that point, save, that in its view that issue must be determined before any preliminary reference can be made.
96. As regards issue (i), the Authority submits that an Article 267 reference is not required. The Authority acknowledges that issues concerning the interpretation of the Control Regulation are relevant to the appeal and states that it is unaware of any judgment of the CJEU on these issues. However, it relies on the principle of *acte clair*, which applies where the correct application of EU law is so obvious that there is no scope "for any reasonable doubt as to the manner in which the question raised is to be resolved" (per *CILFIT*). It is submitted that unless the appellants are correct about the restrictive meaning of the term "data" being confined to the manually inputted catches as reported by fishers, then there is no basis for the suggestion that the Authority was confined to reporting exactly those figures to the European Commission. It is said that the restrictive interpretive approach is clearly not supported by the Regulation itself and this should leave no reasonable doubt as to the manner in which the question should be resolved. It is obvious that there is no restrictive definition of "data" or "information" in the Regulation and that the Authority is not constrained to report to the Commission fisher's electronic logbook figures which it believes, on reasonable grounds, to be grossly inaccurate. The Authority was obliged to refuse to certify such incredible figures and utilized a scientifically valid methodology to determine and report more accurate figures: to apply the appellants' restrictive interpretation of "data" would defeat the very purpose of the CFP.

97. In respect of issue (ii), the Authority submits that if a reference is required, the issue of *locus standi* must first be determined. This is a matter of Irish law and no claim is made that it is capable of a reference to the CJEU. It points out that if the Minister wins the cross-appeal in respect of the standing issue, there clearly will no longer be a basis for any reference. If a reference is made and it is subsequently determined that the appellants have no standing, the CJEU's time will have been wasted. Therefore it is said that the *locus standi* point must be determined before any further step reference is taken. It is also pointed out that the appellants did not seek a reference in the High Court and cannot now complain about any delays that the reference procedure may engender.
98. In relation to issue (iii) and what question should be referred if it is deemed that a reference is necessary, the Authority suggests the following:
- "Is the Single Control Authority in a Member State in notifying and certifying the European Commission under Article 33(2)(a) and Article 34 of the Control Regulation limited to notifying the data as to catch in a particular fishing ground logged by fishers under Articles 14 and 15 of the Control Regulation when the Single Control Authority for good reason believes the logged data to be grossly unreliable or is it entitled to employ reasonable, scientifically valid methods to treat and certify the logged data so as to achieve more accurate outtake figures for notification to the European Commission."
99. As regards issue (v), the Authority submits that this question is better phrased as whether there is a restrictive definition of "data" in the Control Regulation as contended for by the appellants. The Authority focuses its submissions on the EU law aspect of this issue, rather than its functions under the 2006 Act. It points out that, pursuant to Article 5(5) of the Control Regulation it is responsible for, *inter alia*, the "treatment and certification" of information on fishing activities. In the exercise of these functions, it is obliged to notify the Commission of the quantities of stocks, subject to quota, landed under Article 33(2)(a) of the Control Regulation and of exhaustion of 80% of quota under Article 34. It submits that the trial judge correctly rejected the argument that the term "data" as used in Article 33 only means "data" coming within Articles 14(2), 14(9) and 15. This interpretation, the Authority says, is based on a linguistic parsing of the Regulation. It is pointed out that neither Article 14(1) nor (2) mention the word "data" at all; rather what Article 14(2) does is give a non-exhaustive list of the information to be submitted in the fishing logbook. Pointing to Article 14(6), the Authority accepts that what is in the fishing logbook is "information" but submits that this does not limit the term "information" or "data" to what is in the fishing logbook. Similarly, while the appellants rely on Article 14(9), the Authority says that this does not define "data": all it does is refer to what is required to be inputted into the fishing logbook as "data", so it merely identifies one type of "data" and does not limit "data" to that type. Similarly, there is no restrictive definition of "data" or "information" in Article 15. The Authority's central submission on this point is as follows: while one can say arising from Articles 14 and 15 that what's in the fishing logbook is "data" and "information", one cannot say that such is the only type of information which the Single Control Authority established under Article 5(5) can notify to

the Commission. The logbook data is important data, but it must be treated and certified by the Authority. The Authority further submits that its methodology relies on the logbook data insofar as it is credible (i.e. as to fishing time and total outtake), disregarding only that which is unreliable (i.e. outtake from FU16).

100. As regards the reporting obligations of the second named respondent under Articles 33 and 34, it is submitted that the reference in Article 33(1) to "all relevant data" is wider than just the particular data referred to in Articles 14, 21, 23 and 28: while such data is "relevant data", it is not the *only* "relevant data". This must import a measure of discretion as to what other data might be recorded and retained. It is submitted that some of the appellants' arguments rely on incorrectly conflating the obligation to "record and retain" data (Article 33(1)) with the Authority's obligations to notify the Commission under Articles 33(2)(a) and 34. It is submitted that the words "without prejudice" in Article 33(2)(a) make it obvious that that Article is to be read in isolation from the rest of the Control Regulation: it imposes a standalone obligation on Ireland to report the landings of Nephrops in FU16 to the Commission, but there is absolutely nothing in that provision to suggest that in so reporting the Authority is limited to reproducing the data inputted into log books pursuant to Articles 14 and 15 so that only such data may be notified. The use of the term "aggregated" in Article 33(2)(a) makes it clear that what is to be submitted is not limited to the raw data. Further, it is submitted that Article 34 is broader still, such that even if the Authority was not obliged to report the exhaustion of the 2017 Irish FU16 quota to the Commission under Article 33(2)(a), such obligation arose in any event under Article 34, which requires Member States to notify the Commission without delay when it is established that catches of a stock have exhausted 80% of the quota. It is said that Article 34 does not provide for any methodology by which that 80% is to be established; certainly it imposes no obligation to act by uncritically accepting the declared logbook figures. The learned trial judge was correct that there is nothing in the Control Regulation to justify importing a restrictive definition of "data" and "information" into these provisions. The Authority says that if this Court accepts these submissions concerning the lack of any operative restrictive definition of "data" or "information" then that effectively disposes of the appeal.
101. Finally, in relation to issue (vi), the Authority submits that the trial judge correctly stressed the fundamental conservation objectives of the CFP. It points to the objectives of the CFP as set out in Articles 1 and 2 of Regulation (EU) No 1380/2013. The Authority submits that the appellants' argument is essentially that the Authority's responsibilities end at collecting information provided by fishers via electronic logbooks and landing declarations as to outtake and there is no further obligation to treat or certify this information before passing it on to the Commission so as to ensure its accuracy. It notes that the appellants have not challenged the trial judge's finding that there is a reasonable scientific basis to the "time spent" methodology, arguing instead that it has no legal basis. The import of their argument is that the Authority should furnish to the Minister and the Commission figures which it believes on reasonable grounds to be seriously incorrect, rather than employing some reasonable method of arriving at a figure which it could stand over. It is said that this is untenable and the High Court was correct to have

regard to the objectives of the CFP in construing the *vires* of the Authority. The Authority submits that neither a literal nor a teleological interpretation of the relevant EU provisions assists the appellants. On a teleological approach, the Authority's methodology promoted the conservation of fish stock and filled a gap that may otherwise have existed in that it addressed a situation where electronic logbook figures were incredible and landing declaration figures could not be relied upon as a crosscheck because of the difficulty of differentiating FU16 Nephrops from non-FU16 Nephrops at landing. Moreover, it did not require a departure from the literal wording of the Control Regulation as nothing in that instrument precludes the use of the time spent methodology. There is clearly an implied obligation that the figures reported will be reasonably accurate. Moreover, the Authority's obligations under Article 33(2)(a) and Article 34 could not be met by supplying figures which it believed to be false.

102. The Authority accepts that the purpose of the Control Regulation is to ensure the uniformity of the control mechanism across the Single Market and says that it has done nothing to derogate from that system. The time spent methodology was only used when it became obvious to the Authority that there were serious disparities in the data submitted by fishers in FU16 such that it was incredible and required to be treated and certified. The trial judge was correct to find that this was a reasonable alternative to the logbook figures in circumstances where the same were reasonably suspected to be unreliable. In so finding the trial judge gave appropriate consideration to the scientific evidence adduced by the respondents. Thus there was more than adequate scientific justification for adopting the time spent methodology. Further, the trial judge was correct to reject the appellants' argument that the State ought to have used other enforcement tools rather than rely on a new methodology. This would have precluded the Authority from taking a timely, global approach to underreporting and would have required it to proceed against each vessel individually. As stated by the trial judge, this would not have been a practical way to deal with the problem facing the Authority in 2017. Investigating and prosecuting individual fishers would have taken months, if not years. This would have been inconsistent with the conservation of fish stocks. Insofar as the appellants argue that the use of the time spent methodology was unfair because it punishes the innocent fisher in just the same way as the one who is flouting the rules, it is pointed out that this presumes a right for innocent fishers to continue fishing after reliable scientific evidence shows that the quota has been exhausted, which of course is entirely contrary to the objectives of the CFP. Moreover, it is submitted that the Spanish mackerel example is irrelevant, as it concerned a different situation entirely. The Authority further points out that the burden was on the appellants to show that the practice of other Member States when confronted with apparently inaccurate figures differed from that adopted in this instance, and the trial judge correctly found that they had failed to meet that burden.

### **Discussion/Decision**

#### *Locus Standi*

103. The first issue in the case concerns the appellants' standing. The learned High Court judge found that they have *locus standi* to bring this claim, and such finding has been the subject of a cross-appeal by the Minister (but not by the Authority). I accept the

submissions of the Minister (para. 91, *supra*) and the Authority (para 97, *supra*) that this issue should be determined prior to a consideration of whether or not any preliminary reference should be made. This does not appear to have been really disputed by the other parties. As was stated by Clarke C.J. in the case of *Minister for Justice v. O'Connor* [2018] IESC 3, [2018] 2 I.L.R.M. 181 "...it is, of course, the case that there may be other issues which arise on an appeal whose resolution may lead to a European law point falling away. Furthermore, the Court may require further argument to decide whether the relevant European law point truly arises and is necessary for a resolution of the appeal..." (para. 3.11 in the neutral citation). While this was said in the context of an application for leave to further appeal to this Court, where the asserted point of general public importance was whether or not there should be a preliminary reference, on the "Brexit issue", in the context of the European Arrest Warrant regime, it seems equally applicable in the present circumstances. Logically, if the Minister succeeds on the cross-appeal, the appellants will be disbarred from pursuing their appeal: there would therefore be no basis for a reference to the CJEU. It would make absolutely no sense for a reference to be made and for this Court to then subsequently determine that the appellants did not have *locus standi* to bring the proceedings in the first place. I therefore accept that the standing point must first be decided. In adopting this course, I leave aside the tricky question of what the Authority's position would be, if the Minister's submission should be accepted, given the absence of any appeal by it on the standing point.

104. Before addressing that particular submission however, a few general points should be noted. At common law it was generally felt that the standing requirement was not the same for all cases; it differed depending on a variety of factors including the form of the proceedings and in particular the relief claimed. This approach was said to be justified by the distinctive nature of public law remedies, such as *certiorari*, prohibition, *mandamus* and *quo warranto*, on the one hand and those available in private law matters such as declarations, injunctions and damages on the other. Even before the advent of the new Rules regime in 1986 however, it was becoming increasingly clear that the *locus standi* rule, being judge created and one of practice only, needed to serve the administration of justice in a more orderly and uniform way: to achieve this, the historical peculiarities had to be refined, if not discarded. Case law intervened with, *inter alia*, *Cahill v. Sutton* [1980] I.R. 269 ("*Cahill v. Sutton*"), and to a lesser extent, *the State (Lynch) v. Cooney* [1982] I.R. 337 ("*Cooney*"), providing the ground work for the modern approach, which approach remains the cornerstone of the doctrine to this day. Whilst some of the principles therein outlined have been expanded or explained, such as in *Norris v. Attorney General* [1984] I.R. 36, and more recently in *Mohan v. Ireland and the Attorney General* [2019] IESC 18, [2019] 2 I.L.R.M. 1, by and large most of the interventions have been accommodated within the parameters laid down almost forty years ago.
105. Prior to the changes introduced in 1986 it was common to test the standing of a party, certainly on the public side, by asking whether, in the circumstances, he or she was "a person aggrieved" by the act complained of, whatever that might have been (*State (Kerry County Council) v. Minister for Local Government* [1933] I.R. 517; *State (Doyle) v. Carr* [1970] I.R. 87). Where a declaration or injunction was prayed for, the asserting person

was required to establish that a right, recognisable in law as such or as its equivalent, had or would be affected. (*Weir v. Fermanagh County Council* [1913] 1 I.R. 193). Over time the first mentioned phrase became almost interchangeable with another, namely whether such a person had "a sufficient interest" to mount the proceedings. (O'Higgins C.J. at 362 in *Cooney*: Walsh at 369 in *Cooney*). There was however a distinction, as noted by Keane J., as he then was, when he said "...nevertheless, the requirement that, as a general rule, locus standi must be established where a person seeks to challenge the decision of a public body remains, although the criteria have changed over the years, a "sufficient interest" in the matter having replaced the somewhat more restrictive concept of a "person aggrieved"." (*Lancefort Limited v. An Bord Pleanála & anor (No.2)* [1998] IESC 14, [1999] 2 I.R. 270 at p. 309). Howsoever discussed in judgments, the "sufficient interest" test now applies virtually to all forms of litigation, and of course is now expressly laid down in the Rules of the Superior Courts (para. 112 below).

106. *Cahill v. Sutton* was a case in which the constitutionality of s. 11(2)(b) of the Statute of Limitations 1957 was in issue. The argument advanced on behalf of Mrs. Cahill was that the Act failed to include a saver for those 'would be plaintiffs' who were unaware of the facts upon which their case might rest, until after the limitation period had expired. However, as she had knowledge of all relevant information before that date, the judgments of the court were that she could not make such a submission as the facts of her case could not sustain the basis therefor. In effect, it said that she had assumed the role of a hypothetical litigant attempting to mount a *jus tertii*. This line of reasoning came as a considerable surprise to some, including McCarthy J. (who incidentally had been counsel for Mrs. Cahill) who at p. 91 of his judgment in *Norris v. Attorney General* [1984] I.R. 36, questioned whether the "busybody" basis for that decision was justified by the reality of the situation: he doubted whether there had been even one recorded case, between 1937 and 1980 "of such officious interference". Be that as it may, the approach so adopted is set out in the principal judgment of the court and that most commonly cited, namely the decision of Henchy J.
107. In the first instance the learned judge outlined the rule as requiring an applicant to show that the effect of the impugned law discloses an injury or prejudice which he has suffered or is in imminent danger of suffering: later in his judgment he used a slightly different phrase, namely that a person must "stand in real or imminent danger of being adversely affected". So the "impact" requirement of standing could be an injury, or prejudice, or one being adversely affected. To this however there were exceptions:-
  - (i) A litigant, even in the absence of standing in the manner described, could be permitted to mount an action in circumstances where "there is a transcendent need to assert against the statute the Constitution provision that has been invoked" (284 – 285). Put more simply, where there was no other person who could bring such an action or bring it on time.

- (ii) Secondly, the lack of standing may also be overlooked where such a person is part of a group or has a common interest with a group to which the provision in question is directed or operable (p. 285).
- (iii) Thirdly, where there are countervailing factors by reason of which the lack of standing would not deprive the action of legitimacy.

It is important to bear in mind that the instances given, where traditional standing might be excused, were said by Henchy J. to arise “when the justice of the case so requires” (p. 285).

108. Although *Cahill v. Sutton* was a case involving a constitutional challenge to a statutory provision, and thus evidently the principles therein laid down were in that context, nonetheless they have been subsequently followed, almost without differentiation, as to the type of challenge involved. Therefore, it is quite likely that the standing requirement is now the same whether the proceedings are in the form of a constitutional challenge to a statutory provision, to an act of the executive or even to a decision of an administrative body, rather than merely to an *ultra vires* attack on that decision. (18.235 of *Administrative Law in Ireland*, 5th Ed.). In saying this, I am leaving aside distinct situations such as that arising from the Public Participation Directive (2003/35/EC) and from cases where the asserted point has an EU dimension.
109. Whether arising under subpara (i) or subpara (iii) (para. 107 *supra*), the courts have taken a broad view of standing in circumstances where if it had applied a more rigid approach, the act or measure being questioned might avoid judicial scrutiny. *Crotty v. An Taoiseach* [1987] IESC 4, [1987] I.R. 713, *McGimpsey v. Ireland* [1990] I.R. 110 are two such examples, as is *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10. This approach was also endorsed in *Mulcreavy v. Minister for the Environment* [2004] 1 I.R. 72, where Keane C.J. said the following:-

“...it is not in the public interest that decisions by statutory bodies which are of at least questionable validity should wholly escape scrutiny because the person who seeks to invoke the jurisdiction of the court by way of judicial review cannot show that he is personally affected, in some sense peculiar to him, by the decision...it is at the same time essential to bear in mind that while it is understandable that invalid legislation or unlawful practices should escape scrutiny because of the absence of an indisputably qualified objector, it is also important to ensure that unfounded and vexatious challenges are not entertained.” (p. 78-79)

Accordingly, whilst one can see some generosity in the case law, nevertheless vigilance must also be exercised so as to ensure that the appropriate course can be navigated in the various circumstances in which the issue arises.

110. In *Mohan v. Ireland and the Attorney General* [2019] 2 I.L.R.M. 1, the applicant was one of three prospective candidates seeking a nomination from Fianna Fáil for the 2016 General Election in Dublin Central constituency. The other two were female. On 18th

September, 2015, he received a letter from the General Secretary of the party containing a direction that “the candidate selected must be a woman”. He alleged that the justification for this direction had its foundation in s. 17(4B) of the Electoral Act 1997, as amended. The relevant provision, utilised the availability of public funding for political parties so as to achieve one of the objectives of the Act, namely to secure a more gender balanced field of candidates in elections and thus, to increase the possibility of a more diverse legislature. On his constitutional challenge to the said section, the respondents took a standing point, which was dealt with before any consideration was given to the substantive challenge.

111. In a judgment delivered on 21st March, 2019, O’Donnell J., speaking for the court, and having referred to relevant case law, in particular *Cahill v. Sutton*, identified precisely the point which he subsequently addressed, namely what did the phrase “adversely affected” really mean? (Henchy J.: para. 107 *supra*). It is unnecessary to dwell on the facts or on the evidence given in the case to identify the answer to that question: it can be seen from the following passages in the judgment:-

(i) “It is enough that the person is, or can plausibly claim to be, affected or likely to be affected in a real way.” (para. 14)

(ii) “Interest” is a deliberately broad term, extending beyond constitutional or even legal rights. It is sufficient if a person is, therefore, affected in a real way in his or her life.” (para. 16), and thirdly,

(iii) “In general, it is at least a useful preliminary approach to ask if the act affects the plaintiff as a matter of fact. Normally this will be enough to establish standing to challenge the Act....” (para. 16)

Even though expressed in broad terms, the learned judge went on to point out that the range of arguments which may be available to a person, even one who can satisfy the standing requirement, may be circumscribed by the particular facts upon which his or her case is advanced. That might be a slightly different point from standing, *per se*, but clearly it is closely associated with it. In any event, for our purpose it can be said that the broadness or generality of the concept is now well documented.

112. In this case, the issue of standing falls within what might be described as the primary rule identified by Henchy J. in *Cahill v. Sutton*. On that basis, I am satisfied that the learned trial judge was entirely correct in her conclusion that the appellants are entitled to bring these proceedings. Order 84 of the Rules of the Superior Courts deals with judicial review. Rule 18(1) preserves the availability of public law remedies such as *certiorari etc*, but rule 18(2) now also affords access, in such proceedings, to declarations or injunctions. Furthermore, under rule 25, damages may also be awarded. Rule 20(5) deals with the standing requirement and states that “(5) *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates*” (emphasis added); the key issue therefore is one of sufficient interest. This

matter has been addressed in many cases including *Cooney*, where at p. 369 Walsh J. said that:

“The question of whether or not a person has sufficient interest must depend upon the circumstances of every particular case. In each such case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.” (Emphasis added)

Referring to this decision, in *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134, McCarthy J stated that:

“Examination of [*The State (Lynch) v. Cooney*] and the case law cited makes it clear beyond question that the issue of sufficient interest is one capable of objective assessment and relates to the impact on personal situation, ranging from the liability of a rate payer to pay his share of the cost of the luncheon had by members of Dublin Corporation to the damage to the plaintiffs’ business and the licensing provisions covered in *East Donegal Co-operative Livestock Mart Ltd v Attorney General*.” (p. 142) (Emphasis added)

113. One might add the comments of Hogan J in *Waterville Fisheries Development Ltd v Aquaculture Licenses Appeals Board and Others* [2014] IEHC 248, [2014] 1 I.R. 684, where at para. 13 the learned judge stated:

“I consider that in these particular circumstances the applicant must be regarded as having the requisite *locus standi*, since it is, in essence, one and the same entity as the Group who lodged the appeal. It has been emphasised on many occasions that the *locus standi* rules are, in reality, flexible rules of practice which are ultimately concerned with the conservation and proper use of judicial power: see, *e.g.*, the classic judgments of Henchy J in *Cahill v. Sutton* [1980] I.R. 269 and that of Walsh J. in *The State (Lynch) v. Cooney* [1982] I.R. 337. Viewed thus, the *locus standi* principles are accordingly concerned with the underlying reality of the litigant's interest.”

As was said in *Lofinmakin v. Minister for Justice and Equality* [2013] IESC 49, [2013] 4 I.R. 274 this particular rule “...and its underlying utility are designed, like a number of other related practices, to serve justice and to drive the administration of it.” (p. 291).

114. The relevant underlying evidence in this case is set out at paras. 42 and 43 (Mr Fitzpatrick) and 45 (Mr Flannery), *supra*. The appellants’ submissions are at para. 84, *supra* and the Minister’s submissions are summarised at para. 93, *supra*. Having regard to the affidavits filed, I am entirely satisfied that the applicants have a “sufficient interest” in the matter. In no way could the appellants’ challenge be characterised as one brought by some meddlesome busybody or crank litigant as feared by O’Higgins C.J. and Henchy J in

their judgments in *Cahill v. Sutton* [1980] I.R. 269, or as being opportunistic or unmeritorious as envisaged in *Mohan* [2019] 2 I.L.R.M. 1. I do not think that any reasonable view of the case could lead to such a conclusion. Of course, the *locus standi* rules are not limited to preventing claims of such nature. However, whatever about the lawfulness of the Authority's use of the "time spent" methodology, it seems clear to me on the evidence that the closure of the FU16 Nephrops grounds had, or certainly was liable to have, an enormous impact on the appellants' respective fishing opportunities. I do not consider that I necessarily have to inquire, whether that impact would have been fatal and would have forced the closure of their businesses; what seems certain is that the decisions in question had the effect of preventing their vessels from a fishery which was, at the very least, of substantial importance to their businesses' operations and viability. I would therefore hold, on the basis of the evidence adduced, that the underlying business was directly affected by virtue of the impugned decisions, and that this satisfies the "sufficient interest" requirement in Order 84, Rule 20(5).

115. The core of the Minister's argument on this point is that there are particular companies which own the relevant fishing vessels and hold the relevant fishing licences, and so it is those companies that should have brought the proceedings. I have no doubt but that such companies would likewise have standing to mount this challenge. But in his submission the Minister disregards a number of intrinsic connecting factors, such as the fact that their names are on the license, that under section 97 of the Act they are affected persons", that they individually make the landing declarations and complete the log book, that section 6 applies, namely that they are the Master, Skipper or other person in charge of the boat, that they are the beneficial owners, either with a family member or solely of the company in whose name the boat is registered and owned, and that in an overall sense the closure must inevitably have negatively impacted upon their income, livelihood, and source of living. Further, they have a direct and personal interest in the lawfulness of the impugned acts of the respondents. In my view therefore, I do not consider that it follows that simply because the companies could have taken the case, that means that the applicants do not have standing. Accordingly, for the reasons set out above, both applicants satisfy the test for standing under Order 84, Rule 20(5).

*The Substantive Issue – Need for a Reference?*

116. Article 267 TFEU (formerly Article 234 TEC, and before that Article 177 of the EEC Treaty) provides as follows:

*"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

- (a) the interpretation of the Treaties;*
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*

*If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."*

117. The obligation on courts of final resort to refer a matter to the CJEU is intended to ensure the uniform interpretation and proper application of Community law in all the Member States; it seeks to prevent divergences in judicial decisions on matters so related. Given that the interpretation of the Treaties has led to the creation, throughout the Union, of a new and autonomous legal order, which includes both the doctrine of direct effect and supremacy, it is hardly surprising to find the existence of a mechanism by which such is facilitated. That general means is *via* the Article 267 procedure.
118. While the third paragraph is couched in mandatory language ("*that court or tribunal shall bring the matter before the Court*"), there are certain circumstances in which the requirement to refer a question will not apply. The most obvious is where the point has already been decided upon. The seminal judgment on the matter of preliminary rulings is that in Case 283/81 (*Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415 ("*CILFIT*")). That however built on earlier decisions, such as Case No. 28/30/62 *DeCosta & Ors v. Nederlandse Belasting Administratie*, [1963] ECR 31, in which the court referred to a situation where an earlier decision on the referred point had been made. It said "*although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decision there is no judicial remedy under national law – like the Tariefcommissie – to refer to the court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially where the question raised is materially identical with a question which has already been subject of a preliminary ruling in a similar case*" (p. 38). The similar case which the court had in mind was that of *Van Gend en Loos* (Case 26/62 [1963] ECR 13). Whilst a national court, at least in theory, may still make a reference, the CJEU, in the absence of some new factor will most likely repeat the substance of its earlier decision(s). Evidently, there would be little purpose in such an exchange for either court.
119. In *CILFIT*, the plaintiff textile firm sued the Italian Ministry of Health on the basis that certain Italian taxes breached an EU Regulation. The core issue was whether wool was an animal product as the Regulation prohibited levies on such products. The Ministry urged the Italian Court of Cassation, a court of last resort, not to make a reference to the then-ECJ on the grounds that "*the interpretation of the measure is so obvious as to rule out the possibility of there being any interpretative doubt*" (para. 3), thus obviating the need to refer. In turn, the national court decided to ask the ECJ whether the existence of an obvious answer removed the need/obligation to make a reference. The ECJ clarified that

*“the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of [Article 267]”* (para. 9). Moreover, national courts are not obliged to refer a question *“if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case”* (para. 10)

120. The Court then observed that if the national court considers that recourse to EU law is necessary to enable it to decide a case, it is obliged to refer (para. 11). It went on, however, to note that this obligation is subject to certain restrictions. For example, where the proposed question previously been the subject of a reference, such that the answer is already clear from the jurisprudence of the court, the obligation to refer does not arise (para. 13). Similarly, the same can be said “where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical” (para. 14). These are eminently sensible rules. It is not, however, contended by any of the parties to these proceedings that the suggested questions for a reference are irrelevant to the issues before this Court, or that the CJEU has already given a ruling on the correct interpretation of the relevant provisions of the CFP, the Control Regulation and their various implementing measures. Certainly, this court has not been referred to any previous decision of the CJEU on the matter.

121. Rather, the reason that the Minister and the Authority say that no reference is required is because another exception applies, namely, that the interpretation of the measures in question is so obvious as to leave no scope for any reasonable doubt. As set out by the ECJ in para. 16 of its judgment in *CILFIT*:

“Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.”  
(Emphasis added).

122. The Court clarified that this exception must be assessed on the basis of the characteristic features of EU law and the particular difficulties to which its interpretation gives rise. Thus, it must be borne in mind that EU legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of EU law thus involves a comparison of the different language versions. Moreover, EU law uses terminology which is peculiar to it: legal concepts do not necessarily have the same meaning in that legal order as in the laws of the various Member States. Finally, every provision of that order must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its

state of evolution at the date on which the provision in question is to be applied (paras. 17-20).

123. The respondents submit that the answers to the questions raised are *acte clair*, in that it is obvious that there is no restrictive definition of “*data*” or “*information*” in the Control Regulation and that the Authority is not constrained to report to the Commission electronic logbook figures which it believes, on reasonable grounds, to be grossly inaccurate. The Authority argues that the confined meaning of these terms, as suggested by the appellants is clearly not supported by the European provisions themselves and that this should leave no reasonable doubt as to the manner in which this Court should resolve the questions raised. In like fashion, the Minister maintains that there is no legal basis for defining the terms “*data*” and “*information*” in the manner claimed and that to do so would breach the precautionary principle.
124. In the High Court, the learned trial judge resolved the proceedings without making a reference for a preliminary ruling. However, two important points should be stated. First, the learned judge noted that she was not asked to refer a question to the CJEU; by contrast, this Court has been expressly requested to do so. Perhaps more fundamentally, Article 267 places a different obligation on this Court, as a court of last resort, to that placed on the High Court from whose decision an appeal may be taken. As explained in the *CILFIT* judgment, the second paragraph of that Article provides that any court or tribunal of a Member State *may*, if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the CJEU to give a ruling thereon. The third paragraph, however, provides that, where a question of interpretation is raised in a case pending “before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law”, that court or tribunal *shall* bring the matter before the CJEU. Accordingly, (subject to the *acte clair* principles outlined above), this Court does not have the same discretion regarding a reference as does the High Court. As stated by Clarke C.J. for this Court in the *O’Connor* judgment referred to above:

“5.23. It must be recalled that the threshold identified in the *CILFIT* jurisprudence, which establishes the obligation on a court of final appeal of a member state to refer an issue to the Court of Justice, is a low threshold but one which must be faithfully applied by the courts which are governed by it.

5.24. It follows in turn, therefore, that this Court must conclude that there is an issue of European law which arises in these proceedings which could properly form the basis of an appeal to this Court. The Court must further conclude that the issue concerned is necessary to determine these proceedings. ...”

On the facts of this case and in light of the submissions made, it is clear that a reference must be made unless the *acte clair* aspect of the *CILFIT* doctrine applies.

125. In my view, the major issues of EU law which arise on this appeal concern the interpretation of the terms “*data*” and “*information*” in the Control Regulation and, in

particular, whether the Authority is limited, when communicating to the European Commission pursuant to Articles 33(2)(a) and 34 of the Regulation, to notifying it of the information contained in the electronic fishing logbooks or whether, where it has a reasonable basis to doubt the reliability of the figures so contained, it may instead employ reasonable, scientifically valid methods to analyse the logged data so as to arrive at more accurate outtake figures for the purposes of such notification. In other words, can the Authority also utilise other data flows such as fishing licenses, fishing authorisations, vessel monitoring system ("VMS") data, landing declarations, sales notes and transport documents when calculating the figures referred to?

126. That this issue is embedded in Community law cannot be doubted. The EU has exclusive competence in this area and by Article 38(1) of the TFEU the Union is mandated to define and implement the Common Fisheries Policy. This it has done. Such, however, must be policed. To this end, *inter alia*, the Control Regulation, the Commission Regulations and other measures have been put in place. A Community system for the control, management, regulation and enforcement of the CFP thus exists and is imperative to ensure uniform compliance. This regime is designed to ensure compliance with the detail of that policy. Whilst each Member State has responsibility over its relevant area such must be carried out as part of a global and integrated approach; therefore, in principle there should be no disparity between one State and another.
127. Bearing in mind what has just been said, the law, in my view, is not *acte clair* in respect of these issues. Thus, having regard to the *CILFIT* jurisprudence, I am not satisfied that any of the exceptions to the requirement to refer a question apply in this case. Far from being irrelevant, it seems to me that the interpretive issues raised are central to the case. It does not appear that the European provisions in question have previously been interpreted by the court. Moreover, despite the respondents' submissions, and bearing in mind the principles outlined by the CJEU at paras. 16-20 of *CILFIT*, I do not accept that this is a situation where it can be said that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved, and that the answer would be equally obvious to the courts of the other Member States and to the CJEU. It strikes me that this is a new question of interpretation of general interest for the uniform application of EU law. Finally, I am of the view that an answer to this question of interpretation is indeed necessary to determine the proceedings – it is, as just stated, at the heart of the proceedings.
128. I am, further, satisfied, in light to the CJEU's *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01), that the proceedings are at an appropriate procedural stage for a reference. The legal and factual context of the case have been set. Apart from applying the opinion of the Court to the facts of this case, very little, if any, other issues will call for a resolution. Furthermore, the parties have been heard. As noted above, there is essentially no dispute on the facts as found in the High Court. Accordingly, I am satisfied that this Court is in possession of sufficient facts and legal argument to allow the CJEU to give a ruling on the matter.

## Conclusion

129. In its recent judgment in *Graham Dwyer v. Commissioner of An Garda Síochána and ors* [2020] IESC 4, [2020] 1 I.L.R.M. 389, this Court decided to refer to the CJEU certain questions concerning, *inter alia*, the lawfulness under EU law of the retention of telephone records. In giving judgment for the majority of the Court, Clarke C.J. concluded as follows:

“7.3 In those circumstances, it seems to me that it is necessary that this court refers questions to the CJEU under the provisions of Article 267 of the Treaty on the Functioning of the European Union. I propose that the court should make such a reference in the terms set out in a separate document which I will circulate along with the delivery of this judgment. I would propose that the parties be given a period of seven days to make observations on the text of that document. In that context, I would emphasise that the decision which I propose should be made by this court today would definitively determine that there should be a reference and would also definitively determine the broad issues which require to be addressed in that reference. The observations which I propose that the parties should be permitted to make should, therefore, be confined to matters of detail or issues concerning the precise wording of the reference document. I would propose that the court, having considered such observations as may be received within that timeframe, should then finalise the reference document and arrange for its transmission to the CJEU.”

130. I propose to follow a similar course, save that the draft reference will follow very shortly from today’s date and that the parties should have seven days thereafter to make such observations as they see fit but bearing in mind the presumptive views as herein outlined. For clarity, while each of the parties has submitted its own proposed question, I am of the view that the following best captures the essence of the issue. I therefore propose to refer two questions for the CJEU in the following terms:

- (i) “Is the Single Control Authority in a Member State in notifying and certifying to the European Commission under Article 33(2)(a) and Article 34 of the Control Regulation limited to notifying the data as to catch in a particular fishing ground logged by fishers under Articles 14 and 15 of the Regulation when the Single Control Authority for good reason believes the logged data to be grossly unreliable or is it entitled to employ reasonable, scientifically valid methods to treat and certify the logged data so as to achieve more accurate outtake figures for notification to the European Commission?”
- (ii) Where the Authority is so satisfied, based on reasonable grounds, can it lawfully utilise other data flows such as fishing licenses, fishing authorisations, vessel monitoring system (“VMS”) data, landing declarations, sales notes and transport documents?”

This is subject to any refinement which may emerge from the observations of the parties within the time period as outlined above.