



**AN CHÚIRT ACHOMHAIRC
COURT OF APPEAL**

2023/321CA

Neutral Citation Number [2024] IECA 171

**Hogan J.
Pilkington J.
Butler J.**

Between/

**NOEL McDOWELL, KILLYBEGS FISHING ENTERPRISES LTD., KILLYBEGS
SEAFOODS UNLIMITED AND THE KILLYBEGS FISHERMEN'S
ORGANISATION LTD.**

Appellants

AND

SEA FISHERIES PROTECTION AUTHORITY

Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered the 11th day of July 2024

Part I - Introduction

Background

1. The conservation of marine resources in general - and fish stocks in particular - is one of the great contemporary challenges. Advances in technology and the advent of large fishing processing vessels who can sail in remote waters and who possess large catch capacity present the danger of over-fishing and the consequent degradation of fishing stocks. Although some versions of the EU's Common Fisheries Policy ("CFP") have existed since the 1970s, the European Union's objective of conserving "of marine biological resources under the common fisheries policy" now finds expression in Article 3(d) TFEU. Article 3(d) TFEU further declares that this is an exclusive Union competence.
2. As I have just indicated, the CFP represents the response of the Union legislator to these issues. Fishing quotas and the monitoring of the size and quantity of fish catches are at the heart of the CFP. As might be expected, the CFP thus rests on the existence of a series of inter-locking regulatory and inspection powers to ensure strict compliance with this regime. As the Court of Justice explained in *Commission v. United Kingdom* (C-454/99, EU:C:2002:652)("the UK fishing quotas case") the:

"proper functioning of the Community regime for...fishing quotas depends in essence on the effectiveness of the controls on landings and the reliability of the information gathered by the Member States which is also an indispensable condition for ensuring that the Commission can carry out its supervisory responsibilities."
3. The present appeal concerns the proper interpretation of one of these regulatory powers, namely, Article 60(6) of the Council Regulation (EC) No. 1224/2009 ("the Control Regulation") and the Implementing Commission Regulation (EU) No. 404/2011 of the 8th of April 2011 (as amended by Commission Implementing Regulation (EU) No. 2015/1962 of the 28th of October 2015) ("the Commission Implementing Regulation"). As Simons J.

observed in *Pelagic Weighing Services Limited v. Sea Fisheries Protection Authority* [2021] IEHC 345 one of the objectives of the Control Regulation is to give effect to the policy of allocating fishing quotas as between Member States and to ensure that one of the key objectives of the CFP is not compromised by the underreporting of fish catches. The national quota is in turn allocated by the Member States to individual fishery operators. This in turn gives rise to the need for the Member States to monitor and to supervise the amount of fish caught by each such operator. The accurate weighing of fish catches is thereby integral to the proper functioning of the CFP's quota regime. And as one might expect, detailed arrangements regarding these weighing and reporting obligations are contained in both the Control Regulation and Commission Implementing Regulation.

4. As we shall presently see in more detail, Article 60(6) of the Control Regulation provides for a system of regulatory inspection whereby the competent authorities of the Member State in question (in Ireland, the Sea Fisheries Protection Authority) may insist on the quayside weighing of any particular fishing catch in the presence of officials. The issue in the present case is whether this provision is operative where there exists a derogation and control plan for the Member State in question for the purposes of Article 61(1) of the Control Regulations.
5. Article 61(1) allows for a derogation from aspects of Article 60 where Member States have been given a derogation pursuant to a control plan approved by the Commission. In such circumstances the "fishing products [may] be weighed after transport from the place of landing provided that they are transported on the territory of the Member State concerned." Again, as we shall shortly see, the present appeal concern events which took place in October 2020. There was at the time a particular control plan (subsequently revoked) operated by Ireland with Commission approval. The appellants contend that the existence of the derogation reflects the fact that in Ireland (along with a range of other Member

States) the peculiar topography of our fishing ports has meant that fish processing factories are not immediately adjacent to the quayside. Even though Killybegs is one of the major European fishing ports, the Court was informed that the fish factories are each located some 1km. from the actual port and quayside.

6. The appellants contend that the weighing of the de-watered fish at the quayside would impair the quality of the catch. Although Article 61(1) of the Control Regulation does not in terms derogate from Article 60(6), they contend that it would be inconsistent with the nature of the derogation if this provision could operate in such circumstances. Their case in essence is that the existence of the Article 61(1) derogation effectively overrides or suspends the operation of the Article 60(6) power, if only by implication.
7. This argument was rejected by Phelan J. in a careful and comprehensive judgment delivered on 3rd November 2023: see *McDowell v. Sea Fisheries Protection Authority* [2023] IEHC 603. The appellants have now brought an appeal against that decision to this Court and the resolution of this issue of interpretation of the Control Regulation is really at the heart of this appeal.

Part II – Background facts

8. It is next necessary to consider the background facts. The first applicant, Noel McDowell, is the master of an Irish registered fish processing vessel, the MFV Atlantic Challenge (“the vessel”). The second applicant, Killybegs Fishing Enterprises Ltd. (“Killybegs Fishing”), is a limited liability company engaged in the business of catching and selling fish. It is the registered owner of the vessel and is the holder of the appropriate sea fishing vessel licence. The vessel itself is part of the refrigerated sea water fleet and the vessel’s share of the national quotas attaches to the vessel itself. The third applicant, Killybegs Seafoods Unlimited (“Killybegs Seafoods”), is one of the shareholders in the second applicant and

is the buyer and processor of the fish landed by the vessel. Killybegs Seafoods operates a fish processing factory equipped with approved flow-scales. The permit which issued to Killybegs Seafoods authorising the weighing of fishery products following their transfer to the factory provides that the “weighing of fishery product as stated in Council Regulation (EC) No. 1224/2009, Article 60(6), may be conducted in the course of conducting official controls.”

9. The fourth applicant is a representative organisation and recognised fish producer organisation (“KFO”) which was formed to represent and to defend the interests of the fishing industry operating out of Killybegs and fishing the waters around the island of Ireland. In the High Court there was some discussion as to whether KFO had the requisite *locus standi* to pursue this claim, but as this matter was not pursued in this Court, I need not pause to consider it.
10. The Sea Fisheries Authority (“the Authority”) is an independent statutory body established pursuant to the provisions of the Sea Fisheries Jurisdiction Act 2006 (“the 2006 Act”). The principal functions of the Authority are set out in s. 43 of the 2006 Act (as amended) including to secure the efficient and effective enforcement of sea fisheries law and to secure compliance with and deter contraventions of sea-fisheries law. The Authority is designated by s. 2 of the 2006 Act to perform these statutory functions. It has also been tasked by ss. 12 and 13 of the 2006 Act to regulate and control the exploitation of the fishing opportunities in the waters of the Irish territorial sea and, to a more limited extent, the Irish Exclusive Economic Zone. It is also the designated body in Ireland for ensuring compliance with the rules of the CFP and the Control Regulation.
11. Up to the events giving rise to these proceedings, the standard weighing practice – so far, at least, as the refrigerated sea water (“RSW”) segment of the fleet was concerned — in

respect of fish catch which operated in Killybegs was as follows. The catch was stored on board the vessel in RSW and transported, still in sea water, to a fish processing facility. The facility would, of course, have to be an approved facility for the purposes of the control plan and it would also have to possess either a flow scale facility or a conveyor belt weighing system which also complies with national metrology requirements. This was what was provided for in the control plan for Ireland which had been approved by the Commission in accordance with the Article 61(1) derogation.

- 12.** When the fish arrived at the fish processing facility they were first sorted by species and then weighed. As I have already indicated, the use in this way of the flow scales for the weighing of fish products such as mackerel was said to be essential by the applicants in order to ensure that the quality, freshness and value of the fish during the weighing process was thereby preserved. They pointed to the need to minimize the potential for the degradation of the fish catch by permitting the fish to remain in refrigerated water for the purpose of transportation to the factory premises where dewatering, sorting and weighing would occur. It is only fair to add that the Authority also maintained that it is possible to mitigate the effects of dewatering in the weighing process when the weighing does not take place at a factory premises.
- 13.** The (Commission) Implementing Regulation envisages that at least 7.5% of the quantities of listed pelagic species are fully inspected. Prior to a change of practice which was announced in December 2019 it appears that the Authority did not in fact exercise its power to conduct quayside inspections. All of this changed because of concerns about the manner in which the control plan was in fact operated by Ireland and irregularities which came to light as a result of a criminal prosecution and, indeed, a subsequent audit by the European Commission. All of this had prompted the Authority to announce a change in policy whereby a percentage of inspections would then henceforth be carried out at the quayside.

14. This change of policy was explained by Dr. Susan Steele, the Chair of the Authority, in a widely publicised letter of 12th December 2019. In the letter Dr. Steekle stated that:

“The weighing of catches prior to transport from the place of landing is required under EU Regulations. Compliance with this requirement involves the weighing of catches as may be directed by Sea Fisheries Protection Officers in the course of a landing inspection. From the initiation of the 2020 Spring Pelagic Fisheries, the Sea-Fisheries Protection Authority is directed to introduce additional specific measures of control for landings of pelagic species prior to transport from the initial place of landing. These measures, in addition to current control requirements, are set out in the recommendations of an audit conducted by the European Commission in relation to pelagic fisheries controls. Current regulations require that all catches being transported to locations outside the State prior to first sale are weighed upon landing. This measure will now be obligatory in relation to a percentage of catches of pelagic species being landed in the State.

Masters of vessels who are requested to undertake controls at landing as stated in Council Regulation (EC) No 1224/2009, Article 60 will receive a written notification from an inspecting Sea-Fisheries Protection Officer who will direct that weighing prior to transport from the place of landing is required. The dewatering of catches prior to such weighing will be the responsibility of the operator, and the SFPA may facilitate the use of water separation equipment. During such weighing operations an allowance of 2% for water will be deducted from the weights obtained. The resultant figure will be deemed the Official Weigh Record and will be the only figure that will be entered on the Official Pelagic Weigh Record documentation, all associated catch documentation, and recording systems used for recording of weighed catches.

SFPA staff will ensure that the weighing operation at landing prior to transport is completed in an efficient manner. We ask for the full co-operation of operators, which is necessary to facilitate and expedite the process. The derogation that permits weighing of fishery products after transport in permitted establishments will continue in tandem to the procedures stated above. Controls in these establishments will continue, to ensure compliance with legislation and weigh permit conditions.”

- 15.** The Authority contended that that quayside weighings were considered preferable and more reliable because they allowed for the weighing of fish at a neutral venue rather than at a factory which is controlled by fish processors. From the Authority’s perspective such controls could be run more efficiently. As Phelan J. noted in her judgment, it seems likely that this change of practice was also prompted by the Commission’s concerns, since the audit had revealed that the weighing processes used at certain fish processing facility had been manipulated from time to time.
- 16.** It is, however, probably fair to say that that at the time the Authority announced a change in practice the quayside landing weighing infrastructure was somewhat underdeveloped. The Department of Agriculture, Food and the Marine operated a somewhat old-fashioned weighbridge at Killybegs, so that if the water was not separated from the fish in the receptacle to be weighed, the resulting weight included fish and water. To facilitate the separation of fish catches from the water in which they had been stored and consequently a more accurate weighing of the fish, the Authority arranged for the availability of a water separator "hopper" at the quayside at Killybegs. This, however, did not meet a variety of objections raised by the applicants (and others) who maintained that the water separator hopper did not meet modern hygiene and food safety standards. They also contended that the removal of the fish from the RSW in which it was stored prior to its transport to the fish processing facility damaged the quality of the fish. So, for example, in his affidavit, Mr. Eamon McGuinness (who is a director

of Killybegs Seafoods) emphasised the fastidiousness of many Japanese (and other) buyers when it came to fish quality. He drew attention to his personal experience of these buyers who would refuse to purchase if there had been even the slightest drop in the quality of the fish.

- 17.** At all events, the matters giving rise to the present proceedings came to a head on the 11th and 12th October 2020. On the evening of 11th October 2020 the Master of the vessel the *Atlantic Challenge* transmitted to the Authority what is officially known as a “Prior Notification of Arrival” (or “Hail Notice”) in accordance with Article 17 of the Control Regulation. The electronic logbook returns made by the Master pursuant to Article 14 of the Control Regulation recorded a catch of 3,000 kg of herring and 450,000 kg of mackerel.
- 18.** The *Atlantic Challenge* was then selected for inspection and a monitored quayside weighing of the fish catch on landing control pursuant to Article 60(6) of the Control Regulation. The Authority had originally (erroneously) concluded that the *Atlantic Challenge* had not been subject to a full inspection for two years. The Authority was also conscious of its obligation under Article 107 of the Implementing Regulation to ensure that 60% of landings inspected were belonged to the fleet segments in the two highest risk level categories identified. As it happens, the highest two categorisations of risk for vessels in Ireland in 2020 were medium risk and high risk. This vessel was in the medium risk category and the Authority maintained therefore that it qualified for inspection with reference to the 60% benchmark.
- 19.** As I have already indicated, the Authority was incorrect in its belief that the *Atlantic Challenge* had not been so inspected in the previous two years. This oversight was due to the fact that a full factory inspection which had taken place in the previous January had not been properly recorded. The Authority nevertheless contended that this error did not undermine its selection of the vessel for inspection. It also relies on its powers to inspect on a random basis. As it

happens, there is no appeal from the finding of Phelan J. in the High Court to the effect that the selection of the *Atlantic Challenge* for quayside inspection was lawful.

20. Returning now to the facts of the case, Phelan J. found that the *Atlantic Challenge* was boarded by officers of the Authority when it arrived in Killybegs on the morning of 12th October 2020 pursuant to their powers under the 2006 Act. At that point the master was informed that the vessel had been selected for a quayside weighing and inspection in accordance with Article 60(6). The Authority then furnished the master with a statutory notice which stated that it required: “that fishery products landed from the landing referenced above are weighed in accordance with Council Regulation (EC 1 1224/2009 Article 60(6).”

21. The notice further stated that:

“the operator responsible for the weighing of fishery products shall ensure that all fishery products are dewatered prior to weighing on a calibrated weighbridge scale. The legal allowance permitted for water and ice in pelagic products for human consumption landed in bulk is a maximum deduction of 2% from the total weight. There shall be no deduction for water or ice for landings of pelagic products for non-human consumption. The operator responsible for the weighing of fishery shall ensure that the figure resulting from the weighing shall be used for the completion of the official weigh record and associated documentation (Landing Declarations, Transport Document and Sales Notes). The operator weighing fisheries products prior to transport from the place of landing shall record the weighing carried out as required in Regulation 404/2011 Article 70(1). This shall be undertaken using the SFPA official pelagic weigh record to detail the weighing undertaken.”

22. The Authority’s officers then informed the master that they required the entire catch to be weighed over the weighbridge on the pier as part of a controlled quayside weighing. The

master objected on the ground that this process would include the weighing of the accompanying seawater. The Authority offered the use of the seawater hopper, but this was declined by the master. The master in turn requested that the tanks on board be “dipped” (so that there could be an unofficial estimate of the weight of the catch), with an official weighing at the fishing process facility. The Authority refused this request.

23. The Authority then advised the master that the final weight from the weighing on the weighbridge was the official weight which was to be used for the completion of the landing declaration and sales note. It drew the master’s attention to the fact that the responsibility to dewater and weigh the fish accurately lay with the operator.

24. The fish catches were then weighed under protest using the weighbridge. Critically, however, the fish were not dewatered after being discharged from the vessel and prior to their weighing on the weighbridge at the quayside. An Official Pelagic Weighing Record (“OPWR”) was then completed by Killybegs Fishing, which was then marked with the words “under protest” in respect of the weighing operation on the pier. As Phelan J. put it in her judgment:

“The mackerel weight recorded from the weighbridge was 508,995kg following a deduction from the overall weight of the fishery product and water weighed of 2% (which percentage is provided for by law under the Commission Implementing Regulations) and less the weight of the herring caught. Weights for herring and mackerel were recorded by [Killybegs Fishing] in the OPWR for the weighing performed on the weighbridge even though the species were not weighed separately on the weighbridge. The weight recorded for herring was the weight obtained upon factory weighing when the fish were separated and sorted. On arrival at the factory premises in Killybegs the catch was weighed again over the certified flow scales. The factory weighing was not supervised by the Authority in person but there was a live video feed

of the operation of the flow scales. The documentary records maintained in respect of the weighing, packaging and processing of the fishery products discharged by the vessel at the factory over the 12th and 13th of October 2020 were not inspected by the Authority.”

25. The figures for mackerel and herring as subsequently weighed in the certified flow scales in Killybegs Seafoods’ fish processing facility came to 449,985 kg of mackerel and 12,189kg of herring respectively. These weighings were recorded in the Killybegs Fishing’s own log books with different weights and serial numbers. There was a differential of some 11-12% between the weight for mackerel recorded from the weighbridge on landing and that recorded on the flow scales at the Factory. There is, accordingly, a significant differential between the figures returned by Killybegs Fishing to the Minister of Agriculture, Food and the Marine and those returned by the Authority to the Commission under Article 33 of the Control Regulation.
26. At a subsequent meeting between the master and the Authority on 3rd November 2020 it was suggested that the former might be guilty of fishing offences by reason of not using the weights recorded at the quayside weighing. It does not, however, appear that the matter has been referred to the Director of Public Prosecutions by the Authority. Yet as Phelan J. also noted her in her judgment, it is common case that “the monitored weighing on landing did not give an accurate weight as the fish had not been dewatered. It is not in dispute that a by-catch of herring was not sorted from the mackerel catch and separately weighed over the weighbridge on landing under supervision by the Authority.”

Part III: The relevant legislative provisions

27. I now propose to describe and, where necessary, to set out the relevant legislative provisions.
28. We have already noted how the Authority has been vested with a range of regulatory powers by the 2006 Act. In addition, however, s. 11 of the 2006 Act provides that a contravention of

the CFP including (under s. 11(5)) a failure to comply with obligations imposed in relation to weighing or documenting fish is an offence. Section 17 of the 2006 Act provides for a broad power on the part of a Sea Fisheries Protection Officer to stop and search any person believed to be conveying sea fish of any kind and to inspect the fish. Section 17 also expressly provides for a power on the part of a Sea Fisheries Protection Officer to verify the accuracy of the information in any document or record which relates to the CFP (s. 17(1)(d)) and to check the weight of fish (s. 17(1)(e)).

The Control Regulation

29. As I have already indicated, the present case really turns on the proper interpretation of the Control Regulation. Article 5(1) of the Control Regulation provides for control measures 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.”

30. While the enforcement of the Control Regulation is a matter for each Member State within their own sovereign territory, Member States are also enjoined by Article 5(3) of the Control Regulations to take certain actions:

“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.”

- 31.** Article 5(5) further recites that Member States are required to designate a “single authority” with responsibility for the collection and certification on fishing activities and the transmission of information to the Commission. In this State, the Authority has been designated for this purpose by Article 3 of the Sea-Fisheries (Community Control System) Regulations 2016 (S.I. 54 of 2016).
- 32.** The Control Regulations also contains detailed arrangements regarding the duty to keep accurate records and to record weights. Thus, requires that a vessel’s logbook must contain the estimated quantities of each species of fish caught in kilograms live weight with a permitted margin of tolerance in estimates recorded in the logbook under Article 14(3) of 10% for all species. Article 14(9) of the Control Regulation stipulates that the accuracy of the data recorded in the fishing logbook is the responsibility of the master. Separately, Article 17 provides for a requirement to give prior notification of landing (the so-called “hail” notification) at least four hours before the estimated time of arrival at port giving prescribed information. By virtue of Article 17(1)(e) and (f) of the Control Regulation the prescribed information to be recorded includes the quantities of each species recorded in the fishing logbook and the quantities of each species to be landed or trans-shipped. Article 17(5) states that the accuracy of the data recorded in the electronic prior notification shall be the responsibility of the master. Article 23 requires the completion and submission of a landing declaration and this must record the quantities of each species of fish caught in kilograms in product weight. Article 23(4) provides that the accuracy of the data recorded in the landing declaration is the responsibility of the master. The landing declaration must be submitted not later than 48 hours after the completion of the landing.

- 33.** Following the landing of the catch, Article 62 requires the completion of a sales notice by the registered buyer. Article 62(1) provides that the accuracy of the sales note shall be the responsibility of the person completing the notice such as the registered buyer. Article 64 prescribes the contents of the sales notes and requires under Article 64(1)(f) that the sales note provide details of the quantities of each species sold in kilograms in product weight. Article 68 provides for the completion of a transport document in certain circumstances and requires that the transport document indicate the quantities of each species transported in kilograms in product weight and places responsibility for the accuracy of the document on the transporter.
- 34.** This is all by way of regulatory background provisions. As I have already indicated, it is the provisions of Article 60 and Article 61 of the Control Regulation which are central to this appeal. Article 60 provides:

“1. A Member State shall ensure that all fishery products are weighed on systems approved by the competent authorities unless it has adopted a sampling plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.

2. Without prejudice to specific provisions, the weighing shall be carried out on landing prior to the fisheries products being held in storage, transported or sold.

3. By way of derogation from paragraph 2; Member States may permit fisheries products to be weighed on board the fishing vessel subject to a sampling plan as referred to in paragraph 1.

4. Registered buyers, registered auctions or other bodies or persons which are responsible for the first marketing of fisheries products in a Member State shall be responsible for the accuracy of the weighing operation unless, in accordance with

paragraph 3, the weighing takes place on board a fishing vessel, in which case it shall be the master's responsibility.

5. The figure resulting from the weighing shall be used for the completion of landing declarations, transport document, sales notes and take-over declarations.

6. The competent authorities of a Member State may require that any quantity of fisheries products first landed in that Member State is weighed in the presence of officials before being transported elsewhere from the place of landing.

7. Detailed rules on the risk-based methodology and procedure of weighing shall be established in accordance with the procedure referred to in Article 119.”

35. Article 61(1) of the Control Regulation provides for the derogation – an issue which quite fundamental to the appeal - as follows:

“1. By way of derogation from Article 60(2), Member States may permit fisheries products to be weighed after transport from the place of landing provided that they are transported to a destination on the territory of the Member State concerned and that this Member State has adopted a control plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.”

36. I propose presently to return to a consideration of these critical provisions. To continue, however, it is necessary to draw attention to other provisions of the Control Regulation. Article 73(2) provides that inspections shall be conducted in a “non-discriminatory manner”. Article 74(3)(a) imposes a duty on officials to check in particular: (a) the legality of the catch kept on board, stored, transported, processed, or marketed and the accuracy of the documentations or electronic transmissions relating to it. Article 74(5) also provides that officials must conduct inspections in such manner as to cause the least

disturbance or inconvenience to the vessel or transport vehicle and its activities, and to the storing, processing, and marketing of the catch. It further provides that they must, as far as possible, prevent any degradation of the catch during the inspection. Article 76 provides for an inspection report after each inspection.

37. Article 109(2) imposes a duty on the Member States to ensure that all data recorded in accordance with the Control Regulation are accurate and complete and that they are submitted with the time periods specified by the CFP. Article 109(9) states that if the Commission identifies inconsistencies in the data entered in the database of the Member State because of its own investigations, and after having presented documentation and consulted with the Member State, it may require the Member State to investigate the reason for the inconsistency and to correct the data, if necessary. Article 96 gives the Commission power to initiate and to carry out audits, verifications and inspections.

The Commission Implementing Regulation

38. Finally, Article 119 delegates power to the Commission to lay down detailed rules for implementation of the principles established in the Control Regulation. The provisions of Article 29 to Article 37 make provision for the format of the fishing logbook and the weighing of the catch. Article 54 provides:

“When, in accordance with Article 61 of the Control Regulations, the fisheries products are transported from the place of landing before they have been weighed, the landing operation shall be regarded to have been completed for the purpose of the application of Articles 23(3) and 24(1) of the Control Regulation when the fisheries products have been weighed.”

39. It remains to note some other relevant provisions of the Commission Implementing Regulation. Article 75 of the Commission Implementing Regulation requires that

competent authorities always have full access to the weighing systems, the weighing records, written declarations, and all premises where the fisheries products are stored or processed. Article 77 of the Commission Implementing Regulation provides in relation to control plans under Article 61(1) that the plan itself and any substantial modification thereof shall be adopted by Member States in accordance with the risk-based methodology described in Annex XXI of the Implementing Regulation itself.

40. In the case of pelagic species such as mackerel and herring, Article 78 provides that such are to be weighed immediately on landing. This provision nonetheless also provides that catches of these species may be weighed after transport where the Member State concerned has adopted a control plan as referred to in Article 61 (1) of the Control Regulation in accordance with the risk-based methodology described in Annex XXI, and where this control plan or common control programme has been approved by the Commission. Article 80 of the Commission Implementing Regulation requires, for the purpose of weighing, that the master of a fishing vessel or his representative shall inform the competent authorities of the Member State in which the landing is to be made, at least four hours in advance of entry to port of landing concerned of the following:

- “(a) the port he intends to enter, the name of the vessel and its external registration letters and numbers;
- (b) the estimated time of arrival at that port;
- (c) the quantities in kilograms live weight of herring, mackerel, horse mackerel and blue whiting retained on board;”

41. Article 82 of the Implementing Regulation also provides as regards the fishing logbook that immediately upon arrival in port and before the discharge commences that the master of a fishing vessel which is not under the obligation to record fishing logbook data electronically

shall present the completed relevant page or pages of the fishing logbook for inspection by the competent authority of the Member State at the port of landing. The quantities of herring, mackerel, horse mackerel and blue whiting retained on board, notified prior to landing as referred to in Article 80(1)(c) of the Implementing Regulation should be equal to the quantities recorded in the fishing logbook after its completion. Article 89 of the Implementing Regulation makes further provision for weighing as follows:

“1. The weighing of catches of herring, mackerel, horse mackerel and blue whiting from the vessel shall be monitored by species. In the case of vessels pumping catch ashore the weighing of the entire discharge shall be monitored. In the case of landings of frozen herring, mackerel, horse mackerel and blue whiting, all boxes shall be counted and the methodology for calculating the average net weight of boxes provided for in Annex XVIII shall be monitored.”

42. Finally, Article 98 and Article 105 deal with the Commission’s inspection powers. Article 98 and Article 105 provide that vessels are inspected based on risk assessment criteria. Article 105 also provides for inspections on a purely random basis. Article 107 stipulates that the Authority ensure that at least 7.5% of the quantities landed for each species and at least 5% of all landings are fully inspected for pelagic landings. It is also provided that at least 60% of total inspections at landing are to be conducted annually on fishing vessels belonging to the fleet segments in the two highest risk categories identified according to Article 5(1) and Article 5(2) of the Implementing Regulation.

The Irish derogation

43. As I have already indicated, Ireland exercised the derogation provided for by Article 61(1) of the Control Regulation by submitting a Weighing of Fishery Products Control Plan (“the ‘Control Plan’”) to the Commission. The Control Plan was approved by the Commission by

Article 1(3) of Commission Implementing Decision of the 13th of August 2012 (2012/474/EU). (As it happens the Control Plan was subsequently revoked by the Commission in April 2021 following the emergence of discrepancies as a result of a Commission audit).

- 44.** The Control Plan created specific provision in the State for the weighing after transport in approved facilities of fishery products. The aim of the Plan was:

“to minimise the risk of non-compliance with the rules of the Common Fisheries Policy, in particular the under-recording or not recording of fish landed, in circumstances where the transport of fishery products from the place of landing to a destination within Ireland is permitted prior to weighing. At a practical level this Control Plan implements a derogation from the requirement to weigh fish prior to transport. Compliance with the weighing requirements may be achieved by applying the provisions of this Control Plan thereby allowing transport of fish prior to weighing.”

- 45.** So far as the weighing obligations were concerned, the Control Plan provided:

“In order to minimise the risk on non-compliance, the accuracy of post-transport weighing will be validated on a risk-based sample of transport consignments. In general terms, this will involve the weighing of all or some of the fishery products, following separation of water/ice where relevant, prior to transport in the presence of SFPA [i.e., the Authority]. The weighing of these fishery products will then be monitored by SFPA post-transport. Operators transporting bulk-stored pelagic fish should take all reasonable steps to minimise water and ice content prior to this pre-transport weighing. SFPA may supervise sealing of transport units and recording of seal numbers by operators for subsequent removal of seal at destination when approved to do so by SFPA. Permitted Operators are obliged to facilitate these procedures to provide necessary assurance around accuracy of their post transport weighing.”

Part IV: The arguments of the parties and the High Court judgment

46. Before considering the proper interpretation of Article 60 and Article 61(1), it is impossible to get away from the fact that the events giving rise to the present litigation all arose against a background of official concern regarding the accuracy of the catch figures reported by the Irish fishing industry to the Authority and the Minister and, by extension, to the Commission itself. It was, after all, these very concerns which ultimately prompted the Commission to revoke the approval for the original 2012 Control Plan. While it is only fair to say that no allegation has been made against these applicants, it is probably equally true to say that the Authority's change of position as articulated in Dr. Steele's letter of 12th December 2019 regarding the general use of the Article 60 powers reflected the Authority's anxieties in this regard.

47. This was well expressed by Phelan J. in her judgment when she said that (at para. 64):

“I am satisfied that the monitored weighing on landing which occurred in this case was part of a wider response to the Commission's systemic concerns. It is possible even that the Authority may have had some forewarning that the Irish Control Plan was at risk of being revoked unless they could demonstrate better control and monitoring of the industry than previously, although this is not articulated. Even if a warning that the Control Plan was at risk was not signaled in express terms by the Commission (and the question was not addressed in evidence), the decision to revoke was obviously preceded by exchanges between the Authority and the Commission in relation to compliance concerns as referenced in the Decision to revoke such that the risk was foreseeable. In the event the Authority's attempts to step up its exercise of control powers did not alleviate the Commission's concerns and the Irish Control Plan was revoked anyway.”

48. This, at any rate, is the background to the present proceedings. In essence the applicants' case is that the Authority does not have the power to suspend the operation of its own control plan

by – as they put it – by-passing that which is envisaged by Article 61(1). This provision, they contend, gave them the right to organise their weighing systems in accordance with its terms and that a system of mandatory quayside weigh of fish catches was inconsistent with the existence of the control plan derogation. They also contend that the Authority could not have acted lawfully or rationally in requiring a quayside weighing and requiring the declaration of the resulting figure in circumstances where they say that accurate figures could not have been obtained without negatively impacting on the quality of the fish catch.

49. For its part the Authority points to the fact that Article 60(2) normally requires that fish catches be weighed on landing prior to transport to a fish processing facility. Article 61(1) derogates from Article 60(2) – but only from Article 60(2) – in that it provides that Member States may permit fish to be weighed after transport at a fishing processing facility. Where the Authority requires an Article 60(6) weighing on landing or monitored weighing on landing, the Article 61(1) derogation does not apply. The Authority also points to the requirements of the Implementing Regulation to the effect that it must ensure that 7.5% of the fish landed or 5% of the landings of fish be fully inspected by it. It also refers to Article 60(5) of the Control Regulation which provides that the figure resulting from the weighing shall be used for the completion of landing declarations, transport documents, sales notes and takeover declarations.

The High Court judgment

50. As I have already indicated, Phelan J. rejected the applicants’ arguments in a comprehensive and carefully argued judgment. It is perhaps sufficient to point to her conclusions (at para. 82) on the Article 60 point and the scope of the derogation:

“I am satisfied that the agreement of a derogation in the terms of the Control Plan did not impact on a continued exercise of a primary power provided for under Article 60(6)

to require a monitored weighing on landing. The Authority was entitled to require that any quantity of fisheries products first landed be weighed in the presence of officials before being transported even in circumstances where a derogation from the general obligation to weigh on land exists by virtue of an agreement under Article 61(1). By requiring a controlled weighing on landing under Article 60(6) the Authority did not suspend the Control Plan then in place as the Control Plan never interfered with the Article 60(6) power. The Control Plan continued in tandem with the Article 60(6) power by way of derogation from Article 60(2). The derogation remained available at that time in those cases, the majority, in which a monitored weighing on landing was not required. The power to require a monitored weighing on landing was not a new power and had co-existed with the Control Plan from its inception albeit that the Authority did not in practice exercise that power prior to 2020.”

51. All of this brings us directly to the central point in the appeal, namely, the proper construction of Article 60 and Article 61(1) of the Control Regulation. It is to this issue which I now turn.

**Part V: The proper interpretation of Article 60 and
Article 61(1) of the Control Regulation**

52. As I have already observed, the central argument advanced by the applicants was that it was, in effect, incongruous for the Authority to exercise its Article 60(6) powers in circumstances where a control plan is in place. Counsel for the applicants, Mr. Conlon Smyth SC, contended that the entire point of the derogation provided for in Article 61(1)

was in recognition of the topography associated with a variety of European Union fishing ports (including Ireland) such that it was impractical to have the fish dewatered at the quayside in order to be weighed. This was because – it was said – it was necessary to dewater the fish to have an accurate weighing of the fish, yet if this occurred at the quayside, the intervening delay between de-watered weighing and the ultimate transport of the dewatered fish post such weighing to the factory presented the real risk that the quality of the fish would be degraded prior to arrival at the factory for processing. This was disputed by the Authority.

- 53.** While Phelan J. did not find it necessary to resolve this particular conflict of fact, there may possibly be some foundation for the applicants’ concerns. Yet the fact remains that the actual text of Article 61(1) of the Control Regulations is very specific in the manner in which it disapplies Article 60(2) (“By way of derogation from Article 60(2)...”). It does not disapply Article 60(6). The applicants’ contention accordingly immediately meets two interpretative objections deriving from this perfectly clear text.
- 54.** First, it is a general principle of the interpretation of Union legal instruments that exceptions and derogations are to be construed strictly: see, e.g., *Commission v. Netherlands* (C-50/06: EU: C: 2007: 325) (at para. 42).
- 55.** Second, the Court of Justice not infrequently applies the principle of *a contrario* reasoning to the construction of legislative texts (see, e.g., *Slovakia and Hungary v. Council of the European Union* (Case C-643/16 and Case C-647/16: EU:C: 2017: 631) (para. 58). (This principle corresponds in substance to the *exclusio unius* principle in our domestic law). The application of the *a contrario* principle would suggest that the fact that the Union legislator expressly disapplied Article 60(2) – but *not* Article 60(6) – in itself provides strong grounds for interpreting Article 60 in the manner which found favour with Phelan J. in the High

Court. In other words, had the Union legislator wished to disapply Article 60(6) as well as Article 60(2) it could – and should – have done so. The fact that it chose to disapply one such provision but did not disapply the other invariably leads to the conclusion that the Authority were at least in principle entitled to invoke the Article 60(6) power in the circumstances of the present case.

56. It is, of course, true that Union legislation must be interpreted in a teleological fashion and in a manner which does not undermine its fundamental purposes (*effet utile*). Yet as two distinguished commentators have stated (Lenaerts and Gutierrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice* (Academy of European Law, European University Institute, AEL Working Paper, 2013/09):

“It is true that an EU law provision may be interpreted in light of the normative content in which it is placed and/or in accordance with the purposes it pursues, in particular where there are certain ambiguities relating to the way in which the provision is drafted. However, in accordance with settled case law, where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of that provision, as this would run counter to the principle of legal certainty and to the principle of inter-institutional balance enshrined in Article 13(2) TEU. Stated simply, the ECJ will never ignore the clear and precise wording of an EU law provision.”

57. So, for example, in *Commission v. United Kingdom* (Case C-582/08, EU:C: 2010: 429)(“the UK VAT case”) the Commission had argued that the UK was in breach of its obligations under the VAT Directive. Article 169 to Article 171 of the (then principal) 6th VAT Directive gave a taxable person the general right to deduct VAT as an input credit for

transactions carried outside the Member State in question “in respect of which VAT would be deductible if they had been carried out within that Member State.” Article 2 of the 13th VAT Directive had provided that the Member States might make these refunds “conditional upon the granting by third States of comparable advantages regarding turnover taxes.”

- 58.** The United Kingdom had availed of that latter provision in Article 2. The Commission had argued in subsequent infringement proceedings that the UK was not entitled to avail of this derogation, in part because it said that the wording of Article 2 had been erroneously drafted. The CJEU rejected this argument, giving two reasons, both of which are pertinent to the present case.
- 59.** First, it noted that the language of the derogation provisions of Article 2 of the 13th Directive was “clear and precise”. These provisions amounted to a form of *lex specialis*, so that the general language of Article 170 of the earlier 6th Directive could not be taken as overriding this perfectly clear language (paras. 33 to 35), so that Article 170 of the 6th Directive could not be interpreted as permitting “a derogation from the clear and precise wording of Article 2(1) of the Thirteenth Directive.” It necessarily follows from this reasoning that the scope of a derogation cannot be extended by implication, so that if a derogation is expressly granted solely in respect of provision A, one cannot in the absence of clear statutory language thereby extend that by judicial decision to provision B.
- 60.** Second, the CJEU also held (at para. 51) that it could not “in the face of the clear and precise wording of a provision such as Article 2(1) of the Thirteenth Directive, interpret that provision with the intention of correcting it and thereby extending the obligations of the Member States relating to it.”
- 61.** This reasoning is very much in point so far as the present appeal is concerned. The language of Article 60 and Article 61(1) is clear and unambiguous. The main argument of the

appellants really amounted to saying that for the sake of consistency and the maintenance of the internal logic of the Article 61(1) derogation, that very derogation should also be extended by judicial decision to include the Article 60(6) power. Yet it seems to me that the acceptance of this argument would be entirely at variance with the interpretative methodology employed by the CJEU in the UK VAT case.

62. This, I think, is sufficient to dispose of the principal argument advanced on behalf of the appellants. One can perhaps see why the applicants contend that the Article 61(1) derogation should extend also to the quayside inspections powers contained in Article 60(6) if they have also been given the right to transport the fish catches a little distance from the quayside to a fish processing facility where the fish is then dewatered and weighed. Yet one cannot say that this omission – if omission this really is – is somehow absurd or incongruous. The European legislator might justifiably think that it was nonetheless important to retain the right to conduct quayside inspections from time to time, the existence of a derogation notwithstanding. The importance of such inspections as part of preserving the integrity of the CFP was, after all, stressed by the CJEU in the UK fishing quotas case. Likewise in the more recent decision of the Court in *PF and MF* (C-564/20, EU: C: 2022: 90) the Court stressed (at para. 39) that the Authority must be able “to check the reliability and accuracy of the data which it collects”. The Union legislator might justifiably think that quayside inspections are still necessary even where a control plan was otherwise in place.

63. In any event, even if (contrary to my own view) it were to be accepted that the failure on the part of the Union legislator to include the Article 60(6) powers within the scope of the Article 61(1) derogation is in some respects or other an error or a mistake, the decision of the CJEU in the UK VAT case is clear authority for the proposition that it is not open to

this Court to distort or vary the perfectly clear language of Article 61(1) through use of some wider teleological interpretation.

- 64.** For all of these reasons, therefore, if the final decision were to have been left with this Court, I would have proposed that the appeal on this ground should have been rejected and the decision of Phelan J. affirmed. I have nevertheless concluded that this Court should make a reference on this point to the Court of Justice pursuant to Article 267 TFEU and should adjourn a final decision on the disposition of the appeal pending the outcome of the reference. I have arrived at this conclusion for the following reasons.
- 65.** First, the point urged by the appellants is not without substance. It may be that the Court of Justice will apply these interpretative principles differently or will vary them in some way.
- 66.** Second, these are key provisions of the CFP and their proper scope and interpretation is a matter of considerable interest and importance to the fishing industry and the regulatory authorities alike, both here and in other Member States. One may note that Article 60 and Article 61(1) are provisions of the CFP which to date have not been the subject of any judicial interpretation from the Court of Justice. It would be desirable that any lingering doubts regarding the interpretation of these provisions would be dispelled by a final and authoritative decision of the CJEU.
- 67.** Third, while it is clear from this Court's decision in *Sony Music Entertainment (Ireland) Ltd. v. UPC Communication Ireland Ltd.* [2016] IECA 231, [2018] 2 IR 623 that this Court is not a court of last resort for the purposes of Article 267(3) (so that the Court is under no obligation to refer), it is nonetheless salutary to reflect on what is likely to happen were this Court to affirm the decision of the High Court without having made such a reference. There must be a very real possibility that there would be an application for leave to appeal and that in those circumstances the Supreme Court would itself be obliged to grant leave to appeal

under Article 35.4.3^o of the Constitution: see, *e.g.*, by analogy the comments of Irvine J. in *Friends of the Irish Environment v. An Bord Pleanála* [2019] IESC 53 at para. 29. In view of the decision of the Court of Justice in *Conorzio Italian Management* (Case C-561/19, EU:C: 2021: 799) and the comments of that Court (at paragraph 51 of the judgment) regarding the nature of the obligation to refer which is imposed on courts of last resort such as the Supreme Court, one feels that that Court would probably find itself compelled to make an Article 267 TFEU reference.

- 68.** In these circumstances it may be more convenient if this Court to anticipate these likely developments and to make the appropriate Article 267 reference itself.

The accuracy of the returns

- 69.** One further point made by the appellants which may conveniently dealt with here was those key provisions of the Control Regulation – such as, for example, Article 14(9) – emphasise the importance of accurate returns. They maintained that the quayside weighing which took place under protest on 12th October 2020 was not accurate because (a) the fish had not been dewatered and (b) the herring had not in any event been separated from the mackerel. They further contended that they were just not simply entitled, but, indeed, required to include the later fish processing facility weighing in their returns. It is this issue which has given rise to the potential threat of a criminal prosecution.
- 70.** It is true that the Authority acknowledged that this particular return was inaccurate for these reasons. I nevertheless do not accept that the appellants can justly complain on this point, because the inaccuracy in question resulted from their refusal to co-operate with the quayside weighing and the de-watering of the fish.
- 71.** Article 54 of the Commission Implementing Regulation is relevant on this context. It provides that where the fish are taken to a fish processing facility in accordance with the

provisions of Article 61(1) of the Control Regulation (i.e., the terms of the derogation and the control plan) *before they have been weighed*, they are deemed to have been landed for the purposes of Article 23(3) and Article 24(1) when they are in fact weighed. In such circumstances the weighing takes place at the fish processing facility and not at the quayside. This provision obviously does not apply where the quayside weighing upon which the Authority insisted represents the lawful exercise of the Article 60(6) power by that body because in those circumstances the fish will already have been weighed prior to delivery to the fish processing facility.

72. The appellants' argument on this issue is in fact just a variation of their main argument relating to the validity of the Article 60(6) inspection and quayside weighing. If the appellants' argument regarding the proper interpretation of Article 60(6) is not otherwise correct, then for the reasons I have just indicated they cannot be heard to say that the factory weighing was the only lawful and appropriate one for the purposes of making the appropriate returns. All of this is to say that I would reject the appellants' arguments on this point, subject only to the potential outcome of the Article 267 TFEU reference.

Part VI – Conclusions and disposition

73. I would accordingly propose that the final determination of the appeal should await the outcome of the reference from the Court of Justice. While the other grounds advanced by the applicants – which essentially bear on the rationality of the Authority's actions in requiring a quayside weighing of the first and second applicants' fishing catches – it seems to me that any final adjudication on these related issues is so bound up with a final resolution of the Article 60/Article 61(1) interpretative issue that they might also conveniently await the outcome of the resolution of this issues.

74. I would further propose that the Court should refer the following question pursuant to the Article 267 TFEU:

“Where a Member State has exercised its right to derogate in Article 61(1) from the provisions of Article 60 of Council Regulation (EC) No. 1224/2009 of 20 November 2009 (as amended) establishing a Community control system for ensuring compliance with the rules of the common fishing policy in accordance with the terms of a control plan approved by the Commission of the European Union, may the competent authority of that Member State duly designated for the purposes of Article 5(5) of that Regulation nonetheless insist that the master of an authorised shipping vessel ensure that any quantity of fisheries products first landed in that Member State is weighed in the presence of officials of that authority before being transported elsewhere from the place of landing in accordance with the provisions of Article 60(6) of that Regulation?”

75. Should the parties wish to comment on this draft question or suggest any changes thereto, they are required to submit brief written submissions to this effect by Tuesday, 23rd July 2024. Since this judgment is being delivered electronically, I am authorised to say that Pilkington and Butler JJ. agree with it and the order which I have just proposed.