**SUPREME COURT**

**S:AP:IE:2019:000013**

**IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND IN THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

**THE CHIEF JUSTICE**

**THE PRESIDENT OF THE HIGH COURT**

**MR JUSTICE O'DONNELL**

**MR JUSTICE McKECHNIE**

**MS JUSTICE BAKER**

**2017 No. 884 JR**

**BETWEEN**

**PF AND MF**

**APPLICANTS**

**AND**

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

**RESPONDENTS**

---

**ORDER DATED THE 20th DAY OF OCTOBER 2020 FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO ARTICLE 267 OF THE TREATY**

---

The Motion on the part of the Applicants pursuant to Notice of Appeal dated the 17th day of January 2019 by way of appeal from the Judgment of the High Court (Ms Justice Ni Raifeartaigh) given on the 30th day of October 2018 and the Order made on the 18th day of December 2018 refusing the Applicants motion for relief by way of judicial review including an order of Certiorari quashing the decision of the first named Respondent made on or before the 17th October 2017 and formally communicated on the 17th October 2017 by which he refused to permit the fishing of nephrops in the fishing ground known as Functional Area 16 on the Porcupine Bank off the West coast of Ireland on the grounds that the same was inter alia unlawful ultra vires his powers under domestic and European law and in breach of natural justice and fair procedures and for an Order setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal having come on for hearing before this Court on the 25th day of February 2020 in Waterford

Whereupon and having read the Determination of this Court dated the 12th day of June 2019 granting leave to appeal herein the said Notice of Appeal the said Order the documents therein referred to the judgment of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Applicants and Counsel for the Respondents

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed for judgment on the 31st day of July 2020 and judgment having been delivered electronically on that date

And It Appearing that the facts and proceedings are as set forth and included in the Order for Reference annexed hereto

And it further appearing to this Court that the determination of the issues between the parties on this application raise questions concerning the correct interpretation of certain provisions of European Union Law namely Council Regulation (EC) No 1224/2009 ("the Control Regulation") establishing a Community control system for ensuring compliance with the rules of the Common Fisheries

Policy the most recent version of which is contained in Regulation (EU) No. 1380/2013

**THE COURT HAS DECIDED TO REFER** to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Order for Reference the questions:

(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 data, landing declarations, sales notes and transport documents?

**AND IT IS ORDERED** that the further hearing of this Appeal do stand adjourned until after the said Court of Justice shall have given its preliminary ruling on the said questions or until further Order in the meantime

**JOHN MAHON**

**REGISTRAR**

**CHIEF JUSTICE**

**Perfected this 20th day of October, 2020**

**THE SUPREME COURT**

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

**Clarke C.J.**

**Irvine P.**

**O'Donnell J.**

**McKechnie J.**

**Baker J.**

**Between /**

**P. F.**

**and**

**M. F.**

**Applicants / Appellants**

**-and-**

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

**Respondents / Respondents**

**Order for Reference by the Court of certain questions on the interpretation of European Union law to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union dated**

## I. Introduction

**1.** This case arises out of the Common Fisheries Policy (CFP), the European measures in respect thereof and the implementation by the State of its responsibilities thereunder. One of the State's important obligations is to collect and certify relevant information on fishing out-take, particularly in respect of species which are the subject matter of a specific quota. The significance of this is that when such quota is exhausted, the fishery must be closed by the national authority, in respect of that particular species, to vessels flying its flag and, on

notification, by the Commission which then issues a closure notice affecting fishers from all Member States. Being of the view that the data recorded on the electronic logbooks of Irish fishers for the first six months of 2017, regarding their catches of a certain species in a sub-area off the West Coast of Ireland, was wholly unreliable, the second named respondent, as the single authority in this jurisdiction, adopted a "time spent methodology" in calculating the relevant figures. In short, this involved re-allocating the total yield over an entire trip so as attribute catch to the sub-area, by reference to the time spent fishing in that area, as opposed to being based on what the logbook showed as having being caught in that area. In other words, if 75% of the total fishing time of a trip was spent in that area, then 75% of the relevant catch would be attributable to such area, and not elsewhere. As the national quota had been well exceeded by then (on such a basis), no further fishing, for that species, was permitted for the remainder of 2017. The net issue is whether or not, having regard to the relevant legislation, there is a valid legal basis for such approach. The pathway to this reference and the need therefor, shall now be more fully stated.

## II. Background

**2.** Council Regulation (EC) No 1224/2009 ("the Control Regulation") establishes a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, the most recent version of which is contained in Regulation (EU) No. 1380/2013 ("CFP"). The CFP, the Control Regulation and the Commission's Implementing Regulation (EU) No. 404/2011 ("the Commission Regulation") (along with other measures) manage the exploitation of Community fisheries by 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 central to this reference. One of the requirements imposed by the Control Regulation is that each fishing vessel over 10 metres in length is required to maintain an electronic fishing logbook. This system however, does not itself count or record the fishing catch; a human must count the fish and then input the information into the electronic system. 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 referred to 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). Though those are the regulations currently in force, reference will also be made below in para. 10 to the earlier version, designed to implement

the EU regime, the Sea-Fisheries (Common Fisheries Policy Community Control System) Regulations 2011 (S.I. No. 490 of 2011).

**3.** *Nephrops norvegicus* ("Nephrops") 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". Nephrops are an important commercial crustacean and can be found, *inter alia*, in the north-eastern Atlantic Ocean. 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 the relevant time was the second most valuable fisheries resource available to the State.

**4.** An area of the Irish Exclusive Economic Zone ("EEZ") off the west coast of Ireland known as the Porcupine Bank is an important component of the Nephrops fishery. The evidence suggests that Nephrops from this area fetch an increased 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") so that distinct management measures might be adopted for the Nephrops fished on the Porcupine Bank. This sub-area (approximately 68,000 sq.km.) is known as Functional Area 16 ("FU16") and straddles a number of sub-sectors of the more general fishing area known as Area VII. Certain steps were taken to protect the Nephrops stock in FU16; including the imposition of an outtake or catch limit within this sub-area. 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.

**5.** The appellants are fishermen who operate off the west coast of Ireland, including in the region of the Porcupine Bank. As explained in their evidence, the Nephrops fishery in FU16 forms a very important part of their fishing activity.

**6.** The Minister has responsibility under Part 2 Chapter 2 of the 2006 Act (sections 8-15 inclusive) for the management of the State's fishing quota which includes 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 and authorisations. The Sea Fisheries Protection Authority ("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. It also advises the Minister on policy matters regarding the effective implementation of sea-fisheries law and further, as the single authority under Article 5(5) of the Control Regulation, it has the responsibility to ensure the transmission of relevant information to the European Commission ("the Commission").

**7.** In July 2017, for reasons that are set out in detail below, the Authority came to have serious doubts about the veracity and accuracy of the figures contained in the electronic 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 fishing vessels *via* their logbooks, they reported catching 733 tonnes of Nephrops in FU16. 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. The Authority concluded that 1991 tonnes of Nephrops had already been fished in FU16 in 2017, thus already exceeding Ireland's TAC for that area for the entire year. It calculated this figure on the basis of a "time spent" methodology (para. 1 above). The Authority communicated this figure of 1991 tonnes to the Minister and also to the Commission: acting on foot thereof (i) the Minister closed the fishery to vessels flying the Irish flag from October to December 2017, and (ii) the Commission issued a closure notice on the 2nd November, 2017, affecting fishermen from all Member States. In respect of the months of August and September, see para. 14 below. Being dissatisfied with the actions of the Minister and the approach of the Authority, the appellants instituted these proceedings in which multiple issues were sought to be litigated. However, as stated above, it is the validity of the utilised methodology only which is at the centre of this reference.

## III. <u>European Legislation</u>

**8.** Underpinning this reference are Articles 3(1)(d) of the TFEU (regarding the exclusive competence of the Union in the subject matter), Article 4 TFEU (regarding shared competence in the area of fisheries, other than that as provided for in Article 3(1)(d)), Article 38(1) TFEU (regarding the creation and implementation of a Common Fisheries Policy), and Article 43(2) TFEU (regarding the establishment of a common organisation to further the objectives of that policy). This reference in particular concerns the interpretation of certain provisions of the CFP and the Control Regulation. Whilst other measures are in the background, those mentioned form the substantive provisions in issue.

**9.** Article 2 of the CFP, which sets out its objectives, is relevant to the issue of interpretation raised. Central to the questions herein referred to the Court of Justice of the European Union is the proper interpretation of the Control Regulation, in particular Articles 5, 14, 15, 33, 34 and 35 thereof, having regard to the Recitals, including those numbered 2, 9, 10, 11, 14, 17, 18, 22 and 26. In the submissions section of this reference greater detail is provided in respect of these measures. The parties have also referred to other Articles of this Regulation, such as Articles 1, 2, 4, 89, 103, 104, 105 and 109. Some further European measures fall to be considered and these are referred to in Appendix II.

## IV. Irish Legislative Scheme

**10.** Under Irish law, effect is given to the above described European legislation by the Sea Fisheries and Maritime Jurisdiction Act 2006, as amended ("the 2006 Act") and associated regulations. Under this Act the first respondent, the Minister is given the necessary powers to control and implement the scheme and the second respondent, the Authority, is established. The Sea-Fisheries (Common Fisheries Policy Community Control System) Regulations 2011 (S.I. No. 490 of 2011) are intended to implement the EU regime. All of the relevant provisions of the 2006 Act and the Regulations are set out in Appendix I below.

## V. Relevant Factual Context

**11.** On the 14th July, 2017, Mr. M. O., Authority member, wrote to the Minister and stated that the Authority had reached the view that national policy around Nephrops fishing from waters west of Ireland was being systematically and repeatedly circumvented by the Irish fishing industry and 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."* Thus, it warns that the Nephrops stock on the Porcupine Bank is being fished far in excess of the monthly limits set down in policy. It states that the fishery outtake data derived from fisherman declarations is wholly unreliable, with outtake data for FU16 dramatically underestimated, and outtake for the remainder of Area VII dramatically overestimated.

**12.** The letter explains that fishers have a quota of three tonnes per month in the FU16 part of Area VII, compared to twenty tonnes per month for other parts of Area VII; thus there is a compliance risk that catches taken from the lower-quota area would be logged as taken from the higher-quota area in order to legitimise illegal catches in the former area. It continues that the 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. In short, vessels were spending most of their time in FU16 but logging most of their catches in other parts of Area VII and this was happening on a widespread and repeated scale by "most Irish fishers of these stocks".

**13.** The letter concludes with a paragraph setting out "Potential policy alternatives". Two options are set out as follows:

(1) *One function area per trip*. With this option fishers would continue to get separate monthly quotas for FU16 and for 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 did not recommend the closure of FU16 in respect of Nephrops fishing.

**14.** In the period immediately following this letter, several meetings took place between representatives of the fishing industry, the Minister and the Authority. It was firstly agreed that for Nephrops fishing, the area FU16 would close for August, and at a subsequent meeting that it would remain closed for September, although the reasons for such agreement have varied between the parties. In any event, that in fact occurred. Despite this however, concerns continued and Dr. S.S , the Chairperson of the Authority, wrote to the Minister on the 5th October, 2017. She stated:

> "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 [the Authority] 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)

The Minister accepted this advice and by way of Fishery Management Notices effectively prohibited any Nephrops fishing in sub-area FU16 for the months of October, November and December, 2017: the Commission followed suit (para. 7 above).

## VI. High Court Proceedings

**15.** The first named appellant was granted leave to bring the present proceedings on 17th November, 2017, with Mr. M. F. being joined thereafter. As stated, they question the legality of the Authority's method of calculation, regarding the level of exploitation of the FU16 Nephrops fishery. They argued that the Authority was not legally entitled to utilise this approach and that it should have accepted the figures contained in the electronic logbooks, and reported them accordingly. Likewise, in respect of the Minister they asserted that he should not have acted on foot of such figures and consequently, that the Fishery Management Notices were invalid. In furtherance of this basic argument, they sought a series of orders against both the Minister and the Authority, including injunctions, declarations and damages. However, as previously stated the only issue of continuing relevance to this reference is the validity of the approach adopted. The challenge taken was unsuccessful in the High Court and this request for a preliminary ruling arises in the context of an appeal to the Supreme Court against the decision of the trial court.

### *Evidence of the Appellants*

**16.** Mr. P. F., in his affidavit evidence stated that the Nephrops fishery in FU16 *"formed a very important part"* of his fishing activity, and that the actions of both respondents were very damaging economically to him and his business. In a later affidavit he clarified 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 half of the year, given the seasonal rise in prices.

**17.** His essential argument however, was that the time spent methodology was erroneous, fundamentally flawed, opaque, irrational, and not the practice in other European jurisdictions. He said that there may be many reasons, other than overfishing, for variations in yields between areas. In the absence of a detailed evaluation regarding other possible causes, he said that it was "facile" for the Authority to decide that 80% of a vessel's time spent in one area should deliver a yield equal to 80% of a vessel's time spent in another. He rejected the comparative analysis conducted on foreign and Irish vessels saying that many factors could explain the difference between the catch rates of the two cohorts. He averred 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. The evidence of Mr. M. F. echoed that of the first named appellant.

**18.** The appellants did not put any scientific evidence before the High Court.

***Evidence of the Respondents***

**19.** The Authority relied upon affidavits from Mr. M. O., Authority member; Dr. S. C., a Sea Fisheries Protection Officer who works in the Statistic Unit of the Authority; and Dr. C. L. 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").

**20.** Mr. M. O. 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 which 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, while "incredibly large" catches were logged by the same vessel during short periods when they were fishing outside of FU16.

**21.** 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 to 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 repeated returns to FU16 notwithstanding the implausible low catch rate there; (iv) the late log sheet data entry of catches, frequently modified retrospectively; (v) the great disparity between the recorded

catches within FU16 as between Irish and English fishermen (1:10); (vi) information about historical Nephrops catches in the area suggested that the logbook figures could not be true; and (vii) 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. Finally, in this context he referred to the phenomenon of "disappearing fisheries": the fact that in the months following the closure of FU16, the reported yield of prawns from 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.

**22.** Mr. M. O. 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. In conclusion, he said 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.

**23.** Two affidavits were sworn by Dr. S. C. in which she set out the basis of the time spent methodology. She explained that the method involves using some of the figures provided by the fishermen themselves, namely, the figures concerning (1) time spent in a particular area and (2) 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. Thus, 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 figure yielded a figure of 1991 tonnes, which on revision, having regard to the late landing declarations, was adjusted downwards by 12 tonnes.

**24.** In her second affidavit Dr. S. C. 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. A modified extract containing certain columns of her data is exhibited in Appendix III below.

**25.** Finally, there was the affidavit evidence of Dr. C. L.. 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. Dr. C. L. commented on the "time spent" methodology used by Dr. S. C.; 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 in the High Court***

**26.** The submissions made by the parties on the sole surviving issue which is relevant to this reference were in essence repeated before this Court and are set out below at para. 32, thus it is unnecessary to repeat them at this point.

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

**27.** The trial court, Ní Raifeartaigh J., delivered two judgments in this case, one on the injunction application which is not relevant, and the other on the substantive issues, which is dated the 30th October, 2018 ([2018] IEHC 772). When dealing with the time spent methodology, she 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. [S. C.]'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 by Mr. [P. F.] 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)

To illustrate her point, she identified two specific instances, from Dr. S. C.'s spreadsheet, as examples. On Trip No. 284, 97.7% of the total fishing 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 Trip No. 289, 95.6% of the total fishing time was spent in FU16, but resulted in only 15.0% of the total catch being logged as caught in that area.

**28.** 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 her view, believed on reasonable grounds) to be seriously incorrect? Or was it entitled to employ some other reasonable method of 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 appellants' argument, based on a linguistic parsing of the Regulations, that the obligation on the Authority to report "data" excludes the "time spent" methodology employed by the Authority. 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 appellants. It would be in fundamental conflict with the objectives of the CFP if the national authority responsible for reporting figures to the EU authorities was forced to rely on information which, on reasonable grounds it believed to be grossly inaccurate.

**29.** The learned judge dealt with three other arguments. Firstly, she rejected the submission that the method by which the relevant figures should be calculated had to have a

scientific basis, pointing out that the logbook entries could not be said to be scientific in any way. Rather, 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". Secondly, she saw no merit in the suggestion that alternative means of enforcement, such as boardings and checks, investigations and prosecutions, penalty points *etc* should have been undertaken rather than the utilisation of the time spent method. In her view, such offered no realistic or practical way of dealing with the problems which the Authority had raised. Thirdly, the argument that by departing from the logbook entries the Authority would create an uneven playing field for Irish fishing vessels *vis-à-vis,* vessels from other Member States: such could only be the case if one assumed that vessels from other Member States were engaged in false reporting, an assumption that she was not prepared to make. In her view therefore, none of these arguments could be sustained.

**30.** 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 from January to July 2017. It therefore followed that the Minister did not act *ultra vires* in accepting that information and in acting thereon by issuing the Fisheries Managements Notices in question.

## VII. Appeal

**31.** By determination dated the 12th June, 2019 ([2019] IESCDET 120), the appellants were granted leave to appeal directly to the Supreme Court. Whilst a number of issues were still alive at that stage, the only matter in respect of which a reference was requested was the surviving issue herein discussed.

### Submissions of the Parties on this Issue

***The Appellants***

**32.** The two major substantive issues identified by the appellants were (i) what is the correct definition for "data" in Articles 14, 15, 33 and 34 of the Control Regulation? and (ii) was the methodology used by the Authority for the calculation of fishing outtake in FU16 lawful under the provisions of that Regulation? They submitted that the answers to both questions could not be considered *acte clair* in the sense that the correct meaning of the terms

*"data"* and *"information"* is by no means clear and could not be said to 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 (per Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, para. 16).

**33.** As regards 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). 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 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, and accordingly *that* is the data which the Authority is required both by that section and under Community law to collect and report on. 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 of measuring fishing "outtake". In their view, the trial judge erroneously embarked on an extensive interpretation of the terms "data" and "information".

**34.** As regards issue (ii), the appellants stress the central importance of the electronic fishing logbook to the regime established by the Regulation and refer to the level of the detail in the Regulation, 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. Recital 17 of the Control Regulation refers to this as facilitating "effective monitoring" of the activities of fishing vessels. The appellants' core contention on this point is that the Authority has not transmitted "data" as prescribed by Articles 5(5) and 33(1) to the European Commission, but rather has communicated *"a confection 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'"*. Such 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. There is no legal basis for this approach. 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.

**35.** The appellants submit that the respondents have effectively decided that every Nephrops fisher in FU16 is altering their outtake record; however, rather than using its statutory powers and the technology available it, 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. 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 a particular vessel had been investigated and found to be incorrect, but this is not what the Authority has done. It is acknowledged that the respondents are not obliged to take logbook data at face value and simply report it: they have a duty to verify and ensure the reliability of this data and have extensive powers to do so. 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 control 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. In conclusion, there is no basis in law to repudiate the control system required by the Regulation: that Regulation places an obligation on the Authority to report data to the Commissioner and not its expert opinion.

***The Respondents***

**36.** The respondents' general point is that as a matter of substance it is obvious that the Authority is not constrained to report to the Commission, fishers' electronic logbook figures which it believes, on reasonable grounds, to be grossly inaccurate.

**37.** As regards the first substantive issue, the Authority submits that this question is better phrased as whether there is a restrictive definition of *"data"* in the Control Regulation, such as that contended for by the appellants. The Authority 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, under Article 33(2)(a) of the Control Regulation, of the quantities of stocks landed which are subject to a quota and under Article 34, of the exhaustion of 80% of that relevant quota. It submits that the trial judge correctly rejected the appellants' 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. The Authority's central submission on this point is as follows: while one can say arising from Articles 14 and 15 that what is in the fishing logbook is "data" and "information", one cannot say that what is in the fishing logbook 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.

**38.** As regards the Authority's reporting obligation under Articles 33 and 34, the Authority argues 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 must be recorded and retained. It is stated 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 reporting those figures 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 reported. The use of the term "aggregated" in Article 33(2)(a) makes it obvious 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 recorded and declared logbook figures.

**39.** In relation to issue (ii), the Authority submits that the trial judge correctly stressed the fundamental conservation objectives of the CFP. The Authority submits that the appellants'

argument is essentially that its 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. 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. 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: 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.

**40.** 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. 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. 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.

## VIII. The Need for a Reference

**41.** It should firstly be stated that the findings of fact or perhaps more accurately, the assessment of the evidence by the trial judge has not been disputed. As a result, the Authority can be considered as justified in having the serious concerns which it did, as to the accuracy of the logbook information regarding the reported catches of Nephrops in FU16 for the first half of 2017. Simply put, it had reasonable grounds for believing that by reference to all of the data available to it, there was widespread mis-declaring of the actual catches in that area for the period referred to. There was also evidence from Dr. C. L. that the time spent method was a "..scientifically valid means of analysing the available data..", which evidence the learned judge also accepted. Having formed this view, she was satisfied that in its reporting obligations under domestic and Community law, the Authority was not confined to the logbook information but rather, was entitled to adopt the methodology which it did and was further entitled to report the resulting figures which that model gave rise to.

**42.** The major questions of EU law which arise on this reference 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 the Commission of the information contained in the electronic fishing logbooks or whether, where it has a reasonable basis to doubt the reliability of those figures, it may instead employ a reasonable scientifically based method to analyse the logged data so as to arrive at more accurate outtake figures for such notification. In other words, can the Authority lawfully 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?

**43.** 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 Council 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 submits that the restrictive interpretation of these terms 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 that there is no legal basis for

defining the terms *"data"* and *"information"* in the restrictive manner contended for by the appellants and that to do so would breach the precautionary principle.

**44.** The terms "data" and "information" are not defined either in the Control Regulation or in the 2006 Act. The terms, without obvious distinction, appear to be interchangeably used in some of the Articles of this Regulation. For example, in Article 5(5) the word "information" is used as it is in Article 14(2) and (6). Article 15 is headed "Electronic completion and transmission of fishing logbook data", whereas (i) in subparas (1) and (2) the word "information" is used and (ii) in paras. 5, 7 and 8 the word "data" is used. Article 21 provides a further example. Article 33 both in its title and in its text, refers to "data", whilst Article 34 has the word "data" in its title, but in its text it refers to "the catches of any stock…subject to a quota". Consequently, an issue undoubtedly arises as to the correct meaning of these terms and how the relevant Articles of the Control Regulation should be interpreted accordingly.

**45.** Having regard to the terms of Article 267 TFEU, the judgment of the ECJ in Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415 and the decision of the Irish Supreme Court in *Minister for Justice v. O'Connor* [2018] IESC 3, [2018] 2 I.L.R.M. 181, the Court is not satisfied that the law is *acte clair* in respect of these issues. An answer to this question of interpretation is necessary to determine the proceedings: 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 CJEU. Moreover, this does not appear to be 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 questions raised are to be resolved, and that the answers would be equally obvious to the courts of the other Member States and to the CJEU.

## IX. Questions Referred

**46.** Procedurally, the proceedings are in a position to be referred to the CJEU. The legal and factual context of the case have been set. There is essentially no dispute on the facts as found in the High Court. The parties have been heard. The Court, therefore, refers the following two questions:

(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 data, landing declarations, sales notes and transport documents?

**Appendix I: The Irish Legislative Scheme**

**1.** The ***Sea Fisheries and Maritime Jurisdiction Act 2006*** 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."

Also relevant are sections 12(1) and 13(1) of the 2006 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."

The ***Sea-Fisheries (Common Fisheries Policy Community Control System) Regulations 2011*** (S.I. No. 490 of 2011), were designed to implement the EU regime. 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."

Regulation 20 provides that the Single Authority for the purposes of Article 5(5) of the Control Regulation shall be the Sea Fisheries Protection Authority.

**Appendix II: Additional EU Measures**

**1.** In the European context, the following measures are also relevant to the consideration of this reference: The Commission Implementing Regulation; Commission Implementing Regulation (EU) No 185/2013 of 5 March 2013; Commission Implementing Regulation (EU) 2015/1962 of 28 October 2015 amending Commission Implementing Regulation (EU) No 404/2011; and Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

**Appendix III: Dr. S.C.'s spreadsheet of calculated figures using the time-spent methodology**

| 1 | 4 | 5 | 6 | 7 | 8 | 12 |
|---|---|---|---|---|---|---|
| **Fishing Trip number** | **Time Spent Outside** | **Time Spent in FU16** | **Logged Catch outside** | **Logged Catch inside of** | **Total Catch According** | **Estimated weight actually** |

| | FU16 During Trip | During Trip | FU16 (kg) | FU16 (kg) | to Landing Declaration | Caught in FU16 (kg) |
|---|---|---|---|---|---|---|
| 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 |