[2020] IEHC 497

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 316 JR]

BETWEEN

TOM KENNEDY AND NEIL MINIHANE

APPLICANTS

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 31st day of July, 2020.

Introduction

1. The applicants, Mr. Kennedy and Mr. Minihane, or companies with which they are associated, are holders of commercial sea fishing boat licences in respect of certain trawlers which they operate. This case concerns a challenge by the applicants to Policy Directive 1 of 2019 (*"the Directive")* made and published by the respondent on 5th March, 2019 pursuant to powers conferred on him by the Fisheries (Amendment) Act 2003 ("*the Act of 2003*") as amended. This Policy Directive has the effect of excluding fishing vessels exceeding 18m in overall length ("*OAL*") from operating trawl or seine nets inside a 6nm zone, including inside the baselines, subject to a phasing out of sprat fishing over a two year period from 1st January, 2020.

2. The applicants have been fishing for over 30 years from their respective bases in the South West of Ireland. Mr. Kennedy operates from Dingle, Co. Kerry, Mr. Minihane from Castletownbere, Co. Cork. The respondent acknowledges their contribution to society and that they are hard-working, decent and professional fishermen. The applicants' vessels, "*The Celtic Quest", "The Fiona KIII*" and the "*Ocean Venture II*" exceed this length and by virtue of the policy directive are, and will be, excluded from fishing in the six nautical mile ("6nm") zone, including the baselines. It should be said that Mr. Minihane and Mr. Kennedy do not own these vessels. They are owned by, and are licenced in the name of, limited or unlimited companies of which the applicants and directors and shareholders.

3. Geographical fishing limits, or zones, which are measured in nautical miles ("*nm*"), are dictated by national and EU law. Sea boat fishing licences are issued in respect of different types of vessels. Generally speaking the size of the vessel and its country of origin determine where it can fish. The nautical mile limit applicable in this case is measured from what is known as the baseline. The baseline is the low water line along the coast as marked on officially recognised charts. Where there are deep indents in the coastline, baselines tend to be drawn in straight lines from headland to headland. There is a specific statutory instrument dealing with this: The Maritime Jurisdiction (Straight Baselines) Order 2016. The distance between the baseline and shore, therefore, may vary significantly depending on the part of the country's coastline from which it is measured. Given the nature of the more rugged and indented coast on the west of Ireland, the baseline on the west coast is further away than that to the east. Thus, from certain ports, particularly in the west, a sea fishing boat may be required to travel up to 50km to exit the 6nm zone if its licence excludes permission to fish within that zone.

4. The sea boat fishing licences issued in respect of the applicants' vessels entitle them to operate multipurpose vessels, known as polyvalent vessels, which are licensed to fish in the polyvalent segment which includes, white fish, shellfish and pelagic fish. Of the pelagic species, the applicants mainly target herring, sprat and horse mackerel.

5. The licence in respect of the *Celtic Quest* was issued to Dingle Fishing, a private company limited by shares of which Mr. Kennedy and Mr. Minihane are directors. The licence for the *Fiona KIII* was issued to Tom Kennedy Fishing which is an unlimited company of which Mr. Kennedy is a director and shareholder. This vessel was commissioned in 2016 and built in 2018 at a cost of approximately €5.5 million. The licence in respect of the *Ocean Venture II* issued to Ocean Venture II Fishing Ltd. of which Mr. Minihane is a director. These vessels are referred to as *"the applicants' vessels"* in this judgment, partly for convenience and partly because they are so described in the statement of grounds. Mr. Kennedy also owns the *Atlantic Fisher* which is 23m in length and is stated not to be involved in proceedings. It fishes exclusively outside the 6nm limit, mainly for white fish using gill nets which are not permitted within the 6nm zone for any size boat.

6. Over the years the applicants have developed a particular style of fishing. For nine months of the year they trawl for fish outside of the 6nm zone and for the other three months, in respect of two of their vessels, within that zone. The Celtic Quest spends nine months of the year at sea with the Fiona KIII and for three months they trawl in tandem within the 6nm limit. In October, November and December, when within the 6nm zone, they fish for herring, bull mackerel and sprat. Herring and bull mackerel are subject to quotas which are determined at European Union level. Sprat is not subject to a quota.

7. Pursuant to the provisions of the Act of 2003 the licensing authority for sea fishing boats is the Registrar General of Fishing Boats ("*the Registrar General*"). He/she is independent of the respondent in the exercise of his/her functions. The respondent is precluded by statute from involvement in the licensing of such vessels, however, he sets policy and is empowered to issue policy directives by s. 3 of the Act of 2003 as amended by the Sea Fisheries and Maritime Jurisdiction Act 2006, s. 99(3). The Registrar General of Fishing Boats is obliged to comply with any such Policy Directive and this is practically achieved by the attaching of conditions to any licence issued in respect of a sea fishing boat. In *Faherty v. The Registrar General of Fishing Boats* [2010] IEHC 244, Charleton J. held that Policy Directives have similar status to statutory instruments.

8. Ms. Josephine Kelly, of the respondent's department, in an affidavit sworn in these proceedings on 21st November, 2019 provides context for the regulatory regime which applies to fishing in sea waters around the State from both a national and EU perspective. She is the head of the Sea Fisheries Policy and Management Division of the respondent's Department which has responsibility for the strategic, economic and sustainable development of the seafood sector within the framework of the Common Fisheries Policy ("*CFP*"). The CFP provides a framework for the long-term conservation of fish stocks and the sustainability of fishing in EU waters and makes provision, *inter alia*, for access by member state fleets to EU waters, subject to CFP policy rules. Regulation 1380/2013 of

the CFP provides for general rules on access to waters, article 5 of which makes provision for a limitation on access within 12 nm zones from baselines of member states, by restricting fishing to those member states' fleets that had traditionally fished in those waters. Member states are permitted to introduce national measures to promote conservation of fish stocks and the marine ecosystem within the 12nm zone. These measures must be non-discriminatory.

9. The Policy Directive came into force on 1st January, 2020 and was issued following a public consultation process which was launched on 29th April, 2018 by the publication of a consultation document by the respondent entitled "*Public Consultation on a Review of Trawling Activity inside the 6 Nautical Mile Zone*" (hereafter referred to as "*the Consultation document*"). Prior to the adoption of the Policy Directive, licencing of vessels under 27.43m OAL within the 6nm zone was subject to limited restrictions, localised in some cases in relation to the type of fish to be targeted and the type of fishing gear to be used. Longer vessels were generally restricted from entering the 6nm zone.

The Fleet

10. Commercial fishing vessels in the Irish fleet vary in size from 5m to over 65m. They use different types of fishing gear depending on the type of fish they target. It is recognised that larger vessels usually access fish stocks anywhere in Irish coastal waters or offshore, subject to quota limits. Smaller vessels were more dependent on fish stocks closer to their home ports.

11. The fleet of Irish sea fishing boats as identified in the licensing authority's annual report for 2016, showed that a total of 1,991 vessels were registered, over 80% of which were less than 12m in length, 3% were between 12m and 15m in length, 1% between 15m and 18m and the remainder over 18m. The fleet is divided into five segments, aquaculture, specific (bivalve only) polyvalent, beam trawl and pelagic (which are fish inhabiting the water off coasts, open seas and lakes, but not near the bottom; examples include mackerel, herring and sardines). The polyvalent and specific segments are broken into sub-segments, with the former being divided into four sub-segments.

The Policy Directive

12. The Policy Directive provides as follows:-

> *"1. The Sea Fishing boat licences of vessels over 18 metres LOA (length overall) shall include a condition to the effect that such vessels are precluded from operating trawl or seine nets inside the 6 nautical mile zone, including inside the baselines, from 1 January 2020.*
>
> *2. As a derogation from the above and without prejudice to an existing licence condition restricting access to this zone, the Sea Fishing boat licences for Polyvalent segment and RSW Pelagic segment vessels over 18 metres LOA shall include a condition to the effect that such vessels are permitted to operate trawl or seine nets inside the 6 nautical mile zone, including inside the baselines, for the targeting of sprat only, up to and including 31 December 2021, subject to any catch limits as may be determined by the Minister from time to time."*

The Act of 2003

13. Section 3(2) of the Act of 2003 provides:-

> *"(2) The licensing authority shall be independent in the exercise of his or her functions under this Part subject to—*
>
> *(a) the law for the time being in force in relation to sea-fishing boat licensing, including, in particular, the legal obligations of the State arising under any law of an institution of the European Communities or other international agreement which is binding on the State, and*
>
> *(b) such policy directives in relation to sea-fishing boat licensing as the Minister may give in writing from time to time."*

14. Section 3(3) of the Act of 2003 as amended by s. 99(3) of the Sea Fisheries and Maritime Jurisdiction Act, 2006 provides:-

> *"(3) A policy directive given under subsection (2)(b) may provide for measures to control and regulate the capacity, structure, equipment, use and operation of sea-fishing boats for the purpose of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species or the rational management of fisheries, in furtherance of national policy objectives and to comply with requirements of the common fisheries policy of the European Communities or other international obligations which are binding on the State."*

15. The applicants claim that the Policy Directive is unlawful and seek the following orders:

i. An order of *certiorari* quashing Policy Directive 1 of 2019 issued by the respondent on the 5th March, 2019.

ii. A declaration that the Directive was made in breach of fair procedures and/or natural justice and is void and/or of no legal effect.

iii. A declaration that the Policy Directive is *ultra vires* the provisions of s. 3 of the Act of 2003 and therefore *ultra vires*, void and of no legal effect.

iv. A declaration that the Policy Directive is in breach of Regulation (EU) 1380/2013 of the CFP and is therefore void and of no legal effect.

v. Further or alternatively, a declaration that the Policy Directive constitutes a disproportionate interference with the applicants' constitutional right to earn a livelihood under Article 40.1 of the Constitution and/or and an unjust attack on the applicants' property rights under Articles 40.3.2° and 43.1 of the Constitution and is therefore *ultra vires*, void and/or of no legal effect.

vi. Further declarations are sought that the Policy Directive is in breach of the applicant's rights and freedoms under articles 15 and 17 of the Charter of Fundamental Rights of the EU and a declaration is sought regarding the

incompatibility of the Policy Directive with s. 5 of the European Convention on Human Rights Act, 2003 as amended, in particular as it breaches the right to peaceful enjoyment of possessions under article 1 of Protocol 1 of the European Convention on Human Rights.

16. The application is grounded on the affidavits of Mr. Kennedy and Mr. Minihane. Additional affidavits were sworn in support of the application by the solicitor for the applicants, Mr. Creedon, and by a fisheries expert, Dr Ross Shotton who has qualifications in Marine Biology, Fisheries Management and Systems and fish (herring) behaviour and management. He also has experience in matters of fisheries and fishing consultancy. Dr. Shotton prepared a report dated 11th September, 2019 entitled "*An Analysis of the Justification for the Policy Directive 1 of 2019 – Fishing Boat Policy Directive 5 March 2019"* in which he criticises the justification for the Policy Directive, the process by which it was decided and the reports on which it was based.

17. An order granting leave to apply for judicial review was made by Noonan J. on 27th May, 2019.

Grounds of Challenge - Overview

18. The following are the principal grounds of challenge as outlined in the statement of grounds and as averred to in the affidavits of the applicants:

    i. The Policy Directive is *ultra vires* the Act of 2003. It imposes a blanket exclusion on boats over 18m from trawling within the 6nm zone and is beyond the scope of the respondent's powers. The measure has nothing to do with "*protecting, conserving or allowing the sustainable exploitation of living marine and aquatic species or the rational management of fisheries"* but is concerned with the redistribution of resources from larger to smaller vessels. The Policy Directive is beyond the scope of s. 3(2) of the Act of 2003 insofar as it has been adopted in violation of the requirements of the CFP Regulations. It is not a conservation measure because only vessels over 18m are rendered subject to a quota. The measure constitutes fishing discrimination which imposes a quota in circumstances in which none exists at European Union level and without any survey being conducted to establish whether such a quota is warranted. It discriminates against larger trawlers without any supporting or scientific basis or data. The Policy Directive will have a significant impact on the applicants' catch, their business model and therefore their livelihoods. Mr. Kennedy avers that sprat can only be caught within the 6nm zone and that in 2018, herring, which is managed weekly on a vessel by vessel basis, was not caught outside the 6nm zone, with very small quantities caught in 2017. Mr. Kennedy avers that the respondent did not publish any, or any adequate scientific assessment to suggest that a blanket exclusion of vessels over 18m in length was necessary to achieve ecosystem benefits, including for nursery areas and juvenile fish stocks. He maintains that there were alternatives which ought to have been considered to that of blanket exclusion, such as, for example, quota management, depending on surveyed stock levels. He further disputes that the exclusion will have the effect that catch from which vessels over 18m are to be

excluded, will be taken up by inshore fishermen. Mr. Kennedy sees no evidence, in the waters in which he fishes, of small-scale fishermen targeting sprat and states that the fishing efforts of the Fiona KIII inside the 6nm zone does not interfere with the efforts of small fishermen. Nor does he see any evidence that small inshore fishermen target herring and mackerel inside that zone. He suggests that inshore fishermen would not be appropriately geared to target pelagic species such as mackerel and herring in the areas from which the applicants are now excluded. Sprat requires to be caught in large amounts and he believes that inshore fishermen do not have the capacity, gear or size of vessel to achieve this. It is stated that any assumption that inshore fishermen will take up the catch in waters from which the Fiona KII is to be excluded is flawed and by taking a broad-brush approach, the respondent has failed to have proper regard to the particular circumstances which prevailed in specific regions.

ii. The Policy Directive was adopted in a manner which was not consistent with the applicants' constitutional rights to a fair hearing and is in breach of the principles of natural justice. The consultation document committed the respondent to undertake a comprehensive examination and review of access to waters inside the 6nm zone and to engage further with affected stakeholders *prior* to making any decision on implementing any policy change. This was not done despite the fact that the respondent's Department was aware that two of the vessels in particular would be significantly compromised if the respondent excluded all vessels over 18m from the 6nm zone. It was evident from data furnished by the Marine Institute ("*MI*") that the applicants' vessels are particularly affected by the measure. The consultation document merely identified possible options and it was indicated that the respondent would undertake a comprehensive and formal examination and review of access to waters within the zone, having regard to the material identified in the reports. Further, regardless of any such commitment made in the consultation document, in circumstances where the Policy Directive affects the applicants in a unique and very drastic way, their participation in the general consultation process was inadequate and did not vindicate and protect their procedural rights. The applicants ought to have been notified of the basis upon which that chosen option was considered and afforded the opportunity to make meaningful submissions thereon. In not doing so, the applicants were deprived of the opportunity to make such meaningful submissions on the measure which was ultimately adopted, despite the fact that their vessels were the only ones appreciably affected by the change in policy. The respondent refused to meet with the applicants and proceeded to issue the directive without publishing a detailed evaluation and/or allowing submissions to be made, all of which is contrary to basic principles of fair procedures. It is claimed that because the Policy Directive will have a drastic effect on the applicants, the Minister ought to have obtained an expert scientific assessment prior to its making and he ought to have allowed an opportunity to affected third parties, such as the applicants, to make submissions on the proposed directive ultimately decided upon prior to any final decision being taken.

iii. Given that the Policy Directive impacts in such a drastic way on the constitutional rights of the applicants, there was an obligation on the respondent to provide reasons for his decision and the respondent failed to provide adequate reasons. Terse and insufficient reasons have been advanced which are formulaic and fail to enlighten the applicants as to the rationale for the measure. The respondent's explanations fall short of the requirement that people likely to be affected, be informed of the basis for the decision, to enable them to determine whether they have an entitlement to pursue a challenge. It is no answer to say that the Minister was presented with a briefing note. In accordance with relevant jurisprudence, the obligation on the respondent to provide reasons was at the higher end of the spectrum.

iv. The Policy Directive constitutes a disproportionate interference with the applicants' rights as protected by the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU *inter alia*, because it encroaches substantially on their property rights without the payment of compensation. A blanket ban was introduced without considering individual circumstances and will have a hugely damaging effect on the applicants' livelihood, business and the value and viability of their vessels, particularly when the objectives of the policy could be achieved by alternative means. Mr. Kennedy points out that in his case, the percentage value of the catch inside the 6nm zone is 25% but the focus of the Bord Iascaigh Mhara ("*BIM*") report and ultimately the consultation document, was to emphasise the purportedly minimal impact which exclusion of these vessels will have in circumstances where only 2.6% of the value of landings from such vessels originates from waters inside the 6nm zone. He states that this figure is based on an average of 163 vessels and does not in any way reflect the actual impact on the applicants and is therefore misleading. He further avers that the value of the catch from the *Fiona KIII* within the 6nm zone is approximately €500,000 per annum. The loss in respect of the *Celtic Quest* effort would be somewhere in the order of €150,000. They will be unable to replace this income with fishing activities outside that area. Changing gear or the obtaining or receiving of the technical assistance will not allow him to replace lost income. It is also contended that the value of the fishing licence attached to the *Fiona KIII* will be diminished by at least 25% and therefore the value of the vessel will also be significantly diminished in consequence of the operation of the Policy Directive. Mr. Minihane avers that he has been engaged for 38 years in fishing for sprat with a combination of different licence fishing boats. The reason he became involved in sprat fishing was because there were smaller amounts of other species available in some years. This created financial problems for him and the manner in which he addressed such deficits was to target sprat which were and are in plentiful supply. He also states that from where he operates, he sees no evidence that any small-scale fishermen target sprat in those areas being Bantry Bay, Kenmare Bay, Dingle Bay and Galway Bay. He echoes Mr. Kennedy's contention that there are no grounds for believing that his trawling efforts in any way interfere with the efforts of small fishermen and concurs that there is no reality in the suggestion that inshore fishermen will be in a

position to take up the catch in his area. Mr. Minihane avers that the organisation of his business was based on an assumption and understanding that a vessel less than 90 feet would be permitted to trawl within the 6nm area, and that while it may be necessary for the respondent to make changes to licensing conditions from time to time to address specific ecosystem concerns, the stated objectives as outlined in the Policy Directive do not justify a blanket exclusion. The applicants contend that approximately 25% of their financial turnover is achieved in the three month period and that any impact whereby they might lose 25% of their income will have devastating consequences for their business model and they maintain that their ability to fish within the 6nm zone constitutes a vital part of how they earn their livelihoods.

v. As the Policy Directive has the potential to affect vessels from another member State it breaches the requirements of EU law. By virtue of the Sea Fisheries (Amendment) Act 2019, the measure will apply to Northern Irish vessels. As the measure does not apply solely to fishing vessels flying the Irish flag, it does not comply with articles 19 and 20 of the CFP regulations. It is in breach of the CFP regulations insofar as it is not a non-discriminatory measure and/or in circumstances where it is being commenced without consultation as required by article 20(2) of the CFP.

Stated Objectives and Reasons for the Policy Directive

19. When publishing the Policy Directive, the respondent issued a document entitled "*Objectives and Reasons for Policy Directive 1/2019*" in which it is stated that the Policy Directive was intended to give effect to the measures which had been announced by him on 21 December 2018 in relation to trawling (and seine net) activity inside the 6nm zone and inside the baselines. He also set out in this document what might be described as the phasing out of allowances in respect of sprat for the larger vessels. A total allowable catch of up to 2000 tons of sprat is permitted for over 18m vessels during 2020, reducing to 1000 tons in 2021. All trawling activity over 18m OAL vessels inside 6nm, inside the baselines, is therefore curtailed from 2022 onwards. The stated intention of this phasing out is that as sprat fishery is concentrated inside the 6nm zone (the applicants say exclusively), including inside the baselines, the transition period will facilitate and allow those vessels involved in sprat fishing time to transition to other fishing activities.

20. This document continues as follows:-

> *"These measures aim to provide ecosystem benefits, including for nursery areas and juvenile fish stocks. They are also intended to facilitate the further sustainable development of the small scale inshore and the sea-angling sectors which strongly rely on inshore waters."*

21. The applicants maintain that reference to the objective of facilitating the further sustainable development of the small scale inshore and sea angling sectors was not mentioned previously and that in essence the policy is centred on redistribution of income.

The Applicants' Licences

22. The applicants' licences were issued in respect of the "*sea fishing boat particulars of which are set out in the schedule*" and are subject to specified conditions. Licences follow a particular format and the schedule contains such matters as the name of the boat, particulars of registration, overall length and gross tonnage. It also provides particulars of the type of vessel, the type of gear and the fleet segment in respect of which the licence applies.

23. The fleet segment in respect of the *Fiona KIII* is described as "*Polyvalent General*". While it has been stated that the trawler is 24.46m in length, the licence suggests 27.38 m. The current licence issued on 13th June, 2019 to Mr. Thomas Kennedy, Tom Kennedy Fishing, Dingle, for the period 1st July, 2019 to 30th June, 2020. The type of gear which the vessel is licensed to use when fishing includes bottom otter trawls and gillnets. It was explained to the court that gillnets are held by anchors on the seabed. Rather than pulling a net to catch fish, a box is set into which the fish swim and are trapped mainly by their gills. Mr. Kennedy explains in his affidavit that the *Fiona KIII* primarily targets pelagic fish species, including herring, horse mackerel and sprat, using mid water trawls. Mr. Kennedy avers that the length of the *Fiona KIII* was designed at 24.43m specifically having regard to the length-based fishing restrictions and on an assumption that at that length it would be able to trawl within the zone. He also explains that because it is longer than 18.29 m (60 feet) it gets a larger quota for herring.

24. The conditions attached to this licence expressly preclude the vessel from trawling activity from the 1st January, 2020 to 31st December, 2021, other than for the targeting of sprat in accordance with limits determined by the respondent from time to time, "*in any part of the exclusive fishery limits of the State within a distance of 6nm from baselines*". A further condition prohibits the use of the boat for trawling activity from 1st January, 2022 in any part of the exclusive fishery limits of the State within a distance of 6nm miles from the baselines. These conditions effectively implement the Policy Directive in respect of this licence.

25. Similar conditions are imposed in respect of the *Celtic Quest* which has an overall length of 18.9m. This licence was issued to Mr. Ricky Kane, of Dingle Fishing Ltd. on 29th August, 2019 in respect of the period 29th August, 2019 to 30th September, 2020. This is also in the polyvalent general fleet segment and the type of gear for which it is licensed are bottom otter trawls and midwater otter trawls.

26. The licence in respect of the *Ocean Venture II* was issued on 13th June, 2019 in respect of the period 1st July, 2019 to 30th June, 2020 to Mr. Cornelius Minihane, Ocean Venture II Fishing Ltd. The overall length of this boat is 27.36 m. The licence is in respect of the polyvalent general fleet segment. The type of gear in respect of which the licence issued is midwater otter trawls and bottom otter trawls. Similar conditions attach to the licence for this vessel in respect of the 6nm limit.

The Consultation Process - Consultation document on Respondent's Review of Trawling Activity inside the 6nm Zone

27. The applicants complain that the consultation process adopted by the respondent before he made and adopted the Policy Directive was flawed. Prior to the announcement of the process, the MI and BIM compiled reports for the respondent. The consultation document states that these reports were compiled on the extent and impact (economic and biological) of trawling activities by vessels inside Ireland's 6nm zone. The BIM report which is dated 12th September, 2017 is entitled "*Economic analysis of trawl and seine fisheries within the Irish 6nm zone"*. This analysis did not include vessels under 10m, gillnetters or potters. Further, waters between 6nm and 12nm were acknowledged to be subject to certain access rights for EU Member States based on historic fishing patterns and did not fall for consideration. The author of the BIM report, Mr. Curtin, drew significantly on data compiled and contained in two reports prepared by the MI, which were published together. One is dated 16th April, 2018 and is entitled "*Fishing patterns and value of landings for vessels, greater than 15 m in length, with higher than average fishing activity in waters inside 6nm*" ("*the fishing patterns report*"). This report accompanies a second report which is described as a general statistics report on the volume and value of landings of fishing vessels, by size category, fishing inside and outside of 6nm, and is entitled "*Trawl fishing in waters inside 6nm around Ireland." ("the trawl fishing study")* as last modified on 18th April, 2018. Counsel for the respondent, Mr. McCann S.C., describes these documents and reports as being interconnected and mutually dependent.

28. Considerable criticism is made by the applicants of the BIM and MI reports and these are considered below. Many of these criticisms are detailed in Dr Shotton's report to which BIM and MI have replied and these will also be considered.

The BIM Report - "Economic analysis of trawl and seine fisheries within the Irish 6nm zone"

29. Bord Iascaigh Mhara is a semi-state agency, established under the Sea Fisheries Act 1952. Ms. Kelly explains that it has economic expertise in the area of sea fishing and advises the respondent on the development of the Irish seafood industry. Its report was published on 12th September, 2017 and was authored by Mr. Richard Curtin of the Fisheries Development section. The data used was compiled from a subset of total landings declarations and the annual averages for the period 2014-2016. The analysis did not include vessels which were under 10m nor did it include gillnetters or potters. Vessels over 10m were placed into three length categories; 10-12m, 12-18m and over 18m and the potential impact of excluding all trawling activity by vessels over 18m in length was considered, as was the value of landings both inside and outside the 6nm zone.

30. The first section of the report provides a summary of statistics on the activity and characterisation of the fisheries present in the 6nm zone, with the three vessel length classes being analysed. While given particular descriptions, such as VL1012, VL1218 and VL18XX, these descriptions represent vessels of different lengths; with the applicants' vessels falling within class VL18XX. During the period of its review, the total landings within the 6nm zone were 15,000 tons compared to 237,000 tons outside that zone. The value within the 6nm zone was €12million while the value outside was €229 million. The summary of the statistics show that trawlers and seiners between 10-12m represent 1%

of the total volume and value of landings, those between 12-18m represented 2% of total volume and 5% of total value, with the over 18m class representing 97% of total volume and 94% of total value of the landings.

31. Analysis of catches within the 6nm zone show that while the larger classes still catch most of the fish, the shares of the lower classes increase significantly compared to the overall figures. Under the heading "*dependence by landing the value of length classes on 6nm zone*", it is stated that the 10-12m class are 100% dependent on that zone for all their income. The 12-18m class is 32% dependent on the zone and the over 18m class is 3% dependent. With regard to the value of the top 20 main species caught within the 6nm zone by any length class, it is noted that herring and sprat are the second and third most valuable species caught within the zone and are an important source of income for all length classes. Nephrops is the most valuable species caught within the zone.

32. The second section of the BIM report contains an analysis of the potential impacts of excluding all trawling activity by vessels over 18m in length. The value of landings by 27 species inside and outside the zone was analysed. An assumption was made to assess whether current catches within the zone could be directly substituted outside the zone. The assumption, which has been the subject of considerable criticism, was that if less than 50% of the species catch is caught within the 6nm zone then, upon exclusion, the previous quantities can be caught outside the 6nm zone. It was stated that there would be no net impact, only a re-distribution of effort. The estimated impact of exclusion from the zone is shown in tabulated form with the change percentage of total landings by species. Again, it is assumed that unless at least 50% of the value of landings of the species comes from the 6nm zone then one segment can simply catch the difference outside the zone. Therefore, only if the majority of the landings of each species comes from within the zone will there be a negative economic impact. The analysis in this table shows that in the case of vessels which exceed 18m in length, if all trawling activity within the 6nm zone is excluded, there will be little if any effect on herring fishing but in the case of sprat, harvesting by vessels of such type will be reduced by 98%, which counsel for the applicants describes as an immediate and quite drastic impact.

33. The likely impact of exclusion and a worst-case impact were shown. In the third section, the scenario described in the second section shows the likely worst-case impacts on two classes, VL18XX and VL1218, if they were to be excluded from the zone. The same assumption is also used in this context.

34. It was concluded that vessels in this segment were dependent on the 6nm zone for only one species, sprat. This is the only species where over 50% of the value comes from within the zone. Other species with higher dependence include black sole and herring (31% and 13% respectively of total value comes from the zone). Following the application of the 50% criteria, the net impact from exclusion was assessed to be €1 million which is half of 1% of classes' total value. Consideration was given to a worst-case scenario that if there were no replacement catches outside the 6nm zone, then the loss to this length class would be €5.9 million, or 3% of total landing value. There are 14 mid-water pair

trawlers fishing for sprat but individual vessel dependence on sprat was not assessed in the report. It was concluded that the exclusion of the vessels over 18m would have an insignificant effect on their length class.

The Marine Institute Reports

35. The Marine Institute, a State agency, was established under the Marine Institute Act 1991. It is responsible for marine research, technology development and innovation. Ms. Kelly explains that it provides scientific and technical advice to government to help inform policy and to support the sustainable development of Ireland's marine resources.

36. The "*Trawl Fishing Study*" reported on the level of fishing activity in waters inside the 6nm zone, with the value of different species of fish landed by trawl gears inside 6nm being compared with values outside the 6nm zone and by trawler length. It also provides details of the fishing fleet as maintained by the Register of Sea Fishing Vessels. In 2016, 165 of 1439 vessels were in the over 18m category. In 2017, the over 18m category represented 164 from a total of 1392. The report addresses such matters as the environment inside 6nm and the risk of environmental impact from trawling, noting that a high proportion of the area inside the baselines and inside the 6nm zone are designated Special Areas of Conservation and Special Protection Areas under relevant EU directives. Risks such as the impact of mobile or bottom dragging of fishing gears and marine communities in Special Areas of Conservation are identified.

37. Statistics for trawling effort and landings inside and outside the 6nm zone are presented in respect of vessels of the three lengths previously discussed. The "*Fishing Pattern Report*" relies on data compiled between 2014 and 2016. Categories of vessels are identified for which, during the years 2014-2016, at least 15% of the annual average value of their fish landings were taken in the sea area within the 6nm limit. It is recorded that 15 vessels over 15m in length fell into this category.

Reference to the applicants' vessels in the BIM and MI reports

38. The applicants submit that certain references to a limited number of vessels in these reports specifically refer to their vessels and are therefore capable of individual identification. At p.2 of the MI report, importantly from the applicants' perspective, it is stated:-

> *"The value of the landings taken inside 6nm was at least 15% of the value of the total landings of the vessel for 7 vessels over 18m and 8 vessels between 15-18m in length. The value of the landings inside 6nm exceeded 25% of total value in the case of seven of the 15 vessels; two of these were over 18m."* (emphasis added)

39. The following references also support the contention that studies identified the applicants vessels:

    a. When dealing with the category of landings of vessels with more than 15% of the value of landings from inside 6nm, two vessels are mentioned.

b. The fishing patterns of "*the*" 15 vessels which earn more than 15% of their value of landings inside the 6nm zone were grouped into three. First, vessels targeting mixed demersal fish outside of or mainly outside of Nephrops grounds. Seven vessels were in this category, four within the 15-18m length category and three over 18m in length. Second, vessels fishing mainly for Nephrops (with demersal by-catch) which included four vessels in the 15-18m in length category and two vessels over 18m in length. Finally, the remaining vessels being "*Polyvalent vessels targeting sprat and herring*". Excluding the numbers already accounted for only two polyvalent vessels exceeding 18m in length targeting pelagic species, sprat and herring, are identified. Again, although not identified by name, it is stated that these are the applicants' vessels.

c. It is also again acknowledged that in the case of these polyvalent vessels targeting pelagic fish, the main species landed are sprat, all of which is caught within the 6nm zone, and herring, most of which is caught outside that zone. The value of landings for the two over 18m polyvalent vessels is stated to be in excess of €1 million with the average number of days at sea being 37. The applicant states that this number of days represents approximately three months of the year when they fish within the 6nm zone. Under the heading "*polyvalent vessels targeting pelagic species with greater than 15% of value of landings within 6nm*", reference is once again made to the two vessels in question.

d. It is acknowledged at p. 10 of the report that two vessels over 18m targeting pelagic fish derive more than 15% of the value of their annual landing from inside the 6nm zone. It is recorded that "*the top species for these vessels inside 6nms were sprat and herring*".

On this evidence, I am satisfied that the two vessels referred to, while not specifically named, are those of the applicants.

The Consultation Document

40. The purpose of the consultation document as stated in its introduction is as follows:-

> *"To inform the Minister's review and consideration of fishing access inside the 6 nautical mile zone (6nm zone), the Department requested that the Marine Institute (MI) and Bord Iascaigh Mhara (BIM) conduct an analysis, from existing data sources, of the extent and impact (economic and biological) of trawling activity by vessels inside Ireland's 6nm zone, including inside the baselines (internal waters). On completion of these reports, the Department requested feedback and observations from the Fishery Producer Organisations (POs), the Irish Fish Processors and Exporters Association (IFPEA) and the National Inshore Fisheries Forum (NIFF).*
>
> *In light of submissions made and an analysis of all material, the Minister, after considering the matter carefully, has decided, without prejudice, to undertake a comprehensive and formal examination and review of access to waters inside*

Ireland's 6 mile zone, including inside the baselines. To inform the Minister's consideration further, he is now undertaking a full public consultation. It is important to note that the Minister has not made any decision to change the current arrangements at this time. All relevant issues put forward will be carefully evaluated and subjected to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of the waters inside the 6nm zone and baselines."

41. Three possible options were expressly stated on p. 2 to be:-

    (a) no change to the status quo;

    (b) exclusion of all vessels using trawls over 18m from inside 6nm and baselines;

    (c) exclusion of all vessels using trawls over 15 metres length from inside 6 miles and baselines.

    It was also stated, however, that other possible options identified in the consultation process may be considered.

42. Referring to reports of the MI and BIM, it was noted that vessels under 12m have a very high reliance on fishing inside the 6nm and baselines and it was noted from the MI report, that in the case of vessels between 12m and 15m there is a majority reliance on these waters, with value landings being 52%. On the basis of the data in those reports the Minister focussed on vessels over 15m length trawling within the 6nm zone and baselines.

43. The information and analysis was also based on information provided by the licensing authority for sea fishing boats, certain details of which have been outlined at paras 10, 11 and 12 above, and it was noted that "*the policy of sea fishing boat licences implements preclusions involving specific distance from the coastline based on vessel length*". The applicants' boats come within a cohort of 23 vessels which are over 18m in length and are engaged in pelagic trawling. It was also noted in the consultation document that there are eight principal pelagic stocks which are generally managed by way of ministerial policy on an annual basis. The particular management of each stock is further subdivided between various sectors of the fleet.

44. Ms. Kelly avers that on foot of the expert reports and the feedback and observations from the main industry representative organisations, the Minister decided to carry out a full public consultation. A submission was prepared for the respondent seeking his approval of a public consultation, its scope and of arrangements for the consultation. The submission is entitled "*Submission AGR 00230 -18: Consultation document on a Review of Trawling inside the 6 Nautical Mile Zone*". This appears to have been sent to the Minister on 24th April, 2018, and his approval was given, and the process was initiated on 29th April, 2018.

45. In a preface to a section in the Consultation document in which possible impacts and outcomes were considered, the following is stated at 12:-

"To fully inform the consultation process, a number of possible impacts/outcomes are examined if changes in access arrangements for larger vessels were to be introduced. These are informed by the analysis and advice of the MI and BIM.

Reminder: All relevant issues will be carefully evaluated and subject to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of the Irish 6nm zone." (emphasis supplied)

46. The possible impacts/outcomes were examined under a number of headings. What follows is a summary of the matters considered and, in certain cases, the applicants' comments, observations or criticisms thereon.

A. Improved security and economic opportunity for smaller vessels

47. Proposed changes in access arrangements for larger vessels inside the 6nm zone could potentially lead to improved protection of coastal environments, ecology and essential fish habitat and it was stated at p.12 of the Consultation paper that there was "*a potential net increase to smaller vessels with respect to the number of fishing vessels, jobs and added value of the catch that could be derived from such new arrangements*." The applicant states that there is no evidence to support this.

48. The value of the landings from trawling inside the baselines for vessels over 12m was €4.4 million or, 2% of the total value of landings from trawling averaged for the years 2014-2016. This was broken down evenly between pelagic fish and demersal fish. The value of landings from trawling inside the 6nm zone for vessels over 12m was €9.4m or 4.2% of the total value of landings during the same period. Pelagic fish accounted for €3.6 million and the remainder for the demersal fish. The value of landings for vessels over 12m between the baseline and inside 6nm was €4.96 million, approximately €1.4 million being for pelagic fish and the remainder for demersal. Thus, it is observed that if the value of the catch foregone by the over 18m sector inside the 6nm was taken up directly by vessels under 18m, it would represent an increase of €5.5 million to vessels under 18m for pelagic and demersal gears. This would amount to a reduction of 2.6% in value to the vessels over 18m. The value of current landings by vessels under 18m is €8.96 million and adding an additional €5.5 million represents a gain of 62% for vessels under 18m. It was recognised, however, that in practice a number of factors would influence this, such as a difference between fishing activity for pelagic and demersal species for smaller vessels, whether the species was controlled by quota or not, and the capacity of the over 18m to catch landings of the same value, especially of quota species, outside 6nm.

49. The reallocation of herring and sprat inside 6nm to vessels under 18m, it is stated, would potentially add €2.2 million to the value of catch of vessels under 18m. Bearing in mind the average annual value of landings, it was suggested that reallocation of sprat and herring inside the 6nm would allow an additional 60 vessels under 18m to participate in these fisheries without increasing fishing effort. As herring is a quota species, it was stated that the over 18m vessels may be able to maintain their share by taking the catch

outside of the 6nm area, in which case no benefit could accrue to vessels inside 6nm from herring. It was also recognised that sprat is not a quota species, that it was unlikely that vessels over 18m could target additional sprat outside 6nm, it being acknowledged that the catch outside 6nm is currently very small, and that the catch is higher inside 6nm and inside baselines during winter.

50. The increase in availability of sprat, and possibly herring, to vessels under 18m would provide a significant diversification opportunity for smaller vessels. As these species occur in bays and coastal areas during the winter, the capacity of small vessels to increase their catches is feasible and the catch opportunity comes at a time of the year when limited other options are available. With better control on the size of sprat caught and landed, a higher proportion of the catch would be for human consumption, rather than fish meal; and a higher value would accrue to the vessels. The volume of the catch could be reduced, while maintaining its current overall value, if unit prices were higher and managed in line with market demands. This would also align the fishery more closely with local ecological and environmental objectives.

51. There may be additional gains in the marine ecotourism sector if the ecological status of certain areas improved as a result of better management of pelagic stocks locally during autumn and winter. Somewhat similar sentiments are expressed in respect of demersal fishing, which are mainly quota species and it is noted that the value of the catch inside the 6nm zone by vessels over 18m in length, represents 2.6% of their annual average value of landings. This approximates to €2.58 million average during the relevant period of analysis, and it is suggested that if this catch value is foregone by vessels over 18m it could be taken by vessels under that length. Four species account for 75% of this value but they are all quota species. They straddle the 6nm line and it is stated that it would be expected that vessels over 18m could still maintain their share and catch the quarter more competitively that smaller vessels, even if they were restricted to waters outside 6nm. Thus, it is acknowledged that the availability of these stocks to smaller vessels may not, therefore, change dramatically. However, it is stated that this is "…*uncertain and in given areas, the abundance of fish may be higher. If large vessels were excluded there would be more available to smaller vessels than is currently the case*." Some examples are given.

52. The applicant points out that all species which are highlighted in the report, with the exception of sprat, are quota driven and that no information is provided to substantiate this claim that it would align the fishery more closely with local ecological and environmental objectives. A common theme of the applicants' case is that many of the statements, comments and information in the consultation document are aspirational, not based on any survey or specific data and would not in any event be relevant to the applicants' trawlers. It is argued that while many of the suggestions and recommendations are commendable, there is little or no evidence that excluding the applicants' vessels from within the 6nm zone would have any impact on the issues raised.

B. Risk of environmental impact from trawling

53. The risk of environmental impact from trawling is discussed with particular reference to the Marine Strategy Framework Directive ("*MSFD*"). Reference is made to the scientific research carried out by the MI which advised on the environmental impact of fishing. Fishing can have significant effects on local ecology and ecosystems, especially if fishing is intensive locally and results in overfishing of stocks. It is recognised that overfishing can have an effect on other wildlife and habitats and controlling the exploitation of such fish at a local level, rather than along broader geographic scales is important. The effects of trawling were considered as were possible ways of mitigating the effects on seafloor habitats. It is noted that mitigation would be more easily developed if the operating fleets were local, limited and managed. The need for restoration of the prevalence of large fish by management of trawling effort and fish outtake in coastal waters is acknowledged. A discussion follows in respect of Special Areas of Conservation ("*SAC's*") along the coast.

54. Mr. Kennedy avers that trawlers of his size do not cause ecological damage as they fish within the 6nm zone for only three months of the year and that the ecosystem is thriving in the South West where his vessels operate. This, he avers, is evident from the large amounts of whale and dolphins on the South West coast, creating a tourist attraction.

C. Re-establishing links between local fish resources, local fleets and local economies

55. It is stated in the consultation document that fishing patterns of the past are different to those of present times. The links that once existed between local fish resources, local fleets and local economies have reduced and the potential effects of exclusion of large vessels from inside the 6nm which would divert small vessels towards a different marketing and business model are discussed:

(a) Exclusion of large vessels from inside the 6nm zone could strengthen the link between local fish resources and local economies and the development of local businesses. Day boat fleet fishing for certain stocks, landing into smaller ports is consistent with the concept of reconnecting local coastal communities with the sea and with marine fisheries and would enable development of local business and the redistribution of profits from the fishery sector. It was also observed that larger vessels tend to land into the larger fishery harbours.

(b) The Maritime Spatial Planning Directive envisages that such plans would consider the connectivity between activities at sea and local communities. Future planning objectives should promote those connections.

(c) Local supply of fish could be increased, helping to reduce the carbon footprint of fish supplies by using local produce and the development of local fish markets and distribution networks of local supplies could be regularised.

(d) Active piers and regular landings of fish by a day boat fleet are attractive destinations for visitors to coastal communities which could have knock-on benefits for the tourism sector.

Again, the applicants make the point that there is little if no evidence to substantiate these opinions.

D. Conflicts between mobile and static fishing gears

56. With regard to conflicts between mobile and static fishing gear, it is observed that using trawls and static gears in the same location may result in the loss of static gear. Tensions between vessel operators using different types of gears is described as a recurring and long-standing issue. No preference or protection is currently afforded to static gear fisheries in Ireland. There are reasons to give preference and protection to static gears in some areas. These gears have lower environmental effects, are recognised as being environmentally friendly and attract higher percentage grant aids from EU funding programs in consequence. It is recognised that the exclusion of large trawling vessels from inside the 6nm zone will not completely resolve the difficulties of using static gears for smaller vessels where conflicts might remain and that the removal of trawls could result in increased static gear which would increase fishing pressure on stocks such as lobster and crab. All of this will require management.

E. Improving availability of fish in inshore waters

57. Also discussed is a development which has occurred over the last 20 years being that fishing vessels under 12m in length have become increasingly specialised, targeting fewer species and becoming increasingly reliant on a limited number of fish stocks. The majority of their fishing effort is now directed on shellfish whereas previously fish such as salmon, cod, haddock and herring were fished. There is a domino effect as the number of stocks available to the sector has declined so that pressure on the remaining stock increases. Fishing for the main species of shellfish now occurs practically year round as opposed to seasonally because the availability of whitefish and flat fish inshore is too low to be commercially viable in many cases.

F. The Protection of fish recruitment and stock components

58. Under the heading "*stock components*" the following was considered :-

> *"Demersal and pelagic fisheries are assessed and managed over broad spatial scales, usually at the ICES division or sub-division level. Complex stock structure is where a number of stock components (sub stocks) are present and are connected to each other to varying degrees within the distributional area. Ideally the management arrangements for such complex stocks would attempt to conserve each component at the appropriate scale, under a precautionary assumption that each component was important to the survival of the stock complex. Consideration of spatial scale and matching this to underlying stock structure still remains a major challenge for fisheries management."*

Reference is then made to nursery grounds, again under the heading of "*Protection of Fish Recruitment and Stock Components*", where it is stated:-

> *"The recruitment of a number of species of commercial fish occurs mainly in shallow waters. The size of fish generally increases with depth and distance from the shore. Mixed species trawl fisheries that have relatively poor size selectivity, therefore,*

capture a higher proportion of smaller fish in shallow waters and further offshore. As a result, discarding rates to date are generally higher inshore than offshore and reduction of fishing effort in such areas may benefit fish stocks in general. The new requirement to land all catches (discard ban under CFP) further increases the challenge. Examples include:

… Herring: there are numerous spawning and nursery grounds for herring in inshore waters…"

The respondent places emphasis on these aspects of the consultation document as clear evidence of there being a desire to protect fish stocks.

G. Improved management of inshore waters

59. Finally, it is recorded that the proposals potentially enable a more sophisticated management of waters inside the 6nm zone that would incorporate environmental, economic and social objectives into how the State uses the significant and diverse resources in its coastal waters. Restoration of biodiversity and ecosystem services is described as being critical to achieving those objectives. As a first step, it is stated that the competitive environment in which fisheries operate needs to be addressed towards the development of more ordered, efficient, local, profitable and sustainable fisheries in the inshore sector. It is noted that the National Inshore Fisheries Forum ("*NIFF*") was currently leading the development of an inshore sector strategy, which was expected to proceed to public consultation in the near future. It is expected that that strategy will identify three priorities. There is a need to make inshore fisheries an attractive sector within which to work, given the ageing profile of fishermen, to address the decline in fishing opportunities for inshore vessels; the need to restore profitability through diversification; and logical management of fisheries. Thus, it is suggested that it may be very difficult to address these issues effectively without providing more security regarding spatial access and increased opportunities for the inshore fishing fleet.

60. With regard to the latter, the applicants suggest that it is difficult to discern any necessary connection between these aspirations and the data collected by both BIM and the MI in the years 2014 – 2016.

Scope of the Consultation Document

61. Having referred to the options, the '*scope'* of the to exercise is described as follows :-

"The Minister has decided that there is a case for a review of the policy and trawling activity inside the 6nm zone including inside the baselines. In that regard, he is focusing consideration of the three identified options for levels of exclusion. Other suggestions put forward in the public consultation that may involve adjustments to these options will also be carefully examined."

62. The paper concludes as follows:-

"This consultation is taking place without prejudice. It is important to note that at this time the Minister has not made any decision to change the current

arrangements. All relevant issues will be carefully evaluated and subject to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of waters inside the 6nm zone and the baselines.

The purpose of this consultation is to invite stakeholders and interested parties to advise the Minister of their views on any changes to policy within the scope of this review as set out above.

A Sea Fishing Boat Licence holder should not carry out any activities or make any plans on an assumption that a change in policy may happen." (emphasis supplied)

63. Contact details in respect of the process are provided and it is stated at :-

"In accordance with procedures, the Department will not engage in consultations with individual operators or groups of operators and any additional information or clarification made will be published on the website."

64. There is a disclaimer:-

"This document is for consultation purposes only and is not a legally binding document. The Minister and/or the Department are not bound by any of the contents thereof in the context of any change(s) to policy that may arise, either from this review or elsewhere nor does it necessarily set out the Minister/Department's final or definitive position on particular matters."

Submissions of the applicants to the respondent during the consultation process

65. Submissions were invited by 11th June, 2018. In excess of 900 were received, including those made by or on behalf of the applicants. Mr. Kennedy wrote on 7th June, 2018 objecting to the exclusion proposals. He made a number of points:

a. The respondent had undertaken only a partial examination of all issues and it focused on trawling. The review was not comprehensive and omitted gill netting, seine netting and what he described as the total mismanagement of the inshore potting sector.

b. The analyses by BIM and the MI were biased, misleading and flawed. The advice sought from the MI was too narrow and focused only on trawling, failed to consider other fisheries and therefore gave an incomplete and much skewed picture for the consultation.

c. If exclusion suggestions became policy it would mean that vessels along the coast may in some cases have to travel 40 to 50 miles from their home ports to fish. This would result in economic collapse for some vessels and potential loss of life due to economic pressures imposed by the change of the policy.

d. The consultation addresses only trawling inside 6nm of the baselines and fails to evaluate the impact on inshore gill netting and seine netting, both of which are

critically important for vessels of various lengths. The potential future mismanagement of potting inside the 6nm zone and its impact on various shellfish populations is a glaring omission.

e. The consultation document was devoid of any proper scientific evidence and the ecosystem approach to fisheries management. Individual dependence on sprat had not been assessed and Mr. Kennedy queried why no such assessment had taken place given that it had also been acknowledged that 50% of its value came from within the zone.

f. Regarding the assumed impact on the polyvalent sector, by dividing the length class of vessels into three categories and using the statistics value for the overall value of fish caught by all the vessels in the segment, to demonstrate a negligible impact overall on the segment, the method completely ignored the serious impact on those who depend on the sector and who did not have an alternative.

g. There is an absence of evidence that an additional 60 vessels under 15m actually existed or had the expertise and technology to catch such fish which would enable them to participate in these fisheries or to catch the fish.

h. Removing access to a vessel or vessels of a particular cohort from traditionally fished areas simply meant shifting the effort elsewhere. When one considered that the baselines ran from head land to head land and that vessels would have to leave a sheltered area in bad weather to travel to open water, in many cases this would be unviable and extremely dangerous.

i. Policy changes have major economic impacts. Persons have a right to enjoy traditional rights to fish. To exclude one citizen over another based on vessel length without outlining any reason for so doing, was seriously flawed.

j. The process was agenda driven and was not transparent. The respondent had examined only commissioned evidence chosen for him and he had been "*deliberately*" denied proper scientific and economic evidence.

The plaintiff's son, Mr. Donal Kennedy made similar submissions.

66. Mr. Minihane's submissions were made through the Irish South and West Fish Producers Organisation by letter dated 11th June, 2018. They expressed the view that the process was fundamentally flawed, that it was restricted to trawling activities, and that nowhere in the BIM paper was a breakdown given of fishing activity within the 6nm zone by reference to different methods of fishing. It was submitted that it was impossible to construct a policy in respect of the fish stocks and fishing methods to be employed in targeting those fish stocks inside the zone on the basis of data of a general nature. The organisation enclosed submissions which they made in respect of the *Island Fisheries (Heritage Licence) Bill 2017* which was due to be considered for discussion before the relevant Oireachtas committee later that month. It was reiterated that the scientific basis on which

the consultation process was based was unreliable, insofar as it related primarily to evidence collected in waters inside of the baseline and not to evidence of fish stocks and fishing activities, including trawling, within the 6nm zone in the waters between the baseline and the 6nm limit. Particular submissions were made in respect of the alternatives. They recommended that the "*do nothing*" approach was correct policy and that the process should be halted. It was submitted that no further policy consultation be embarked upon until such time as scientific information and data was collected in respect of a number of matters, such as information differentiating between fish stocks in Ireland's inland waters inside the baseline, that are not subject to either the EU Common Fisheries Policy or advices from the International Council of the Exploration of the Seas ("*ICES*"), and fish stocks in the 6nm zone that are subject to those policies and advices. It should also not occur until such time as the full dataset was available for all sea fishing vessels within either or both the 6nm zone and the inland waters, with greater detail concerning those vessels and the extent of the clear catches of non-quota species including, specifically, sprat; and until there is knowledge of the source of fishing activities in respect of all catches landed by sea fishing boats within either or both the inland waters and the waters in the 6nm zone by reference to the port of landing, homeport, source of crew and whether local to any one area of coastline or another. The view was expressed that it would be unfair and unlawful to confer a benefit on owners and crew of one class fishing boat wishing to fish for species in an area of sea far from their homeport while restricting and penalising owners and crew of other classes of fishing boat wishing to fish for the same species of fish close to their home ports.

67. In summary, it was submitted that the process had been embarked upon in the absence of reliable scientific data, without identification of any clear objectives that are, or might be, in accordance with the CFP, including supporting fishing in areas of sea closest to remote coastal communities that the process itself was flawed because it related solely to fishing activities within the 6nm zone while at the same time appearing to relate to fishing activities in the inland waters of the State pursuing fish stocks not subject to the CFP or ICES advice, and that there was a danger that in the event that the consultation proceeded and a decision is made changing the present position, it will have been made in the context of a flawed consultation process with flawed data and scientific information. It will be seen that many of these criticisms are repeated in the applicants' affidavits grounding this application.

68. A submission was made from the Irish Fish Producers Organisation which also opposed the exclusion proposals. They suggested an alternative approach which takes the direction of fisheries management plans that are ecologically and economically sound, region and localised area specific and particular species specific.

The Briefing Note

69. Prior to the respondent making his decision, a briefing note was prepared by officials of his Department and submitted to him on the 4th December, 2018. The submissions were summarised in an attached document. The officials recommended that trawling by vessels over 18m in length inside the 6nm zone and baselines be phased out. The policy was

approved by the respondent on the 6th December, 2018. The applicants point out that this note was not available to them prior to the institution of the proceedings and that the phasing out option was not signalled in the consultation document.

70. The authors of the briefing note (officials from the respondent's department) recorded and recommended the following:

a. In excess of 900 submissions were received, some of which supported particular options. A considerable number of alternative or additional options were raised in the submissions. Producer organisations favoured maintaining the status quo.

b. Based on the advice from the MI and BIM and having regard to the majority of stakeholder submissions, there were a number of supporting factors which included environmental, economic and gear conflict issues to make a case for some restrictions.

c. Excluding vessels over 18m using trawls from inside the 6nm zone would present a significant economic opportunity to smaller inshore vessels.

d. Increasing availability of sprat and possibly herring to smaller vessels would represent a significant diversification opportunity for those vessels.

e. Specific reference was made to the option which excluded vessels over 18m from within the 6nm zone and baselines and to the BIM and MI reports. It was stated that according to the MI report there were just seven vessels out of 163 in the Irish fleet, which were over 18m in length, and which obtained more than 15% of the value of their landings from inside the 6nm zone. The note specifically referred to these as including three vessels targeting mixed demersal fish outside, or mainly outside Nephrops grounds, two other vessels fishing mainly for Nephrops and two polyvalent vessels targeting sprat and herring. The latter two are referable to the applicants' vessels.

f. The preferred option was then outlined as was an analysis of potential impacts of that option on fishing vessels. Again, specific reference was made to the MI report.

g. Importantly, in the executive summary it is stated that:-

> *"For just over 1% of over 18 m vessels, sprat constitutes a high proportion of the value of their landings. Sprat is not subject to EU quotas and fishing is concentrated in coastal bays. To allow these vessels to transition effectively to other fishing strategies, it is recommended that restrictions on trawling for sprat are introduced on a phased basis, based on catch records for recent years. A total allowable catch of up to 2000 tonnes of sprat should be permitted for over 18 m vessels inside six nautical miles during 2020, reducing to 1000 tonnes 2021, with all trawling being entirely curtailed from 2022 onwards."*

Thus, by recommending the particular option which was ultimately adopted it was stated that it was important that any amendments to the current legislation be introduced in a way that allows vessel owners to prepare for changes. It was stated that many of the target species of the over 18m vessels currently trawling inside 6nms are capable of being obtained outside that area and, some of the stocks in question appeared to straddle the 6nm zone. It was recognised that the only exception appeared to be sprat. It was recommended that there be a phased introduction of the total allowable catch of sprat, leading to a complete exclusion of vessels over 18m in length using trawls inside the 6nm zone and baselines by 2022. It was suggested that the measure would provide affected vessels with an opportunity to transition away from their current fishing strategies including allowing time for potential gear adaptations and the targeting of alternative stocks. This recommendation would not have any bearing on the track record of vessels under the respondent's policy for the management of mackerel and herring.

71. The catch records for recent years identified that over 18m vessels landed an average of just less than 3000 tons per annum of sprat and therefore it was recommended that those vessels should continue to be permitted to trawl inside the zone for sprat only, on a reduced tonnage basis, until December, 2022.

The Respondent's Decision

72. The Respondent published his decision on 20th December, 2018:-

"1. Following a full public consultation and careful consideration of the issues raised, my decision regarding the review of trawling activity inside 6 nautical miles is as follows:

1.1 From 1 January 2020 vessels over 18metres LOA (Length Overall) will be excluded from trawling inside 6nms and the baselines, with the exception of trawling for sprat only, which will be phased out by 31 December 2021.

1.2 A total allowable catch of up to 2000 tonnes of sprat will be permitted for over 18m LOA vessels inside 6 nautical miles and the baselines during 2020, reducing to 1000 tonnes in 2021, with all trawling activity by over 18m LO vessels inside 6 nautical miles and inside the baselines being entirely curtailed from 2022 onwards."

The reasons for the policy change was stated as follows:-

"2.1 There is a compelling case for excluding trawling activity by large vessels in coastal waters inside 6nms. There are sufficient fishing opportunities for these vessels outside of 6nms. These actions will provide ecosystem benefits, including for nursery areas and juvenile fish stocks. These changes will also benefit small scale and island fishermen who exclusively rely on inshore waters.

2.2 As the sprat fishery is concentrated inside the 6nm zone the transition period will allow those vessels involved in the sprat fishery time to transition to other fishing activities."

The applicants strongly disagree that there are sufficient opportunities for vessels over 18m outside the 6nm zone such as to justify their blanket exclusion from within that zone. Mr. Kennedy avers that it will not be possible for him to replace the value of that catch from outside the 6nm zone.

Correspondence with the Respondent before the making and publication of the Policy Decision

73. On the 17th January, 2019 the applicant's solicitor wrote to the respondent enquiring whether it was possible or appropriate for him to meet with him and his clients to discuss the matter. The respondent's private secretary replied on the 6th February, 2019 stating that the respondent had carefully considered the issues raised during the public consultation process and that following a detailed evaluation he had made the decision to exclude vessels over 18m from inside the 6nm zone and the baselines. The letter repeats the reasons provided on the 20th December, 2018. It was explained that as the respondent had already decided the matter, following the public consultation open to all, a meeting was not warranted.

Statement of Opposition

74. The challenge is fully contested. The respondent maintains that the Policy Directive is *intra vires* the powers of the respondent under the Act of 2003. While the respondent pleaded that the applicants do not enjoy *locus standi* to maintain the proceedings, nevertheless this was clarified at hearing that while the respondent was not making any point that the applicants do not have an interest in the vessels, the challenge to the applicants' *locus standi* is maintained in respect of a number of grounds of challenge on the basis that they have not established that they will be adversely impacted by the Policy Measure and also on the basis of *jus tertii*, insofar as the challenge raises issue of breaches of article 19 and 20 of the CFP Regulations.

75. The respondent's position as outlined in the pleadings and Ms. Kelly's affidavit is as follows:

1) In excess of 900 submissions were made and considered as part of the consultation process. A wide variety of views were expressed. The National Inshore Fisheries Forum, environmental NGOs and small-scale fishermen supported the introduction of restrictions on trawling inside the 6nm zone. All producer organisations were opposed to any changes. The respondent's assessment was that there was a compelling case for the exclusion of trawling by large vessels in coastal waters inside that zone. The Minister considers that the Policy Directive will provide wider ecosystem benefits including for nursing areas and juvenile fish stocks. The level of activity will continue under review. Part of the consideration which informed the respondent's decision was that a high proportion of areas designated as SAC's, and Special Protection Areas ("*SPA's*") are found inside the baselines and the zone. The State is required to take measures to achieve and maintain Good Environmental Status ("*GES*") for its waters under the EU Marine Strategy Framework Directive, by 2020. The criteria for determining GES includes the integrity of the seabed and the status of commercial fish and shellfish stocks. The

MI report identified that trawling by large vessels can have a more detrimental impact on the environment than smaller vessels. Coastal waters provide nursery grounds for certain fish species, including commercial species, such as herring, plaice, whiting and cod. Mixed species trawl fisheries can capture higher proportions of smaller fish inshore compared to further offshore. These factors presented a compelling environmental argument for the Minister to introduce restrictions in coastal waters inside the 6nm zone.

2) A range of possible options were identified, and it was made clear that other possible options, to be identified in the consultation document, would be considered. In excess of twenty such possible options are identified in the pleadings. Prior to full consultation, the respondent did not limit his options in any way and all options were kept open and considered, including maintaining the status quo. The applicants maintain, however, that although they may have been mentioned in the briefing note to the respondent, none of them were identified in the consultation document.

3) The respondent has made other Policy Directives placing restrictions on the use and operation of sea fishing boats. The respondent arranged for the MI to carry out an analysis of the impacts of any new policy proposals on vessel owners most directly impacted, which included the applicants' category of vessels. The reports were sufficiently detailed to enable the respondent to make an informed decision.

4) It was also part of the respondent's consideration that excluding vessels over 18m in length, using trawls from inside the 6nm zone, would present a significant economic opportunity to smaller inshore vessels. The BIM report identified the value of landings by vessels over 18m inside the 6nm zone. If the value of landings by the over 18metres sector inside the 6nm zone was taken up directly by vessels under 18m, it would represent an increase of €5.5 million to vessels under 18m (for pelagic and demersal species). This would amount to a reduction of 2.6% in value to vessels over 18m. As the value of the landings by vessels under 18m is €8.96 million, adding an additional €5.5 million represents a gain of 62% for vessels under 18m. Other influential factors included the differences in the fishing activities of smaller vessels, whether the species was controlled by quota and the capacity of the over 18m vessels to catch landings of the same value, especially quota species, outside the 6nm zone. Just over half of the estimated reduction of €5.5 million to the over 18m vessels, if excluded from waters inside the 6nm zone, relates to pelagic trawling.

5) A consideration that informed the respondent's decision was that the increase in the availability of sprat and possibly herring (subject to stock recovery) to smaller vessels would represent a significant diversification opportunity for these vessels. As these species are found in bays and coastal areas during the winter, the capacity of small vessels to increase the catches was feasible and the catch opportunity comes at a time of the year when limited other options are available. With better

control on the size of sprat that is caught and landed and shorter fishing periods nearer to port, there may be an opportunity for higher value from the landings of smaller vessels.

6) A further consideration that informed the respondent's decision was that the main fishing gear used by smaller vessels are static, while large vessels primarily employ trawls. This can sometimes lead to gear conflict, especially when the trawling vessels are large. Submissions had been received from inshore fishermen's groups supporting restrictions to prevent damage to, or loss of, gear. The National Inshore Fisheries Forum ("*NIFF*") supported the position that vessels over 18m should be restricted from trawling inside the 6nm zone as this would go some way to address the issue of gear conflict. However, Ms. Kelly acknowledged that restrictions on trawling by larger vessels will not completely resolve such conflicts and difficulties. These matters were outlined in the briefing note prepared for the Minister.

7) Regarding the management of quotas, the three principal managed herring stocks in Ireland are Celtic Sea Herring, North-West Herring and Irish Sea Herring. Stock levels are monitored on an ongoing basis by the MI and the ICES, the advice of the latter playing an important role in the setting of total allowable catches and quotas for EU member states at the annual December Fisheries Council. There was a 53% decrease in Ireland's quota of Celtic Sea Herring in 2019 compared to 2018 based on ICES advice. ICES advice is that when a precautionary approach is applied there should be zero catch limit for 2020. Quotas are addressed on a sea area basis. In the years up to 2018, the majority of the Irish Sea Herring quota was used in exchange for other fishing opportunities sought by the Irish fleet. The remaining quota was usually allocated to either a single vessel or a pair of vessels to fish herring in the Irish Sea. On the recommendation of the fishing industry representatives, the Minister decided to operate the fishery in 2018 and again in 2019 for 13 vessels. Sprat is an important prey fish for many marine species, which are vital to the ocean food chain and an important source of income for inshore fishermen. Sprat is considered by ICES as a data limited stock, which means that more detail is required in order to form a full understanding of the state of the stock. There is, however, no quota limit on catching sprat.

8) Regarding the applicant's suggestion that the reasonable inference from the pleadings and averments before the court is that sprat are not an endangered species and thus there is no justification for imposing an exclusion on the longer trawlers, the Directive has objectives other than maintaining sustainability of fish stocks, including the development of the small-scale inshore and sea angling sectors, matters which contribute to the rational management of fisheries. This term is sufficiently broad to permit the Minister to pursue a policy of favouring small-scale fisheries of a particular species, even where that species does not face any immediate threat from overfishing.

9) The licences which the applicants' vessels enjoy, grant fishing opportunities for a range of fish stocks and do not confer on the applicants property rights.

10) There is no obligation on the respondent to preserve the position of individual operators and it was never the intention or the process to focus on individual operators. While fishing activity of any individual vessel did not form the basis of the Minister's decision, it is nevertheless denied that the Minister failed to have regard to the merits of the respective individual vessels, such as the applicants' which might be affected. The respondent evaluated categories of vessels greater than 15m and 18m in length.

11) The individual livelihood of any one person or the fishing activity of one vessel did not form the basis of the respondent's decision which was made in the public interest taking into account a number of factors:

a. the security and economic opportunity for smaller vessels;
b. risks of environmental impacts from trawling;
c. the re-establishing of links between local fish resources, local fleets and local economies;
d. conflicts between mobile and static fishing gear;
e. improving availability to fish in inshore waters;
f. protection of fish recruitment and stock components; and
g. improved management of inshore waters.

12) The MI and BIM reports provided a detailed analysis of the effects on different classes of operators, including the applicants.

13) The respondent was not obliged to conduct an independent scientific assessment prior to issuing the Policy Directive. Surveying of stock levels falls under the remit of the MI. The majority of scientific advice is, in any event, formulated by the ICES released each year, normally in June, and the MI draws on this advice. It also draws on advice from the EU's Scientific, Technical and Economic Committee for Fisheries. The provision of all such scientific advice is a key pillar of the CFP and forms the basis for management decisions taken in accordance with that policy.

14) It is accepted that sprat is concentrated inside the 6nm zone and therefore the Minister decided to phase out fishing for sprat by vessels over 18m over a two-year period to allow a transition period for affected vessels. Whether smaller vessels have or will fish for sprat in the future was not the basis of the decision, but there is, or will be, capacity in the event of the exclusion of the longer vessels. It is not accepted that there are either no small-scale fishermen or no potential for them to fish for sprat.

15) The removal of trawlers greater than 18m will support the sustainable management and rational exploitation of fisheries inside the 6nm zone. The current state of sprat stocks in Irish waters was not the basis for the decision, nor was it made on the

basis of one particular stock. It was made taking into account several factors. While the respondent expects that additional smaller vessels will commence to fish for the resources left behind by the policy, it is not anticipated that this will result in fishing of the same volumes previously taken by larger vessels.

16) Fair procedures were followed. The applicant did not submit Dr Shotton's report as they could have, and it ought not now be considered as it did not form part of the material before the Minister at the time he made his decision. To the extent that the applicants advance the requirement for a second consultation with stakeholders before the introduction of the directive, it is pleaded that a repetition of same was not required and would have no basis or merit. The period between the respondent's decision and signing into force of the Policy Directive was to allow for time to draft and implement the required legal instrument. The public consultation gave all stakeholders an opportunity to make submissions. All were considered by the respondent. The Minister did not commit to a further consultation once he had made his decision and after the full consultation was completed, nor would there have been any basis or merit in an additional consultation process. While it is accepted that the respondent refused to meet with the applicants, nevertheless it is pleaded that this was in accordance with the terms of the consultation process and that it would not have been proper for the respondent to accede to a request for a meeting which would confer an unfair preference on the applicants. The applicants had already made representations through representative organisations. Further, the respondent is willing to open any official policies for review where there is evidence of significant change in circumstances.

17) Fishing opportunities are a public resource and are not the applicants' "*property rights*". National fish quotas are managed to ensure the property rights are not granted to individual operators. This is described as a critical policy, designed to ensure that fishing opportunities are not concentrated into the hands of large fishing companies whose owners have the financial resources to buy up such rights. The applicants observe that this was not a reason which was given by the Minister.

18) Any move towards concentration of such rights into the hands of large companies would seriously risk fishing vessels losing an economic link with Ireland's coastal communities and undermine the socio-economic importance of the fishing industry in those communities which are dependent on fishing. The result of this long-standing policy is that the Irish fishing fleet involves a balanced spread of sizes and types of fishing vessels which have retained a strong economic link with Ireland's coastal communities and have delivered economic activity including vital employment to those communities. The applicants are particularly critical of this plea as forming a stated basis for any such policy, particularly when this was provided as a reason at the time the decision was issued.

19) It is not accepted that all herring caught for 2018 was within the 6nm zone. Herring is found both inside and outside that zone. The intent of the policy is to require the

class of operators of trawling vessels over 18m in length to fish outside the 6nm zone.

20) It is denied that the Policy Directive is in breach of articles 19 and 20 of Regulation 1380/2013 on the CFP. The Sea Fisheries (Amendment) Act 2019 has the effect of recognising the *Voisinage* arrangement between Northern Ireland and Ireland whereby vessels may fish in each other's 6nm zone. This arrangement allows for reciprocal access on the basis of equal treatment with the rules applying to local vessels and compliance by vessels from each jurisdiction. Therefore, any Irish law providing for fisheries management measures in the 0- 6 mile zone apply only to Irish fishing vessels, not to foreign fishing vessels but will apply by default to Northern Ireland vessels wishing to fish in Ireland's zone. Management measures are applicable to Irish vessels fishing inside the 6nm zone and by extension to Northern Ireland boats. No consultation was required with the European Commission or the relevant European Commission Advisory Council.

Discussion and Decision - is the Policy Directive *ultra vires* the Act of 2003 as amended?

76. It appears to me that the applicants' case that the Policy Directive is *ultra vires* may be addressed under three headings. First, is what might be termed the substantive point - whether the adopted measure comes within the powers conferred on the respondent by the Act of 2003. The second is whether the measure complies with the notification and consultation requirements of the CFP. The third is whether the measure is ultra vires because there was no rational basis for its making and that it is disproportionate.

77. It should be observed at this point that counsel for the respondent, Mr. McCann S.C., submits the court cannot entertain this case if it is not persuaded by appropriate evidential material that the applicants will suffer an injury and that on the evidence advanced, this has not been shown. It is submitted that this is crucially connected with the argument advanced on fair procedures and alleged impact on the applicants' property rights. The nature of the rights and interests which the applicants advance in support of their claim is also of some relevance to the issue of *jus tertii*, being the applicants' standing to challenge the Policy Directive on the grounds that it was made in breach of the provisions of the CFP. Thus, the nature and extent of the applicants' rights and any attack or interference with them are relevant under a number of headings and it seems to me that the same may be said of the challenge based on proportionality, if not also rationality, of the measure.

78. Therefore, it is proposed at this stage to address the question of vires by considering the substantive issue of whether the measure is one which comes within the powers of the respondent under the Act of 2003 as amended and, secondly, whether it is unlawful because it breaches any necessary requirements of the CFP regulations, leaving aside for the moment the issue of *jus tertii*.

Substantive issue – the arguments

79. The applicants maintain that the power of the respondent to make policy directives is not open-ended or unfettered and is specifically directed at husbandry matters involving the

conservation of fisheries resources and the rational management of fisheries. The essence of the claim, in this regard, is that the subsection does not provide for the issuing of policy directives which are directed at the redistribution of fishing resources amongst fishermen, as opposed to the conservation of fisheries; and that the achievement of such socio-economic goals, whether desirable or not, lies outside the scope of the respondent's powers under the Act. It is argued that while the respondent contends that the Policy Directive purports to achieve benefits of an environmental or ecological nature, on close examination such aims "*fall away*". Sprat is not a quota species and the only vessels which will now be subject to such quota are those in excess of 18m. Many of the stated environmental and ecological aims are aspirational only with no supporting data or evidence. It is also argued that the respondent's interpretation of what constitutes rational management of fisheries is excessively broad. Language and words must be viewed in the company which they keep, and it is impermissible to divorce the language of protection, conservation or sustained exploitation of living marine from the objectives of the section. Therefore, it is not permissible to read "*rational management of fisheries"* without looking at the preceding language and objective which the section is meant to serve. It is also submitted that policy directives must be in furtherance of the national policy objectives and comply with the requirements of the CFP and that nothing contained in the material produced by the respondent suggests that the measure was introduced in compliance with national policy, the CFP or other international obligations which are binding on the State; and that no clear national policy objective is being pursued.

80. It is submitted by the respondent that the applicants' case is based on a false premise that because the decision aims to redistribute resources from larger vessels to smaller ones it cannot also have the purpose of facilitating the sustainable exploitation of living marine aquatic species or the rational management of such fisheries. Addressing any potential confusion which might arise given the use of the conjunctive and disjunctive within the same section, counsel for the respondent submits that the respondent has power to introduce policy for conservation or for rational management of fisheries. It is accepted that the conjunctive "*and*" as employed in the section means that the Policy Directive must, in addition, be in conformity with national policy objectives and with EU law or other binding international obligations. Such national policy is referred to in the Programme for Government. It aims to bring about the sustainable development of the small inshore and sea angling sectors to which the Government has committed in that programme; but even had it not been so stated it is a matter for the respondent to decide policy and he could have done so without any published document. It is also submitted that while the Policy Directive has the purpose of ensuring greater sustainability in fishing, this is not a precondition to its validity. The Act of 2003 permits the making of policy directives for the purposes of the "*rational management of fisheries*". On a proper interpretation of this term, the respondent is permitted to make policy directives for the purposes of sensibly, logically or reasonably running, administering or regulating fisheries and he has a broad discretion to do so. Even if the objective of the decision is to effect a more equitable distribution of fish stocks between larger and smaller vessels, *in addition to the objective of sustainability*, this is in no way objectionable and does not render the directive *ultra vires*. The respondent has expressed in the reasons for his decision that the

measures aim to provide ecosystem benefits including for nursery areas and juvenile fish stocks. While ecosystem benefits may include a conservation benefit, when the respondent described ecosystem benefits, he was not thereby limiting himself to purely conservation measures. Broader ecosystem issues including, for example SAC's and SPA's and the damage which trawlers can cause with adverse environmental effects, are considered and referred to in the underlying documents. Fewer sprat may be caught because of inshore or smaller vessels being used and not taking up what is available, albeit this is not an exclusive target when ecosystem benefits are being described. It is therefore submitted that it is unclear the basis upon which the applicant maintains that the decision does not have the objective of protecting, conserving or allowing the sustainable exploitation of fish stocks.

81. Counsel also refers to recital number 19 of the CFP which states, *inter alia*, that "Member states should endeavour to give preferential access for small-scale artisanal or coastal fishermen". Thus, he submits that it is also a policy of the EU to provide for a legal environment favourable to those classes of vessels. Smaller boats generally produce a smaller catch and therefore the measure is compatible with sustainable fishing is a matter of common sense. He also contends that sustainable exploitation is an objective which is being pursued expressly by the policy. Smaller vessels have the capacity to catch smaller amounts of herring than vessels of greater length than 18m and thus the policy decision should help to reduce the exploitation of scarce herring stocks within the 6-mile zone. Thus, it is submitted that the applicants cannot reasonably maintain that the decision does not serve the cause of sustainability. Finally, emphasis is placed on the wording of a condition contained in the licence condition which states:-

> *"the licensing authority, in deciding whether or not to renew the licence, will require the owner of the boat to provide such information as will demonstrate the extent of the social and economic benefit accruing to the local coastal communities arising from the operation of the boat."*

Substantive Issue – Discussion and Decision

(a) Statutory interpretation

82. The issues under consideration involve the proper interpretation of the Act and the Policy Directive. In *Faherty v. The Registrar Of Fishing Boats* [2010] IEHC 244, a case stated pursuant to s. 18 of the Act of 2003, the court was requested to determine, *inter alia,* whether a policy directive is subject to the Interpretation Act 2005 ("*the Act of 2005*"). Charleton J. held that the provisions of the Act of 2005 applied to the interpretation of a measure such as a policy directive. "*Enactment*" is defined in the Act of 2005 as meaning an Act or a statutory instrument. "*Statutory instrument*" means an order, regulation, rule, bye-law, warrant, license, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act. References, in relation to a statutory instrument, to "*made*" or to "*made under*" include references to made, issued, granted or otherwise created by or under such instrument. Both of the provisions of the Act of 2003 and the policy directive must be interpreted in accordance

with the normal principles of statutory interpretation, and with the provisions of the Act of 2005.

83. It also seems to be the case, as submitted by the respondent, that apart from the question of the *interpretation* of a policy directive, Charleton J expressed the view that such directives have a similar *status* to statutory instruments. He observed that under s. 3 of the Act of 2003 the respondent is entitled to make policy directives for "*the management of the Irish fleet*". Noting that such a directive is first made by the Minister and then laid before the Houses of the Oireachtas he stated that "*in issuing these directives, the Minister is pursuing both European Union and national policy as to the conservation and proper management of fish stocks within national waters*." I should observe, in passing, that on my analysis of *Faherty*, no issue arose as to whether the Policy Directive in that case was made with a view to pursuing both European Union and national policy as to the conservation and proper management of fish stocks within national waters.

84. The provisions of s. 3 of the Act of 2003 as amended confer on the respondent relatively wide powers in relation to the adoption of policy directives which provide for measures "*to control and regulate the capacity, structure, equipment, use and operation of sea fishing boats*." The Registrar General is obliged to comply with and implement a policy directive. This is practically achieved by the attaching of conditions to such licences. In exercising his powers under the section, the respondent is engaged in the implementation of policy. While the applicant correctly submits that the exercise by the respondent of a power under s. 3(3) of the Act of 2003 is not open ended, the appellation ascribed to such measures suggests that when they are adopted, care ought to be exercised by a court in the assessment of the legality of such a measure which in essence, involves the implementation of national policy. In my view, therefore, the court should approach the interpretation of the section by affording to the respondent a margin of discretion consistent with the wording of the Act, but also bearing in mind, that any such policy directive must comply with the requirements of the CFP. A somewhat different issue is whether the policy being pursued must be a previously stated policy of government and/or one which is notified in advance of the making of the policy directive.

85. Generally speaking, the aim of statutory interpretation is to ascertain the will or intention of the legislature. In so doing the court is required to adopt an objective approach. The primary route by which the intention of the legislature is ascertained is by adopting the literal approach and ascribing to the words used in their ordinary and natural meaning.

86. Counsel for the applicants emphasises the importance of the words surrounding and associated the expression "*rational management of fisheries*." I accept that as a matter of statutory interpretation words must be read in context – and that they ought to be read in the context of the company they keep. This is in effect an application of the principle of *noscitur a sociis* which was addressed in *DPP v. Brown* [2019] 2 I.R. 1, by McKechnie J., as follows:-

"94. Of course, the task of ascribing ordinary meaning is not as simple as it first appears. What is meant by the "ordinary" or "natural" meaning of a word may differ depending on whether one consults a dictionary or the man on the street. Words may have legal meanings but also "ordinary" meanings. The natural meaning of a word can also vary greatly depending on the context in which it appears. "Context" in this regard may require the one interpreting the legislation to consider the immediate context of the sentence within which the word is used; the other sub-sections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including on occasion Law Reform Commission or other reports; and perhaps even the mischief which the Act sought to remedy. With each avenue of remove, the natural meaning of the word may, or may not, begin to shift. As eloquently put by Black J. in People (Attorney General) v. Kennedy [1946] I.R. 517 ("People (AG) v. Kennedy"):

> *'A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*
>
> *If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given a quite different meaning when viewed in the light of its context.' (p. 536)".* (emphasis added)

87. I am satisfied that it is proper to interpret the provisions of s. 3 of the Act of 2003 disjunctively and that the measure may be aimed at either the rational management of fisheries or for the purposes of protection, conservation or sustainable exploitation. To read the section in a manner submitted by the respondent, in my view, would mean either that the expression "*rational management of fisheries*" is otiose, or, if the words are to be given meaning, that measures made for the purposes of protection, conservation or sustainable exploitation may only be achieved when they also consist of measures which have the aim and effect of the rational management of fisheries. Such interpretation, in my view, would render the disjunctive meaningless and would result in a failure to give the sub-section its full meaning and effect. It is a presumption of statutory interpretation that words must be given meaning and that words used by the Oireachtas are not superfluous and I am therefore unable to conclude that the expression "*rational management of fisheries*" is qualified by the application of the principle of noscitur a sociis to the extent that pursuing the objective of rational management of fisheries is only permissible in the context of the protection, conservation or allowing the sustainable exploitation of living marine aquatic species.

88. While not determinative, I am fortified in this conclusion by comparing the wording of the section before its amendment and its wording thereafter, the former making no express reference to the "*rational management of fisheries*", whereas the latter does. Section 3(3) of the Act of 2003, prior to its amendment in 2006, provided:-

> *"A Policy Directive given under subsection (2)(b) may require certain prohibitions or conditions to be imposed in relation to sea fishing for the purposes of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species."*

89. It is clear that while later amending legislation may not be called in aid in the interpretation of earlier legislation, the converse is not necessarily the case as is evident from the above emphasised section of the observations of McKechnie J. in *DPP v. Brown* [2019] 2 I.R. 1.

90. But even without recourse to a comparison between the wording of the provisions before and after the amendment, I am satisfied that the provision under consideration when construed in accordance with its literal interpretation requires that it be read disjunctively.

91. The applicants maintain that the section does not give the respondent a *carte blanche* to introduce measures which serve general economic aims; but in my view, and subject to the issues of *rationality and proportionality* referred to below, it is difficult to see that the Policy Directive is not one which has at least the aim, if not the effect, of rationally managing fisheries by causing the imposition of conditions to sea boat fishing licences which constitute measures to control and regulate the use and operation of the applicants' sea fishing boats, in this case, by the exclusion of the larger vessels from within the 6nm zone.

92. Further, assuming that the court is incorrect and that the section must be read conjunctively, having considered the extensive documentation opened to the court, and again subject to a consideration of the issues of rationality and proportionality, I am satisfied that the Policy Directive is one which is aimed at providing for measures to control and regulate the capacity, structure, equipment, use and operation of sea fishing boats, not only for the rational management of fisheries but also for the protection, conservation or permitting the sustainable exploitation of living marine aquatic species. In this regard, the potential effects of the exclusion of larger trawlers from inside the 6nm zone, are addressed in the consultation document in some detail under headings such as "*Risk of Environmental Impact from Trawling" and "Protection of Fish Recruitment and Stock Components*". I have addressed these at paras. 54 and 59 et seq and do not require to be repeated.

93. In his reasoning the respondent expressed the view that such benefits will ensure that exclusion of the larger trawlers "*will provide ecosystem benefits, including for nursery areas and juvenile fish stocks*." A principal criticism of the applicants is that such stated ecosystem benefits are at best aspirational, are not evidence based and that the respondent has failed to carry out appropriate surveys to substantiate such claims. In essence the argument is that, whatever may have been stated, the Policy Directive will

not achieve such objectives and that while the policy measure is stated to be directed at husbandry objectives, on close analysis this falls away and the substance of the directive is to facilitate redistribution of wealth from larger to smaller boats which goes beyond the rational management of fisheries. In my view, whether the Policy Directive is capable of achieving the aims addressed in the consultation document in the long term is not to be conflated or confused with whether the adoption of such a measure with such aims comes within the statutory power of the respondent in the first instance. Perhaps such arguments are best considered in connection with, and linked to, the rationality and proportionality arguments which are considered below. Before turning to the rationality/proportionality of the measure, I now address the contention that the measure is not one made in furtherance of national and EU policy as required by s. 3(3) of the Act of 2003 as amended.

(b) National Policy

94. The respondent submits that a stated policy reason for the Policy Directive is to bring about the sustainable development of inshore fisheries to ensure that smaller inshore boats are given new opportunities for commercial fishing, a policy which was contained in the programme for government. Counsel for the applicant, Mr. Reilly B.L. reserved his position in relation to the admissibility of the Programme for Government as it was not placed before the court on affidavit.

95. It is also true that it is not expressly referred to in the respondent's decision or in the reasons for his decision, nor is it expressly referred to in the consultation document. The Programme for Government, however, is a document which was in the public domain and of which the respondent was no doubt aware, but even if such policy had not been expressly stated in such programme, in my view, the respondent was entitled to adopt such policy if and when he chose to so do. It seems to me to be correct, as submitted on behalf of the respondent, that it was open to the respondent, by virtue of a Policy Directive itself, to adopt a new national policy objective. I do not believe that the failure to expressly refer to a particular policy outlined in a Programme for Government or other document could, on its own, render the Policy Directive *ultra vires*. In my view, it is within the powers of the executive, or arm of the executive, to make or alter its policy on an evolving basis. That it has not previously expressly stated such policy in any document, or otherwise, does not in my view deprive the executive of its entitlement to adopt or change a policy from time to time as it may decide. That is what government is elected to do. Whether it is perceived that those policies are correct or incorrect is a matter for the electorate and not for the courts. The consequences of the adoption of a new policy or the alteration of policy from one previously expressed, it seems to me, is also a matter for government and on which, if judgment be required, it ought to be made by the electorate and not by the courts. It follows that the respondent was entitled to adopt a policy in the context of the steps taken in advance and/or in the making of the Policy Directive itself. However, and importantly, it must also be the case that should measures adopted in pursuance of such policy unlawfully interfere with established and legally protected rights, then the courts are entitled, if not obliged, to intervene.

96. The respondent expressed the view in his decision published in December 2018 that the Policy Directive will benefit small scale and inshore/island fishermen This is consistent with that which was stated in the Programme for Government. In my view this is a policy which the respondent was entitled to pursue when making the Policy Directive and I could not conclude that the pursuance of such policy is not permitted by law.

(c) Compliance with the CFP or other international obligations

97. The Policy Directive must also comply with the requirements of the CFP or other international obligations. In this regard it is relevant to note that recital 19 to Regulation 1380/2013 states as follows:-

> *"Existing rules restricting access to resources within the 12 nautical mile zones of Member States have operated satisfactorily, benefiting conservation by restricting fishing effort in the most sensitive part of Union waters. Those rules have also preserved the traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent. Those rules should therefore continue to apply. Member states should endeavour to give preferential access for small-scale, artisanal or coastal fishermen."* (emphasis added)

98. Although not the subject of detailed analysis or argument at hearing, I am nevertheless satisfied that, subject to the contention that the respondent has not complied with the notification and consultation requirements of articles 19 and 20 of the CFP, the Policy Directive is consistent with the above stated objective insofar as the policy pursues preferential access to the 6nm zone for small-scale, artisanal or coastal fishermen.

99. The principal allegation of failure to comply with the requirements of the CFP is one of failure to comply with obligations in respect of notification and consultation. It is that issue to which I now turn.

Has the measure been adopted in compliance with the requirements of the Common Fisheries Policy

(a) The arguments

100. Article 5 of Regulation 1380/2013 provides that EU fishing vessels shall have equal access to waters and resources in all Union waters other than those referred to in subsections 2 and 3 and subject to measures adopted under Part III. Part III is entitled "*Measures for the Conservation and Sustainable Exploitation of Marine Biological Resources*". Articles 19 and 20 are contained in Title IV of Part III which is entitled "*National Measures*".

101. Article 19 of Regulation 1380/2013 provides:-

> *"1. A Member State may adopt measures for the conservation of fish stocks in Union waters provided that those measures fulfil all of the following requirements:*
>
> *(a) they apply solely to fishing vessels flying the flag of that Member State or, in the case of fishing activities which are not conducted by a fishing vessel, to persons established in that part of its territory to which the Treaty applies;*

(b) they are compatible with the objectives set out in Article 2;

(c) they are at least as stringent as measures under Union law.

2. A Member State shall, for control purposes, inform the other Member States concerned of provisions adopted pursuant to paragraph 1."

102. Article 20 provides as follows:-

"1. A Member State may take non-discriminatory measures for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within 12 nautical miles of its baselines provided that the Union has not adopted measures addressing conservation and management specifically for that area or specifically addressing the problem identified by the Member State concerned. The Member State measures shall be compatible with the objectives set out in Article 2 and shall be at least as stringent as measures under Union law.

2. Where conservation and management measures to be adopted by a Member State are liable to affect fishing vessels of other Member States, such measures shall be adopted only after consulting the Commission, the relevant Member States and the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, inter alia, that those measures are non-discriminatory. For the purpose of such consultation, the consulting Member State may set a reasonable deadline, which shall, however, not be shorter than two months.

3. Member States shall make publicly available appropriate information concerning the measures adopted in accordance with this Article.

4. Where the Commission considers that a measure adopted under this Article does not comply with the conditions set out in paragraph 1, it may, subject to providing relevant reasons, request that the Member State concerned amends or repeals the relevant measure."

103. The applicants' arguments may be summarised as follows:

a. By virtue of the Sea Fisheries (Amendment) Act 2019 ("*the Act of 2019*") the Policy Directive applies to vessels from Northern Ireland, therefore, the State was obliged to inform other member states of the provision and, pursuant to article 20(2), the Policy Directive could only have been adopted after consulting with the Commission, the relevant Member States and the relevant advisory council in advance.

b. The requirement to consult clearly applies because the Policy Directive is a measure which has the effect of conserving and managing fish stocks.

c. They have a patent interest in the outcome of any consultation or publication process. Any argument on standing which relies on the doctrine of *jus tertii* cannot succeed because the provisions of articles 19 and 20 are part of a Regulation which, in accordance with the provisions of Article 288 of the TFEU, is binding in its entirety and directly applicable. The CFP regulations are part of the domestic law of Member States and so long as their provisions are sufficiently clear, precise and certain, there is no reason why they are not capable of being of direct effect and relied upon by individuals and enforced before national courts.

d. While it may be that had the Act of 2019 never been enacted then this obligation would not have arisen, nevertheless, this court should not endorse a situation whereby the respondent ignores his obligation under the Regulation, thereby nullifying its provisions concerning consultation. Given the enactment of the Act of 2019, the obligation of the respondent to consult and/or notify is clear and has not been complied with. The effect of the Policy Directive is to impose a licencing condition on Irish registered boats. The Minister does not and cannot control the issuing of licences to Northern Irish vessels and therefore it is suggested that it is not clear how a Northern Irish vessel can "*comply with the obligations*" set out in the Policy Directive. If this is correct, then it is submitted that the effect of the Act of 2019 may be that there is no enforceable prohibition on Northern Irish vessels greater than 18m OAL trawling in the 6nm zone leading to yet a different issue being that the Policy Directive is in breach of article 20 of Regulation 1380/2013 insofar as it is not a non – discriminatory measure.

104. The respondent in reply, maintains that:

a. The Policy Directive is not a measure for the conservation and management of fish stocks in Union waters and therefore the provisions of article 19 do not apply. Although it may also have some conservation benefits it is an environmental measure which has benefits for ecosystems and an economic benefit.

b. The applicants do not have *locus standi* to challenge the legality of a measure which does not affect them and that the obligation to consult, should it arise, is one of EU law in respect of which the applicant does not enjoy *jus tertii*. They have no relevant interest which enables them to claim standing on this issue. Any contention that the Policy Directive will unlawfully affect Northern Ireland vessels is irrelevant to the applicants since none of them owns or operates such a vessel and that the applicants, not being the government of the United Kingdom, the European Commission or a relevant Advisory Council, are not entitled to invoke any default by Ireland towards those parties. It is also submitted that this court should not adjudicate on a claim regarding the compatibility of the Policy Directive with the CFP Regulations and that if there is a breach, it is a matter for the Commission.

c. In the alternative, while substantive EU law must be enforced by national courts, procedural issues such as the application of the statute of limitations, and *jus tertii* are justifiably and acceptably matters within the jurisdiction of national courts.

d. Even if the applicants had vessels operating out of Northern Ireland, the Regulation does not confer any rights on them which are capable of being vindicated before the national courts.

e. The measure is not one which is "*of direct and individual concern*" to the applicants.

f. When the Policy Directive was made by the Minister, the Act of 2019 had not yet been enacted. Thus, at the time of the adoption of the policy on 5 March 2019 it could not have affected vessels from Northern Ireland and therefore the requirements of the CFP Regulation were not engaged. The arrangement only came into existence following the enactment of the Act of 2019 and no case is made that the Act of 2019 is contrary to European law.

g. If consultation was required at EU level, nothing in the Regulation suggests that a failure to consult or to comply with any requirements of the articles of the regulation in question, renders, *ipso facto*, the Policy Directive invalid. Implicit in the wording of article 20(4) is that the measure retains validity until such time as the Commission takes action. It is not a matter for a national court to declare a Policy Directive invalid because there was no consultation at European level. A corollary and supporting argument is that, in accordance with the provisions of national law, it does not follow that because there has been a breach of an Act that everything that follows in consequence of its breach is invalid.

Background - The *Voisinage* Arrangement

105. The background to this argument lies in an arrangement which existed between the authorities in Ireland and Northern Ireland, known as the *Voisinage* arrangement, whereby vessels from Northern Ireland and Ireland were entitled to fish in each other's 6nm zone. This allowed reciprocal access to each other's waters on the basis of equal treatment and compliance by vessels from each jurisdiction with the rules applying to local vessels. In *Barlow v. Minister for Agriculture* [2016] IESC 62 it was held that fishing by Northern Ireland boats within the State's 6nm zone was not permitted by law. In response to this decision, the Oireachtas enacted the Act of 2019 which came into force on the 23rd April, 2019. This has the effect of substituting s. 10 of the Sea Fisheries and Maritime Jurisdiction Act 2006 by providing as follows:-

"10. (1) Subject to section 9 and subsection (2), a person on board a foreign sea-fishing boat shall not fish or attempt to fish while the boat is within the exclusive fishery limits unless he or she is authorised by law to do so.

(2) A person who is on board a sea-fishing boat owned and operated in Northern Ireland may fish or attempt to fish while the boat is within the area between 0 and 6 nautical miles as measured from the baseline (within the meaning of section 85) if, at that time, both the person and the boat comply with any obligation specified in subsection (3) which would apply in the same circumstances if the boat were an Irish sea-fishing boat.

(3) The obligations referred to in subsection (2) are the following:

(e) an obligation specified in a Policy Directive given by the Minister under section 3(2)(b) of the Act of 2003;

(f) such other obligation as the Minister may specify in regulations under section 3."

Thus, from the date of the decision of the Supreme Court until the enactment of the Act of 2019 on the 23rd April, 2019, Northern Ireland vessels were not legally permitted to fish in Ireland's 6nm zone. It is accepted in the pleadings that by virtue of the provisions of the Act of 2019 any Irish law providing for fisheries management measures in the 6nm apply by default to Northern Ireland vessels wishing to fish in Ireland's 6nm zone.

(b) Discussion and Decision

Conservation of Fish Stocks

106. It seems to me, as a matter of first principle, that if the respondent is correct that the Policy Directive is not a measure which was adopted for the conservation of fish stocks in union waters within the meaning of article 19 or a non-discriminatory measure for the conservation in management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within the meaning of article 20, then those provisions are not engaged.

107. Article 19 is directed at the adoption of measures by Member States for the conservation of fish stocks in union waters. Where such a measure is adopted, then an obligation is placed on the Member State, for control purposes, to inform other Member States and to make the information publicly available. Article 19 concerns measures taken by a member state which are applicable only to fishing vessels flying its flag or to persons established in its territory. On my interpretation, the taking of such measures is not confined to any particular geographical area and this is explicable on the basis that the measures adopted must be at least as stringent as measures under European union law.

108. Article 20 applies to non-discriminatory measures for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within the 12nm zone. It seems to me to be correct, as submitted by Mr. McCann S.C., that the notification requirements under article 20(2) apply only to measures which are directed at the conservation and management of fish stocks and that the measure captured by article 20 is one for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within the relevant zone. Therefore, I am satisfied that it is correct to state that if the measure is not one which is directed towards the conservation and management of fish stocks, the provisions of the Regulation do not apply to it.

109. Perhaps it is best to consider this issue by addressing first the reasons advanced by the respondent for the adoption of the Policy Directive against the backdrop of the stated purpose of the review as outlined in the consultation document.

110. In the reasons advanced by the respondent in his decision of the 20th December, 2018, he described the case for the exclusion of trawling by large vessels in coastal waters inside 6nm as being compelling. He continued:-

> *"There are sufficient fishing opportunities for these vessels outside of six nautical miles. These actions will provide ecosystem benefits, including for nursery areas and juvenile fish stocks. These changes will also benefit small scale and island fishermen who exclusively rely on inshore waters."*

It is also stated that *"As the sprat fishery is concentrated inside the six nautical mile zone the transition period will allow those vessels involved in sprat fishery time to transition to other fishing activities".*

111. A preliminary examination suggests that the Policy Directive operates in a manner which has the effect of imposing licensing conditions of vessels of a particular size regarding the fish which they may catch and the areas where they may fish, rather than the type or amount of fish which they are entitled to catch, with the exception of the derogation provision in respect of sprat. Those limits are set out in the respondent's decision, rather than in the Policy Directive itself. But the purpose of the transition period, as stated and acknowledged in the Ministerial decision, is to afford time to those vessels involved in sprat fishing to transition to other fishing activities. Therefore, in my view, it cannot be said that in so far as the expressly stated policy of the Directive is concerned, it is a measure which is designed for the conservation of fish stocks. While it may have a conservation effect, I must accept the distinction drawn by counsel for the respondent between a conservation measure and a measure which may have conservation effects. That it is not an overt conservation measure is best exemplified by the fact that no legal limit is placed on the amount of sprat that can be caught within the six nautical mile zone, albeit by smaller vessels. That there may be practical limitations on those vessels being able to catch a similar amount of sprat to the larger vessels does not, it seems to me, amount to a legal limitation or render the Policy Directive a measure for the conservation of fish stocks.

112. I believe that this conclusion is reinforced by an examination of the consultation document and, in particular, the purpose for which it was stated to have been drawn up and circulated. The key points to the review were stated to concern restrictions on vessel size and the options set out were directed at vessel length. It is true, as the applicants point out, that a considerable number of other options were discussed in the briefing note which were not expressly outlined in the consultation document and in respect of which they did not have access prior to this case commencing. But it was also expressly stated that other options might be considered; and, further, none of those options were adopted. When viewed in its entirety, including the content of the consultation document, the reasons advanced in the decision and the wording of the Policy Directive, I am satisfied that the Policy Directive by determining where vessels of particular lengths may fish, does not place a limitation on the amount of fish which might be caught and which are otherwise subject to quotas separately implemented.

113. I am satisfied that the provisions of the articles 19 and 20 of Regulation 1380/2013 are not engaged and even if the applicants have the necessary *locus standi* to advance this point, they cannot succeed on this ground.

114. With regard to whether the Policy Directive is a non-discriminatory measure within article 20, while it is true that the authorities in this State cannot impose conditions attached to licences issued in other States, it seems to me that the method of enforcement is through criminal sanction, as provided by s. 10(4) of the Act of 2019 that "*(4) A person who contravenes subsection (1) commits an offence*". It does not therefore, appear to me, on the face of it that it is, as suggested by counsel, a non-discriminatory measure, even if it is open to the national court to decide this.

115. Finally, in the event that the court is incorrect in its analysis of the above points, insofar as the argument based on chronology i.e. that when the Policy Directive was made fishing vessels from Northern Ireland had no right to fish in Ireland's 6nm zone. It seems clear that when the Minister made the Policy Directive on the 1st March, 2019 the owners of vessels registered in Northern Ireland who wished to fish in Irish waters had no entitlement to do so. Temporally, that position changed not by the making of the Policy Directive, but through the subsequent enactment of the Act of 2019 approximately one month later, and through the combined effect of both measures. If the Act had not been passed, then this issue could not have arisen.

116. While this issue has been raised, the court has not had the benefit of detailed submissions on this point, nor has it been referred to authority on the meaning of the words "*adopt*" or "*take*" as employed in articles 19 and 20 of the CFP Regulation. Nevertheless, it appears that ss. 16 (3) and 16 (4) of the Interpretation Act 2005 provide that "*every provision of a statutory instrument comes into operation at the end of the day before the day on which the instrument is made…*" but:-

> *"…where a statutory instrument or the provision of a statutory instrument is expressed to come into operation on a particular day (whether the day is before or after the date of the making of the statutory instrument and whether the day is named in the instrument or is to be fixed or ascertained in a particular manner), the statutory instrument or provision comes into operation at the end of the day before the particular day."*

117. The Policy Directive makes provision for the imposition of a condition on licences as and from the 1st January, 2020. In my view, absent authority to the contrary, while the Policy Directive results in the *imposition of the relevant conditions* as and from the 1st January, 2020 it does not follow that it did not *come into operation* until that date. Nothing in the Policy Directive provides for the postponing of its *coming into operation*. It seems to me that the future effect of a measure is not necessarily equivalent to the date that it comes into operation. Therefore, I must conclude that the respondent is correct that if there are grounds for complaint regarding a breach of the provisions of articles 19 and 20 of CFP Regulations, it is not the Policy Directive, at least not on its own, which gives rise to cause for such complaint.

Rationality, proportionality, fair procedures, duty to give reasons and their relationship to the nature of the rights allegedly infringed.

118. As stated, there is a degree of overlap between a number of strands of the challenge brought by the applicant, and the respondent's response thereto, in relation to reasonableness, proportionality, fair procedures and the duty to give reasons. The authorities upon which the applicants rely suggests an increased recognition of a duty to give reasons particularly where constitutional rights are concerned. The applicants contend that their right to earn a livelihood and their property rights will be significantly impaired by the Policy Directive. In those circumstances it is submitted that in accordance with authority the duty to give reasons is at the higher end of the scale.

Rationality and proportionality

119. It is submitted that in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 the Supreme Court recognised that a proportionality test can be used as a means of challenging an administrative decision in circumstances where fundamental rights are in issue. Denham J. observed that a consideration of the reasonableness test as articulated in *Keegan v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 ought to include the implied constitutional limitation of jurisdiction of all decisions which affect rights and duties and that the decision-maker should not disregard fundamental reason and common sense in relation to its decision. She observed at para. 180 that:-

> *"When a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision:- 1. (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations, 2. (b) the rights of the person must be impaired as little as possible; and 3. (c) the effect on rights should be proportional to the objective."*

120. It is thus contended that the means adopted in the measure must be rationally connected to the objective, must not be arbitrary and must not be unfair. To a large extent, the applicants rely on Dr Shotton's report to advance the case of irrationality and disproportionality. While it may be that the concept of rationality as historically understood, is to be considered different to that of proportionality, it ought to be borne in mind that we are here concerned with the remedy of judicial review. In *Donegan v Dublin City Council* [2012] IESC 18, McKechnie J. observed at paras. 130 *et seq*:-

> *"130. The Council have submitted that the Supreme Court decision in Meadows (para. 57 supra) has notably changed the scope of judicial review, and that therefore, notwithstanding that such remedy may not have been a sufficient safeguard in the past, it is now clear that it is. In particular, it is argued that Meadows has incorporated a consideration of proportionality into judicial review, where an administrative decision bears on constitutional or Convention rights.*
>
> *131. In this regard the decision of Murray C.J. at p. 723 should be noted:-*
>
> > *'In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to*

the principle of proportionality in determining those issues…. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness, I do not find anything in the dicta of the Court in Keegan or O'Keefe which would exclude the Court from applying the principle of proportionality where it could be considered relevant.'

It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of Keegan and O'Keeffe, rather than as an entirely novel criterion. As Fennelly J. noted at p. 817 in the same case:-

'Two fundamental principles must, therefore, be respected in the rules for the judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected.'

Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact.

132. In light of the comments already made as to the adequacy of judicial review, I would not find that Meadows has substantially altered that position in this regard."

Dr Shotton's Report

121. Dr Shotton describes the purpose of his paper as being an analysis to assess the justification for the Policy Directive, the fundamental issues being whether the points addressed in the consultation document are:-

i. unreasonable in the context in which they are evaluated;

ii. whether they failed to take into account relevant information or whether the respondent has undertaken reasonable efforts to obtain relevant information; and

iii. whether the consultation document suffers from flaws in their contribution to the decision-making process.

122. Submissions made to the respondent were not considered by Dr Shotton because, he states, the consultation document made no reference to such material or if/how it may have been used to establish the respondent's Policy Directive. He is critical of the BIM and MI reports in a number of respects, particularly where they are based on certain assumptions which he claims are without supporting evidence. A source of difficulty, in his view, is the absence of explicitly articulated management objectives against which assertions and implied benefits of the consequences of the Policy Directive may be assessed. He states that many of the suggested benefits reflect popular perceptions better described as advocacy rather than evidence based. While he has prepared a very

detailed and tabulated section by section critique of the consultation document and the BIM and MI reports, his criticisms may be summarised as follows:

i. The salient feature of the consultation paper is that it fails to link many arguments it makes to the options considered;

ii. The consultation document does not specifically identify the respondent's policy management objectives. It claims that a number of potentially beneficial outcomes may arise from withdrawing fishing privileges for trawlers greater than 18m, but the outcomes are general to most fisheries within and beyond Irish seas. The absence of an expressly articulated policy objective renders it difficult, if not impossible, to evaluate the effectiveness of the other alternative options proposed.

iii. Certain claims made in the consultation document are contradictory and other claims of potential benefits could be achieved independently of the management options assessed.

iv. Several of the claims are contrary to the understanding of the fishing industry and while many identified aims would be welcome, they bear little relationship to the management options discussed.

v. There will be no additional benefit to the less than 12m class and he describes as untenable the assumption that an additional 60 vessels in the less than 18m length class will be available to participate in the fishery for sprat no longer caught during the three-month late autumn/early winter season.

vi. The BIM report restricted its analysis to consideration of catch and the expected revenue of the vessel classes of concern, but its conclusions assume that if less than half of the vessels' catch caught within the zone, and if that vessel be excluded from fishing within the zone, then an equivalent catch can be taken from outside the zone, suggesting no loss of revenue but a relocation of fishing effort. This is an untested and untestable assumption, in his view. He suggests that the report does not address the possibility that fish left uncaught would move beyond the 6nm limit before capture and thus be unavailable to vessels operating within the 6nm.

vii. The underlying reports illustrate that in general the over 18m length vessels target low value fish in the 6nm zone whereas higher value fish are targeted by the smaller vessel. The BIM report fails to provide information on such matters as the catch of nephrops by polyvalent pair trawlers in the over 18m class and its conclusion that there will be negligible impact on over 18m vessels is disingenuous in its comparison of the possible revenue reduction compared to the total revenues from this class for all Irish waters with no account for impact on catch per unit effort beyond 6nm.

viii. The BIM report failed to identify the individual fishing vessel revenues and given the limited numbers, this would have been a straightforward exercise. The failure to conduct this analysis is described by him as baffling, given the impact on the affected vessels. Further, this report assumes that all landings by the 10-12m class are from within the 6nm zone which may not be the case. Depending on the weather, these vessels are capable of working outside the 6nm zone and conclusions based on incorrect assumptions would overestimate the importance of the area within the 6nm zone. This assumption was capable of easy verification, which was not done.

ix. Sprat is mainly caught within the 6nm zone and comparisons with revenue from other fisheries beyond the 6nm zone are specious in terms of the vessels' earning potential.

x. The MI reports fail to identify the areas where smaller vessels target species. This information would inform the actual competition for resources between the two classes, or whether their activities are complementary.

xi. It does not follow that exclusion of vessels capable of fishing in exposed areas within the 6nm zone will result in smaller vessels being able to do so and no specific information is provided on the activities within the specific areas where the excluded vessels now fish. Further, no specific information is provided on the seasonal fishing operation of the over 18m class or seasonal distribution effort by the different vessel classes.

xii. Pelagic trawling by the applicants' two vessels is concentrated in the south west of Ireland at a time of little other activity by other fishing boats and a reasonable conclusion is that given the cessation of fishing for sprat by these two vessels, there would be no additional benefit to the less than 12m class, i.e. that 18.2% of the gains that are envisaged for the less than 18m class from cessation of fishing by the over 18m class would not happen, notwithstanding the assumption that an additional 60 vessels in the less than 18m class would be available to participate in a fishery for sprat no longer caught during the three month late autumn/early winter season, off the south west of Ireland.

xiii. No claim is made in the text of the policy document that Ireland's obligations in respect of marine environmental protection is inadequate and no recognition is given that all forms of food production affect the environment, but that fishing is increasingly being recognised as a more environmentally benign form of food production. No evidence is presented of the claimed improvement in protection of fish recruitment and stock components or as to why this would happen, and appropriate analysis was not conducted, nor was data available, in respect of the claim that nursery grounds would be protected. Similar criticisms are made of how issues such as gear conflict and improved management of inshore waters are considered in the consultation document.

xiv. Dr Shotton is similarly critical of the suggested benefits of conservation and environmental impact and socio economic impacts which might occur on the exclusion of the over 18m trawlers. He criticises the lack of explanation, information and evidence to support these conclusions.

xv. The consultation document displays unreasonableness and fails to take into account relevant information, fails to display that reasonable efforts were made to obtain relevant information and there are flaws in their contribution to the decision-making process.

xvi. The only way in which to prevent impacts on local ecologies is to ban fishing by all classes of fishing vessels and not just particular classes, an option which was not considered.

xvii. He also set out a number of alternative and possible management options that have been implemented elsewhere to address the objectives implied in the consultation document such as area seasonal fishing closures, area gear restriction, species specific totally allowable catches and minimum fish size regulations.

Rebuttal reports

123. The respondent relies on the rebuttal reports prepared in the context of these proceedings by BIM (5 November 2019) and by the MI (31 October 2019). BIM state that the original report in 2017 was an economic impact assessment of the fishing fleet vessel length segments exclusion from the 6nm zone. It was requested to carry out a specified socioeconomic impact assessment on two length classes and was provided with the data to carry this out. Therefore, the criticisms by Dr Shotton of the BIM report are of matters which lie outside its scope. It was not an analysis at the level of individual vessels and BIM did not have individual vessel data. Reliance was placed by BIM on the MI data and even if such data was available at the individual vessel level, the required analysis is deeper than merely interrogating a database. The report did not assess biological or technical aspects of the fisheries within or outside the 6nm zone, as this fell under the remit of the Marine Institute. Therefore, the possibility that the fish left uncaught would move beyond the 6nm limit before capture or that fish stocks beyond the 6nm limit sustained increase fishing mortality was outside the scope of that report. Further, the assumption of which Dr Shotton was critical was made following the logic that if most of the landings of the species is caught outside the 6nm zone then the minority of landings from within the 6nm zone could be replaced with landings from outside the zone. As this assumption contained an element of doubt, impact results were described for both scenarios - using the assumption and not using the assumption. Nevertheless, it is stated that the logic remains. Thus, for example, if 69% of the landings of black sole and 87% of the landings of herring are from waters outside the zone then it is highly probable that the remainder could also be caught outside the zone. It is pointed out that the 2017 report did not state that the exclusion of the greater than 18m length class would directly benefit the smaller length classes.

124. The Marine Institute responded by stating, *inter alia*, that the Policy Directive was not a panacea for the problems faced by the small-scale fisheries sector in Ireland but represents a first step in providing the conditions and environment in which further policies can be developed. It came at an opportune time for the small-scale fleet which published its own strategy for development in 2019. Further, it is incorrect to critically assess the consultation document in isolation. The submissions from the consultation provided material as did the broader context and history of management of inshore fisheries in the State. I should observe that Mr. Gordon S.C. points out, however, that there is no reference to such considerations in the respondent's decision. Further, the MI observed that the submissions received were significantly in favour of the proposed change and to the extent that there is a criticism of the absence of evidence, what has been suggested by the applicant is that what should have been carried out is a full assessment of the cost benefits went beyond the scope of the consultation paper, and given the limited scale of the proposed changes would not be justified as they did not represent a major upheaval to how fisheries operate in Irish waters. The applicant, however, suggests that this is internally contradicted by a further statement at p. 2 of the MI rebuttal that the Policy Directive "*represents a significant addition to these existing measures and is probably the most important Policy Directive with respect to the potential to manage fisheries in inside waters, in recent years*".

125. Counsel for the respondent submits that if the test which the court should apply is that it is necessary to establish a confirmed connection between the exclusion of larger fishing vessels and economic benefits, it would be very difficult for government to innovate in terms of policy. He draws an analogy with the proposals in respect of climate change. They may or may not work and may not be capable of confirmation. By way of illustration he refers to historical measures taken in the field of education in the 1960s. It was not then clear that an economic and social benefit would follow. Mr. McCann S.C. submits that the respondent and his officials would be open to greater criticism if they had sought to identify what would happen, as opposed to possibilities or potentialities.

Decision on Rationality

126. The test for rationality, as historically understood, is not dependent upon whether one side's argument is more persuasive than the other. The court is not here concerned with a merit-based review. The test per *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 is whether the Minister had material before him on which he could make the decision which he did. When the Minister is adopting a policy measure, it seems to me that it is open to him to consider potential benefits and to rely on such material and the available data for this purpose. I am not satisfied, given the material which was before the respondent, including the reports to which I have referred in detail in this judgment, the identified proposals and options and the objections received, could I conclude that there was no material on which he could base the decision which he made. I am unable, therefore, to conclude that it was irrational, in the *O'Keeffe* sense, for him to come to the conclusion which he did. Further, insofar as it is contended that the material before the respondent was out of date, it is clear from the evidence that he operated on the basis of the most up to date data available to him. I am satisfied that he was entitled to rely on such data

despite the criticisms advanced by the applicants. While the applicants are very critical of the assumption in the report underlying the basis for the conclusion that there will be no net impact, the matter was presented to the respondent on an alternative worst case basis that the assumption might not be so. The respondent therefore had material before him which indicated the level of impact in such a scenario and it is nowhere suggested that the data in the MI reports were inaccurate. Indeed, it may also be said that certain of the material before the respondent, particularly data contained in the MI reports, is relied upon by the applicants, in support of aspects of their case. Data and conditions may change and it always remains open to the respondent to adopt a change in policy in the light of new or updated information. The respondent clearly had information before him of the level of potential impact on the applicant's vessels if he chose the option which he did. That he ought to have conducted other, further, or more detailed studies does not appear to me to detract from this fundamental fact. Whether the failure to do so amounts to a disproportionate interference with the applicants' rights, however, it seems to me, ought to be considered in the context of the applicants' claim that the measure should be condemned on grounds that it is disproportionate. In so far as the applicant's advance their claim based on unreasonableness to the extent that the measure constitutes a disproportionate interference with their rights and to the extent that such a test was adopted in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, it seems to me that this must also involve a consideration of the nature and extent of the rights which are alleged to have been disproportionately affected and the level and extent of the alleged impact.

The Nature and Extent of the Rights and the level of impact thereon and *locus standi* - introduction

127. As previously discussed, the respondent does not take issue with the *locus standi* of the applicants to maintain these proceedings simply on the basis that the named applicants are not the companies which own the vessels and in respect of which the licences have issued. Nevertheless, it is submitted that a necessary but not sufficient part of their case is that the Policy Directive will impair their rights by delivering a serious impact to their business. It is submitted that because the applicants or the companies with which they are associated have not shown adequate evidence of impact or loss that they cannot advance claims based on absence of fair procedures, proportionality and the duty to give reasons. The respondent accepts that citizens have both property rights and rights or interests in respect of employment, being the freedom to seek work, but contest that the applicants have any property rights in the fish stocks which are a natural resource belonging to the State. It is submitted that no evidence has been advanced of any loss, or loss of fishing opportunity, sufficient to confer upon the applicants necessary standing to maintain their challenge, in particular on the ground of alleged interference with property rights. The most that occurs is that the applicants may lose some opportunity and it is submitted that this loss is not articulated by them in any clear or reliable way. Further, it is submitted that in the adoption of policy, it is contended that the respondent Minister does not operate by reference to the aggregating of individual interests of citizens or businesses, rather he operates in the public interest.

128. If the respondent is correct in this submission, then it seems to me that this will have significant implications for many of the grounds of challenge advanced by the applicants.

Interest or Right

129. In Mohan v. Ireland and the Attorney General [2019] I ESC 18, O'Donnell J. observed at para. 11:-

> *"Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no actio popularis (a right on the part of the citizen to challenge the validity of legislation without showing any effect upon him or her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims. Rather, in Irish law, it is necessary to show some adverse effect on the plaintiff either actual or anticipated."*

130. O'Donnell J. observed that a declaration of invalidity is a very significant disruption of the legal order which operates in a blunt, and essentially negative way. It removes a law or an aspect of a law but can put nothing in its place. Therefore, permitting a challenge, as in *Mohan*, to the constitutional validity of a piece of legislation should not be taken lightly simply because someone wishes, however genuinely, to have the question determined. Rather it should only be permitted when a person can show that they are adversely affected in reality. Although Mohan concerned a challenge to the constitutionality of legislation, it is difficult to see that any different reasoning could apply to a challenge to a Policy Directive. If it is declared invalid or unlawful, nothing will be put in its place by the court. Nevertheless, it is also important to recall that the court spoke in terms of interests rather than rights. O'Donnell J continued at para. 12:-

> *"Courts do not exist to operate as a committee of wise citizens providing a generalized review of the validity of legislation as it is enacted, nor should courts become a forum for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, re-packaged in constitutional terms. On the contrary, the question of the validity of legislation is treated by Article 34.3.2° as part of the jurisdiction of the Superior Courts only, established under article 34.1, whose function it is to administer justice between the parties. This normally requires a real case or controversy which the parties require (rather than simply desire) to be resolved, in order to establish and justify the court's exercise of jurisdiction, and the possibility of the invalidation of legislation. Accordingly, it is necessary to show adverse effect, or imminent adverse effect upon the interests of a real plaintiff. This has the further benefit, as Henchy J. observed in Cahill v Sutton [1980] I.R. 269, at p. 282,that :-*
>
> > *'normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what must otherwise be an abstract or hypothetical legal argument.'"*
> > (emphasis added)

131. Thus, in accordance with such reasoning, to *enjoy locus* standi the person challenging the measure must establish that he has an interest which has been adversely affected or that such effect is imminent. O'Donnell J. accepted that if, on hearing evidence, the court was satisfied that the impugned provisions had no effect upon a person, let alone on their interests or rights, that would be fatal to the claim proper and also to his standing to bring the claim, unless one of the exceptions to the primary rule of standing could be established.

The Nature of the Right or Interest of the Sea-boat Licence holder and Evidence of Impact thereon

132. In affidavits grounding this application, the applicants aver that their livelihoods will be significantly impacted by the Policy Directive, that their losses will affect their ability to meet commitments to service loans obtained to finance the purchase of the vessels and that the value of their fishing vessels will be diminished. In the case of the *Fiona KIII*, Mr. Kennedy avers that its value will diminish by at least 25%. The value of the catch from the *Fiona KIII* within the 6nm zone was estimated at €500,000 a year, described as a vital part of the income from that vessel. The loss from the *Celtic Quest* effort is stated to be €150,000. It is contended that the applicants would be unable to replace income lost. Mr. Minihane describes the Policy Directive as a huge commercial setback to his fishing business and to the commercial viability of the *Ocean Venture II*, affecting the value of the vessel with the likelihood of a resulting loss in the order of 25% of current income. Further details were provided and expanded upon in the context of an application for an interlocutory injunction in which they sought to restrain and prohibit the respondent from introducing or implementing the Policy Directive.

133. The application was prepared on the 2nd December, 2019 and was grounded on the affidavits of Mr. Kennedy and Mr. Minihane sworn for that purpose on the 29th November, 2019. The applications did not in fact proceed, rather the parties sought an early hearing of the substantive matter, on the basis that irreparable harm had been caused to the applicants and their interests if an injunction was not granted, particularly in the light of the failure of the respondent to confirm through correspondence that he is liable to compensate them in respect of any loss or damage suffered as a result of the introduction of the Policy Directive. Mr. Kennedy averred that the commercial enterprise which he conducted through an unlimited company would suffer very significant loss if he is not allowed to avail of fishing effort within the 6nm zone and that this was confirmed by his accountant. He also averred to the fact that his accountant was of the opinion that during the year 2019, prior to the introduction of the Policy Directive, fishing effort within the 6nm zone generated, or would generate, €400,000, Mr. Kennedy exhibited a letter/report from Mr. Aidan O'Shea, accountant, dated the 28th November, 2019. Mr. O'Shea has not sworn an affidavit. Mr. O'Shea states that Mr. Kennedy, through the company, had purchased the *Fiona KIII* for €5.5 million. It was introduced into the sea fishing fleet in December 2018. To fund the purchase and building of the vessel, the *Fiona KII* was sold. A bank loan of €3.6 million to fund the purchase and construction of the vessel was obtained and the company provided a charge over the vessel as security for the loan. Mr. Kennedy provided a personal guarantee for the loan, which is subject to

covenants regarding turnover and profitability and setting targets which have to be met on an annual basis. Mr. O'Shea reports that the loan is subject to annual review and should those targets not be met; the company will be considered to be in breach of its loan facilities. In that event, the bank could call in the loan. This would have a serious consequence for Mr. Kennedy as it could lead to him having to dispose of the vessel to meet the obligation to the bank.

134. From a preliminary examination of the books and records of Tom Kennedy Fishing Unlimited, Mr. O'Shea confirmed that the *Fiona KIII* turnover for the year 2019 will be in the region of €1.6 million, which is comparable to the turnover previously achieved by the *Fiona KII*. The letter continues:-

> *"During the last three months of the year, the Fiona KIII fishing effort is mainly within six nautical miles of the shore baseline. During that period of time the turnover generated will amount to €400,000. This turnover is a significant part of the financial viability of the vessel in terms of its profitability and its contribution to the overall turnover of the vessel. Should that turnover be lost to the vessel, it will have very serious implications for the company and Mr. Kennedy for the reason set out above. The inshore fishing is also more profitable than the other fishing activities as there are fewer costs involved, the shorter steaming distances incurring fewer costs in particular – so profitability is also disproportionately affected relative to the turnover.*
>
> *I am advised by Mr. Kennedy that the fishing effort lost cannot be replaced because the vessels licences and capacity relate to the fish quota species where additional catches and revenues are not possible, and there are no non-quota species in the vessels area of operation.*
>
> *There are seven crew share fishermen working for the company and their livelihood will be placed at risk.*
>
> *The loss of fishing effort within six nautical miles would also affect the value of the fishing licence and the Fiona KIII and in my opinion the value of same would be reduced by circa 25%.*
>
> *I believe that the commercial enterprise conducted by Mr. Kennedy through his company will suffer a very significant loss and damage should the situation arise whereby he will not be allowed to avail of fishing effort within six nautical miles of the shore baseline."*

135. Similarly, Mr. Minihane exhibited a letter from his accountants, Westboro Partners, signed by Mr. Michael Magee. This letter was prepared on the 26th November, 2019. Mr. Magee has not sworn an affidavit. The level of anticipated loss is addressed. Mr. Magee records that Mr. Minihane is the owner of 33.3% of the shareholding in Ocean Venture II Ltd. The company secretary and another director are equal shareholders. Westboro Partners carried out a review of the trading results for the three years to the 31st December,

2018 and state that they had identified that the turnover attributed to the fishing in the last three months of each year from fishing effort within six nautical miles would have been €1,446,623, being €507,277 to the year ending the 31st December, 2016, €389,763 in respect of the year ending 31st December, 2017 and €549,583 up to the year ending December 2018. Mr. Magee states that this represents approximately 21% of the turnover and catch of the vessel and the loss of this income would have a detrimental effect on the overall profitability of the company. He also advises that the cost value of the Ocean Venture II Ltd. being carried in the accounts to 31st December, 2018 was €5,306,550 with a balance outstanding to the bank on the loans pertaining to borrowing on its funding being €2,810,427.

136. Again, somewhat similar to Mr. Kennedy's situation, Mr. Minihane's company borrowings from the bank were secured on the vessel by way of charge from the company and a fixed and floating charge over all other assets of the company. Mr. Magee reports that these borrowings are also secured by personal guarantees from the three shareholders and that directors' loans in the company have been subordinated by the bank, as the bank required that the company maintain a minimum debt service cover ratio of a certain amount at the end of each financial year until the facility is repaid in full. This loan is subject to an annual review and the annual capital repayments are €375,000. Interest is also being paid on an annual basis of €80,000 approximately. The profitability and turnover of the company is monitored by AIB. The letter continues:-

> *"Should the turnover generated from fishing within six nautical miles be lost this would have a significant impact on the company's profitability. I am also concerned that this could give rise to difficulties with the loan arrangements and targets set by the bank on an annual basis for the performance of the vessel. Should these loan repayments not be met then there is a risk that the loan will be called in forcing Mr. Minihane and the company to dispose of the vessel to meet its obligations to the bank. This would have a serious impact on the directors' livelihoods and that of other share fishermen who fish from the boat."*

137. Mr. McCann S.C. submits that the applicants have failed to establish a satisfactory basis for anticipated injury and that this is fatal to the claim. He contends that the extent of any prospective loss lacks necessary clarity:

a. No detail is provided of overheads or profits. It is unknown what the companies' profits are or what they would be under the new policy. No data has been made available as to the basis upon which it is claimed that there will be a significant effect on profitability. The vessel is an asset in its own right and no valuations of the vessels have been placed before the court and thus there is no evidence that the value of the vessel has diminished.

b. To the extent that it is claimed that the value of a fishing licence is diminished by at least 25%, the licence is not a tradable commodity and the licence in itself does not actually have a value. It cannot be sold in the marketplace.

c. There are other fishing options and opportunities available to the applicants. While they may have to buy additional gear or to seek technical assistance, there are grants available, which they have not explored.

d. Mitigation has not been addressed or excluded and they have failed to discharge the onus which lies on them to illustrate efforts to so do.

e. The Policy Directive, and thus the licences which the applicants enjoy, do not prevent them from fishing to the limit of the permitted licence or permitted quotas outside the 6nm zone. While most of the fish that the applicants land are subject to quotas, the larger the vessel, the larger the quota. Nothing before the court suggest that these vessels cannot do what the larger vessel, the Atlantic Fisher, can do. There is no suggestion that this vessel operates otherwise than profitably outside the 6nm zone. There is a long list of species that can be fished for outside the 6nm zone.

f. The applicants have made a business decision in relation to the manner in which they organise their fishing. To the extent that they have a particular business model and approach, for example that the *Fiona KIII* targets mackerel in January, says nothing of whether and why this cannot be done in other months from October to December. There is no material before the court to suggest that sprat or mackerel are available or not available at particular times of the year.

g. The court was informed that no quota is available for herring, and that in any event regardless of the policy, the applicant would have had to change their business model, at least in that respect.

138. While counsel for the applicant accepts that the licence itself is not per se tradable, he points out that the tonnage which is assigned to the trawler is tradable and the real value of the business is in the tonnage. The applicants (or at least the companies with which they are associated) maintain that the Policy Directive will have a significant impact on them and their business model. Mr. Kennedy avers that the value of the catch from the *Fiona KIII* within the 6nm zone is approximately €500,000, a vital part of the income for the vessel and a loss for the *Celtic Quest* would come to €150,000, which he would not be able to replace with the requirement for modification such as the changing of gear.

139. Following the conclusion of oral arguments, further affidavits were submitted by the parties by agreement. They were invited to make additional submissions as they may have considered necessary in respect of any matters arising from those affidavits. Neither party made further submissions.

140. These affidavits primarily deal with the financial implications of the Policy Directive, particularly in terms of loss of catch and/or the costs associated with re-rigging their vessels.

141. Ms. Kelly in an affidavit sworn on the 24th February, 2020 provides further detail of quotas and how they are established. Quotas, which may fluctuate considerably from year to year, are set for most fish stocks at EU level in December each year and are strongly informed by scientific advice. Quotas for cod and whiting in the Celtic sea have been cut by 29% and 24% respectively for 2020, compared with 2019; Celtic Sea herring has been effectively closed for 2020 (with a small allocation allowed to collect data for scientific purposes). Quotas for some other stocks increased for 2020, for example haddock in the Celtic Sea increased by 30% and mackerel by 41%. Ms. Kelly avers that all three vessels central to these proceedings are polyvalent vessels, intended to be multi-purpose and are not intended to be dedicated to catching pelagic fish stocks only (such as mackerel, herring or sprat). The Refrigerated Sea Water Pelagic Segment is dedicated to target pelagic fish stocks and the applicants' vessels are not licensed in that segment. She avers that the *Fiona KIII* (and its predecessor the *Fiona KII* up to December, 2018) and the *Ocean Venture II* have fished for whitefish and shellfish as well as pelagic stocks in 2018 and 2019 and accordingly have fishing gear that allows them to target such fish. This gear differs from pelagic fishing gear. She states that in 2018 and 2019 the *Celtic Quest* fished for whitefish and shellfish only. In Ireland, unlike other Member States, fish quotas and fishing opportunities are under the direct management of the Minister. They are not privately owned and quotas made available to a fishing vessel may not be sold, leased or otherwise concentrated in individual or company ownership. There are complex rules set down at both EU and national level that underpin the granting of a fishing boat licence. In order to introduce a new fishing vessel into the fishing fleet, an operator must remove a fishing vessel of at least the same size from the existing fleet. This is measured in terms of the engine power and the tonnage of the vessel. "*Capacity replacement*" which is an entry/exit replacement policy is managed by the Licencing Authority, requires that engine power and tonnage must be replaced at 100% level. The purpose of this rule is to keep the size of Ireland's fishing fleet commensurate with available fishing opportunities. This "*capacity*" is privatised and may be traded. Operators may buy the notional engine power and tonnage of a fishing vessel from an existing operator without purchasing the physical vessel itself. They may then use this notional engine power and tonnage to licence an intended new vessel. On this basis, the fishing vessel from which the capacity was taken will no longer be licensed. Such capacity (engine power and tonnage) is privately owned and commercially traded. The value of the capacity is dependent on the type of licence which that capacity will support, and this is based on the fleet segment and will also be impacted by what the previous vessel was permitted to catch. Subject to catch limits affecting all vessels, she avers that there are substantial species of fish available for these vessels to fish in the fourth quarter of every year and that the owners of the vessels will not have to expend money purchasing tonnage and/or engine power from other licence holders to increase the physical size of the vessel or the engine power. Their licences already permit them to fish whitefish and prawn stocks.

142. Dealing specifically with the applicants' vessels, Ms. Kelly states that the Celtic Quest did not record landings of pelagic species (including sprat) in 2018 and 2019. She avers that all pelagic species that are currently targeted by the *Fiona K Ill* and the *Ocean Venture Il* inside the 6nm zone, with the exception of sprat, can be targeted outside the 6nm zone.

All three vessels have licences which permit gear which is suitable for targeting pelagic fish, whitefish and shellfish and do not have to make additional payments to fish for whitefish and prawns. She avers that fishing opportunities for herring, sprat, mackerel, haddock, monkfish and prawns are available to vessels whose fishing boat licence permits them to fish such stocks and there is no additional payment required for such fishing. There is no onus on the licence holder to purchase extra capacity unless the owner wishes to increase the physical size of the vessel or the engine size; it is a business decision. There should be no practical reason for these vessels to increase their physical size or engine size in order to fish for whitefish and prawns, as all three vessels are already over 55 feet in length; and vessels in this size category receive double the monthly catch limits for whitefish and prawn stocks of vessels under 55 feet.

143. In response, Mr. Minihane, in an affidavit sworn on the 11th March, 2020, accepts that quotas are under the direct management of the Minister and that "*capacity*" is privatized and may be traded. It is also accepted that operators may buy the notional engine power and tonnage of a fishing vessel from an existing operator without purchasing the physical vessel itself, may then use this notional engine power and tonnage to license an intended new vessel and that the value of the capacity is impacted by what the previous vessel was permitted to catch. It has never been contended that they would have to spend money purchasing tonnage and/or engine power from other licence holders to increase the physical size of the vessel or the engine power. While their licences technically permit them to fish for white fish and prawn stocks in the last quarter of the year this will not negate what he describes as the disastrous impact which the Policy Directive will have. The value of the boat's capacity has been affected by the Policy Directive, particularly insofar as they can no longer target sprat, and this reduces the value of the vessels. Further, he does not dispute that quotas are set for most fish stocks at EU level in December each year and these are strongly informed by scientific advice. Issue is not taken with the statistics quoted. But these quotas fluctuate from year to year. He provides an example of a situation where there was an approximate 30% decrease in the quota for mackerel in the previous two years, which decrease has almost been entirely reversed. The quota for haddock was also reduced a number of years ago but it has since increased. It is also not disputed that the three vessels are dedicated to catching pelagic fish stock. It is accepted that they are capable of catching demersal species. They fish for demersal species from the 17th March to the 31st July each year. However, it is disputed that it is open to the applicants to engage in other fishing operations during the last quarter of the year when they would normally fish for sprat. Mr. Minihane reiterates that fishing in the 6nm zone for the last quarter of the year is fundamental to the business model they have adopted over 30 years for good commercial and fisheries reasons. The quotas which are issued to each vessel on the 1st January each year for mackerel and horse mackerel are substantially used by the 17th March each year. The vessels then target demersal fish such as sole, plaice, monkfish and hake. The quota is managed monthly and diminishes by the month. Producer Organisations meet and liaise with the respondent's Department in the management of that quota. Demersal species are not commercially lucrative, as it is not a cost effective means of fishing. The vessels must spend a considerable length of time at sea. To catch these species a lot of fuel is

consumed thus increasing carbon footprint. In a month of fishing for sprat it is possible to generate landings worth approximately €550,000/€650,000. In contrast, he states that landings for demersal species over the course of a month generates a fraction of these sums. He explains that the applicants normally use up a substantial part of the quota for demersal species by the 31st July and the remainder is used by year end. The tuna season commences in August. The fleet generally has a 2,500 ton quota which is filled by the fleet over the subsequent three-month period; the quota is shared out between 28 vessels. When the fleet quota has been reached, tuna fishing ceases normally by the 30th September. It is then that the vessels target pelagic species, with sprat being plentiful and not restricted by quota. Mr. Minihane explains that it is at this time of the year that there is already pressure on the fleet resources and there is little, if any, further quota available to use in respect of other species which the vessels are geared to target. The applicants' vessels have been geared and designed in a particular way and re-rigging or re-gearing boats is an exceedingly costly exercise.

144. It is also averred by Mr. Minihane that it is not correct to say that the *Celtic Quest* did not record any landings of pelagic species for 2018 and 2019. It has a mackerel quota and a herring quota and jointly fishes with the *Ocean Venture II* and *Fiona KIII* and her quota is used in this way. Sprat is the main species targeted by the *Fiona KIII* and the *Ocean Venture II* during the last quarter of the year. Ninety-five percent of sprat is caught within the 6nm, that is where they shoal. A small quantity of mackerel and herring when available is also targeted, but only what is left over from the unused quota. It is accepted that the three vessels have licences permitting them to catch pelagic fish, white fish and shell-fish and that the *Fiona KIII*, the *Ocean Venture II* and the Celtic Quest fished for white fish in 2018 and 2019 and have gear suitable to target such fish, but the critical point is that this is not a commercially viable fishing activity in the last quarter of the year for these vessels. It has never been claimed that the applicants would have to increase their physical size or engine size to fish for white fish and prawns as all three vessels are already over 55 feet in length. It is argued that to adapt the *Ocean Venture II* and the *Fiona KIII* boats (which are trawlers) for gillnetting (where there is a "*bottom net*" on the boat which is static and is anchored at each end and the boat is specifically geared for that type of operation) would involve huge structural alterations to the vessels and would not be viable and would likely also require Departmental approval.

145. In a further affidavit sworn on the 2nd April, 2020 Ms. Kelly takes issue with Mr. Minihane's assertion that the applicants cannot make up business lost as a result of the Policy Directive. She disputes the contention that there is little, if any, further quota available for the applicants in respect of other species which the vessels are geared to target. Between October and December 2019 there were good fishing opportunities available for white fish and prawns. These included opportunities to fish for monkfish (landing value €4,850 per tonne), hake (landing value €3,070 per tonne) and megrim (landing value €3,700 per tonne). There were generous monthly catch limits set for each of these high value stocks. Similarly there were fishing opportunities for prawns (€8,500 per tonne), haddock (€2,040 per tonne), whiting (€1,450 per tonne) and pollock (€2,500 per tonne). She again avers that the *Celtic Quest* had no recorded landings of sprat in

2018 or 2019 and that it is incorrect for Mr. Minihane to claim that the *Celtic Quest* fishes for sprat in the last quarter of the year. The *Celtic Quest* did not record landings of sprat at all in those years. Ms. Kelly avers that it is incorrect for Mr. Minihane to say that quotas are managed by Producer Organisations. Quotas are under the direct management of the Minister who is informed by the recommendation of the Quota Management Advisory Committee on which one representative from each of the four main Producer Organisations sit. At the end of July, 2019 there were significant annual quotas remaining for some high value fisheries such as monkfish and hake. The remaining quotas were made available to all registered vessels licensed to fish for demersal species between August and December, 2019. This included the applicants' vessels. Further, she states that there is good availability of white fish and prawn stocks during this period. Ms. Kelly maintains that the use of particular gear is a business decision. The applicants' vessels re-gear at particular times during the year depending on the intended fishing activity. Ms. Kelly disputes Mr. Minihane's contention that white fish is not a commercially viable fishing activity in the last quarter of the year. The majority of the fishing vessels in the polyvalent segment of the fishing fleet over 12m in length are fully dependant on these stocks. Mr. Minihane's statement that any adaptation of the applicants' vessels would "*likely also require Departmental approval"* is incorrect. This is a matter for the independent Licensing Authority for Sea Fishing Boats.

146. It has been observed in the context of licensing in other areas that as a matter of general principle, licences which may be issued by licensing authorities enhance the value of the physical property to which they are attached, rather than constitute property rights in and of themselves (see *State (Pheasantry) Limited v. Donnelly* [1982] I.L.R.M. 512). Nevertheless, in *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20, Costello J. held that property rights arising in licences created by law, are subject to the conditions created by law and to an implied condition that the law may change those conditions. There the claim was based in part on a contention that taxi licences constituted a property right which was constitutionally protected and which had been unjustly attacked by the adoption of a regulation which lifted restrictions on the number of hackney licences which could be issued. The Minister had not denied that the applicant's licences were property rights and valuable rights which were constitutionally protected. The response focused on the contention that such rights had not been unjustly attacked by the impugned regulations. On the facts, Costello J. was not satisfied that the regulations had or would have the effect contended for. He held that even if it was established that the making of the regulations resulted in a diminution in the value of the taxi plates, that would not, as a matter of law, amount to an attack on the applicant's property rights and stated at p. 28:-

> "*Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions. Changes brought about by law may enhance the value of those property rights… or they may diminish them… But an amendment of the law which by changing the conditions under which a licence is held, reduces the commercial value of the licence cannot be regarded as an attack on the property*

right in the licence-it is the consequence of the implied condition which is an inherent part of the property rights in the licence." (emphasis added)

147. He was satisfied that the object of the exercise of the ministerial regulatory power was to benefit users of small public service vehicles. It had not been shown or even suggested that the Minister acted otherwise than in accordance with his statutory powers and he observed at p. 29 that *"[o]nce he did so then it cannot be said that he has thereby "attacked" the applicants' property rights because a diminution in the value may have resulted".*

Conclusion on the nature of the injury or impact alleged

148. I am satisfied that sea fishing boat licences are not in and of themselves a tradeable commodity. The evidence establishes that fish quotas and fishing opportunities are under the direct management of the respondent. While there is a dispute as to the catch achieved by the applicants' vessels in certain recent years, Ms. Kelly's general evidence on such matters is not in dispute. Quotas are not privately owned and quotas made available to a fishing vessel may not be sold, leased or otherwise concentrated in individual or company ownership. Rules exist at both EU and national level which underpin the granting of a fishing boat licence. In order to introduce a new fishing vessel into the fishing fleet, an operator must remove a fishing vessel of at least the same size from the existing fleet. This is measured in terms of the engine power and the tonnage of the vessel, or "*capacity replacement*". This is an entry/exit replacement policy which is managed by the Licencing Authority whereby the engine power and the tonnage must be replaced at 100% level. The purpose of this rule is to keep the size of Ireland's fishing fleet commensurate with available fishing opportunities. This "*capacity*" is privatised and may be traded. Operators may buy the notional engine power and tonnage of a fishing vessel from an existing operator without purchasing the physical vessel itself. They may then use this notional engine power and tonnage to licence an intended new vessel. On this basis, the fishing vessel from which the capacity was taken will no longer be licensed. The value of the capacity is dependent on the type of licence which that capacity will support which in turn is based on the fleet segment and will also be impacted by what the previous vessel was permitted to catch.

149. I am also satisfied on the basis of the authorities, that when a licence is granted it is not open ended and is subject to terms and conditions which the respondent is entitled, under statute, to determine from time to time. If the terms and conditions upon which a licence is granted are altered, this may have an effect on the type of fishing which may be undertaken by and the type of gear which the sea fishing boat may use. It seems to me, on the basis of the decision of Costello J. in *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20 that although a change in the terms and conditions of the licence may, as a matter of fact, have financial implications for the holder of the licence, it does not necessarily follow that such a consequence renders that measure unlawful, nor does it necessarily constitute an attack on property rights.

150. Having considered the evidence adduced on affidavit, I am satisfied that while there may be some financial and organisational impact experienced by the applicants, such

evidence, taken at its height, does not go so far as to corroborate the extent of the applicants' claim that the measure will have an effect to the extent claimed. While suggested figures for losses have been advanced, they have not been the subject of necessary detailed analysis based on past and projected financial profit models that might corroborate the applicants' contentions. I am not satisfied, therefore, that it has been established that there has or will be any significant interference with any fundamental right of the applicants. Although the change in licensing conditions may have some financial implication for the licence holders, nevertheless, in my view it is not established that this amounts to an unjust attack on any rights which they may have.

151. It seems to me that this conclusion must have implications for the grounds of challenge based on alleged lack of proportionality and the duty to give reasons. Apart from the extent of the impact on the rights alleged, a further consideration is the nature of the measure taken. The Policy Directive is a national measure adopted in pursuance of national policy designed, inter alia, to further the interests of inshore fishermen and to advance the protection of the ecosystems and the environment. The measure affects only a limited class and while it may have some impact on the applicants' business and be disruptive, I am not satisfied that it has been established that the nature of such impact is or will be disproportionate to the impact or upheaval contended for.

152. The reasons given for the measure concern the provision of ecosystem benefits including for nursery and juvenile fish stocks, and to facilitate the further sustainable development of the small scale inshore and sea-angling sectors. In the light of the failure of the applicants to establish the significant impact on the substantive rights advanced by them, I am satisfied that the duty to give reasons does not lie at the higher end of the scale as discussed in *Mallak v. Minister for Justice* [2012] 3 I.R. 297. The reasons advanced by the respondent were sufficient to explain the rationale for the Policy Directive and to enable a person who might seek to challenge, to have such necessary information as he/she may require for this purpose. In arriving at this conclusion, I have taken into account the sentiments expressed by Clarke C.J. at para. 5.3 in *Connelly v. An Bord Pleanala and Ors* [2018] 2 I.L.R.M. 453 "…*that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached*."

153. While the applicants' vessels were of a finite number affected by the Policy Directive, the decision, as I have concluded, was taken in pursuance of a national policy objective for which the respondent enjoyed a margin of appreciation. I am also satisfied that the reasons advanced did not amount to the engagement in a *pro forma* recitation of necessary requirements condemned by Kelly J. in *Deerland Construction Ltd v. Aquaculture Licences Appeals Board* [2009] 1 I.R. 673. Further, all interested parties had access to the consultation document and the underlying reports of BIM and the MI and I am satisfied that the decision must be understood and read in such context.

Fair Procedures for Licence Holders – Rights and Interests

154. The applicants also advance a claim that they have procedural rights which have not been respected. In this regard, and as discussed below, it seems to me that the nature, quality and extent of any such rights are also dependent upon the nature and legal quality of the measure by which that change is brought about, and the nature of the rights or interests potentially impacted by that measure.

155. A number of general propositions appear to be established. First, that the measure to be adopted affects or impacts on a licence does not necessarily lead to a conclusion that fair procedures are implied in the process. In *Gorman v. The Minister for the Environment* [2001] 2 I.R. 414 , which concerned deregulation of taxis, Carney J. observed at p. 439:-

> *"It is important to emphasise that this case concerns the exercise of the Minister's discretionary powers under s.82 of the Road Traffic Act, 1961 to enact secondary legislation. This is of crucial importance when considering whether the rules of natural and constitutional justice import a duty to consult in the circumstances.*
>
> *The Minister of State in introducing deregulation by means of the second Regulations of 2000 [S.I. 367/2000] was acting not in judicial or administrative capacity but in his capacity as a legislator, to make or refuse to make a statutory instrument under the delegated legislative process.*
>
> *The imposition of a duty to consult in the instant case would render the Minister's task largely unworkable. An obligation to consult and hear submissions from every interested party would not only severely delay the legislative process, but it would also leave the instrument subsequently made open to challenge on the basis that the Minister of State failed to consult an 'interested party'. In the case in hand, the category of interested persons is unlimited, in that every member of the public may be said to have an interest in the efficient working of small public service vehicles. After the first Regulations of 2000 [S.I. 3/2000] had been declared unlawful in the Humphrey v. Minister for the Environment [2001] 1 I.R 263, swift action had to be taken by the State."*

156. It is clear that where a licence is proposed to be withdrawn, decisions such as *Hygeia Chemicals Ltd v. Irish Medicines Board* [2010] IESC 4 and Teahan v. Minister for Communications [2008] IEHC 194 recognise the right to be consulted. But we are not here concerned with a complete withdrawal or revocation of a licence.

157. Regardless of any general obligation imposed by law, the applicants also maintain that specific representations were made in the consultation document that there would be consultation with stakeholders and that the respondent failed to honour such representations where it was clear that, although not identified by name, they would be the only ones affected by the measure. The applicants maintain that the consultation document was only the commencement of the process and presented options to explore, but that notwithstanding this, no further consultation took place with them before the respondent made his decision and published the directive.

Delegated Legislation and administrative decisions

158. The authorities suggest that while there is not a one size fits all formula and the more individual or closed category the measure, and the more direct and individual nature of the potential impact, the more stringent the application of the principles of natural justice and in particular the right to be heard, will be viewed.

159. Depending on the circumstances, the fulfilment of the requirements of natural justice may be achieved through a spectrum of measures such as simple and straightforward notification or consultation at one end, to a more complete hearing at the other. The spectrum approach is evident from *dicta* such as that of Barron J. in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 at p. 92 where he observed:-

> *"What is fair is dependent upon a number of factors. The most significant one is the manner in which the exercise of the particular power or function has impinged upon the rights of the person affected."*

160. In Hogan and Morgan, *Administrative Law in Ireland* (5th ed., Round Hall, 2019) the authors write at para. 15.151:-

> *"The rules of fair procedure apply where any individual interest is directly affected. But what is the position where legislative decisions are concerned? The rationale given for excluding legislative decisions from the scope of the rules is that these rules seem more appropriate were a compact range of facts in issue-for example, in a dismissal case, whether an employee was dishonest-and less appropriate when a broader range of acts and divergent considerations, for example, the economy or some other national interest, is concerned. A subsidiary reason is that the principal type of legislation is an Act of Parliament, made by a body where all interests are supposedly represented and means that the process of legislation is traditionally not subject to control by the courts…"* (emphasis supplied)

161. Turning to a consideration of delegated legislation, the authors note that what they described as the orthodoxy, that the rules of fair procedure do not apply, was followed in certain cases such as *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297 where it was held that consultation was not required with vintner organisations before the making of a statutory instrument fixing maximum prices in a particular geographical area. *Burke v. Minister for Labour* [1979] I.R. 354, as the authors point out, is one of the few cases in which it was assumed, albeit without any discussion, that the maker of delegated legislation was under a duty to consult interested parties. That case concerned a joint labour committee order fixing minimum wages for persons working in the hotel industry. The employers' representations wished to adduce evidence as to the real cost to the employers of board and lodgings provided to employees but the committee determined the minimum wages applicable without regard to this evidence. The Supreme Court held that the committee's refusal to admit such evidence rendered the order invalid. It seems clear therefore, that in certain circumstances a right exists to make representations in respect of, or to be informed of a potential change being effected by secondary legislation such as a bye-law. Hogan and Morgan also observe at para. 15-155:-

> *"There have also been some cases concerning fisheries bye-laws which had tended in the same direction as Burke. In the first, the major point of controversy concerned the extent of the High Court's powers on a statutory appeal. However, it was assumed that 'fair procedures' (meaning that the persons affected ought to be consulted) applied to the making of a bye-law, although the principle under consideration here was not really considered. Moreover, these cases may be reconciled with the Garda Representative Association case on the basis that, since local fisheries were involved, the class of persons affected was 'narrow'."*

162. Where the measure involves the revocation of a licence or authorisation, the authorities suggest that the procedures associated with the withdrawal require greater adherence to the principles of natural justice and fair hearing. This is exemplified in decisions which concern matters as diverse as the withdrawal of a hard fought and won product authorisation for medicinal products, and the revocation of a seasonal salmon fishing licence: see *Hygeia Chemicals Limited v. Irish Medicines Board* [2010] IESC 4 and *Teahan v. Minister for Communications* [2008] IEHC 194.

163. In *Hygeia*, the applicant sought, *inter alia,* a declaration that the respondent had failed to comply with the principles of basic fairness of procedures and natural and constitutional justice in the internal procedures adopted for the review of veterinary product authorisation subsequent to their grant. Stressing the importance of fair procedures in such circumstances, Macken J. continued at para. 83:-

> *"Where it is considered necessary to review the presence of products on the market and/or withdraw an authorisation, thereby possibly depriving a party of a valuable property right, it is clear from the case law of our courts that established principles of law apply so as to ensure the appropriate respect for Constitutional rights attaching to the diminution or cancellation of the property rights in question. These include principles applicable to the process or the procedures operating to deprive a person of such rights or interests, which procedures must be fair in law. No relevant case law on this point was cited in the judgment, and I do not consider it necessary to do so in my judgment, since the principle is such a well established and fundamental one."* (emphasis added)

164. The withdrawal of the authorisation in *Hygeia* was effected by a statutory body. Under the relevant legislation, the relevant minister appointed an advisory committee to assist the respondent on matters of safety. The applicant's challenge, which was upheld by the Supreme Court, concerned the internal procedures adopted for the review of product authorisations and in respect of appeals from such reviews. Macken J concluding that the absence of bye-laws or other clear rules and regulations by which the mechanism applicable to review and recall of products, or the withdrawal of an authorisation, had the consequence that unfair procedures had been adopted.

165. In *Teahan*, Laffoy J. considered a challenge to the South Western Fisheries No. 7 Kerry District's Conservation of Salmon and Sea Trout Bye-Laws. The applicants depended on fishing of various types during different seasons to earn their livelihoods. The most

important type of fishing in which they habitually engaged was salmon fishing by means of draft net in the harbour from the middle of May until the end of July each year. The licensing regime for draft net fishing in the harbour was administered by the notice party, the South West Regional Fisheries Board. A short time prior to this, the applicants had been granted draft net fishing licences for the forthcoming season. The licences were subject to a number of conditions including quota and tagging conditions and entitled the applicants to commence fishing on the 13th May, 2008. However, on 14th May, 2008 they were informed by a representative of the South Western Regional Fisheries Board that they were not to fish on the basis that the Minister intended to introduce a bye-law which would prohibit fishing in the harbour. On the 15th May, 2008, the respondent advertised that he had made the bye-laws in question. The bye-law had been made on the 13th May, 2008 and had come into force on the 14th May, 2008. The applicants appealed the introduction of the original bye-law to the High Court pursuant to s. 11(1)(d) of the Fisheries (Consolidation) Act 1959.

166. This claim was predicated in two propositions. First, that the right to fish under a licence constituted a part of the means by which the applicants earned a livelihood. Second, that in making the bye-law the respondent effectively forfeited, nullified or undid the licence which had been granted by virtue of which the appellants had an entitlement to earn part of their livelihood. It was not the appellants' case that they had an absolute right to fish but they claimed that, at a minimum, they were entitled to fair procedures. This meant that they ought to have been notified in advance of the making of the bye-law, be given an opportunity to make representations and that the respondent should give reasons for making it. The challenged decision was described as a focussed one, the purpose of which was to reverse the effect of the decision of the licensing authority to grant the licences. That authority had written to all potential public or private draft net licence holders for the 2008 season on the 23rd April, 2008 providing information such that applicants might be better equipped in deciding whether to accept the offer of a draft net licence for the season. Relevant quotas were outlined. The appellants applied for and were granted licences. The effect of the bye-law was to prohibit any person fishing for or attempting to take or fish for salmon or sea trout with a draft net or rod and line from the waters in respect of which licences had been granted to the appellants.

167. Laffoy J. annulled the bye-law on the basis that it had been introduced in breach of the Act and rights to fair procedures. She observed at p. 21:-

> *"If they were granted valid licences, then, on the authorities cited by counsel for the appellants, it seems to me that, as a matter of basic fairness, the respondent should have informed both the notice party and the appellants of his intention to make the Bye-law and should have given them an opportunity to make submissions to him, before making the Bye-law, as to whether the making of such bye-law was expedient for the more effectual government, management, protection and improvement of the salmon and sea trout fishery in the Kerry District.*

Even if it were to transpire, following further submissions and, perhaps further evidence, that the appellants were not granted valid licences by the notice party on 8th May, 2008, it seems to me that as the position stood between all of the parties as of 13th May, 2008, given that it was represented by the notice party to the appellants that they were getting valid licences, as a matter of basic fairness, the appellants should have been given advance notice of the intention to make the Bye-law and should have been given an opportunity to make representations in respect of it.

Accordingly, whether the appellants obtained the benefit of valid licences or not, their right to fair procedures has been violated and the Bye-law should be annulled."

Garda Representative Association v. Minister for Public Expenditure and Reform

168. The extent to which rights of natural justice apply in the context of the adoption of quasi legislative measures was addressed in *Garda Representative Association v. Minister for Public Expenditure and Reform* [2018] IESC 4 ("*GRA*"). The Public Servant Management (Sick Leave) Regulations, 2014 (S.I. 124 of 2014) had the effect of significantly altering the sick leave regime applicable to certain categories of public servants, including members of An Garda Siochana. The central issue concerned the extent to which the law may impose an obligation to consult before introducing such measures. The Court of Appeal in rejecting the claim was satisfied that what was at issue was a delegated legislative power and that the principles of fair procedures had no application in the context of the making of generally applicable regulations; and no duty to consult arose. The matter was appealed to the Supreme Court.

169. Clarke C.J. observed that the courts are only concerned with identifying and enforcing legal obligations. The approach adopted by the court to the determination of whether the right to fair procedures or a duty to consult arises in the context of the delegated legislation at issue in that case, is instructive and was stated as follows:-

"7.12 It follows that the legislation itself envisages that, notwithstanding the provisions for consultation which exist in relation to An Garda Síochána under the 2005 Act, regulations affecting terms and conditions can be made under the general Public Service Provisions introduced by the 2013 Act. In those circumstances it seems to me that the following questions arise:-

(a) As a matter of statutory construction is there any basis for suggesting that the obligation to consult or consider representations as set out in the 2005 Act can still apply notwithstanding section 58C;

(b) If not does the power to make regulations under the measures contained in the 2013 Act itself carry with it a general obligation to consult or consider representations;

(c) *If the answer to both (a) and (b) is no, is there any legal principle which would require consultation or an entitlement to make representations and have same considered before measures impacting on terms and conditions of An Garda Síochána are introduced;*

(d) *Is there anything in the history of events leading up to the making of the Regulations which could have created a legally binding expectation that such a process would be engaged in; and*

(e) *To the extent that under any one or more of the above headings some obligation may lie in law on either the Minister for Justice and Equality or the Minister for Public Expenditure and Reform to consider representations, did the process comply with any such legally binding obligation."*

170. In the consideration of any implied obligation to consult, Clarke C.J. acknowledged that the type of delegation which can arise under statute can vary considerably. Primary legislation does not carry with it an entitlement on the part of persons who might be affected by such legislation, to be heard in the process leading up to the enactment of the legislation concerned. At the other end of the spectrum, legislation may confer on a decision maker the power to make specific decisions affecting the rights and obligations of individuals where it is clear that constitutionally fair procedures must be followed. He held that whether constitutionally fair procedures are mandated is not dependent on the form in which the decision is promulgated:-

"8.7 The fact that an individual decision affecting individual rights and obligations might take the form of a statutory instrument could not, in and of itself, deprive the individual concerned of such entitlements in relation to fair procedures as they would enjoy if exactly the same decision were to be taken in a different form. The entitlement to fair procedures depends on the substance rather than the form of the type of decision which may be taken." (emphasis added)

171. It seems to me that in the assessment of the nature, extent and quality of any such right and whether it has been respected, that I should follow the pathway outlined by Clarke C.J. The first step (a), to which he referred, was particular to the facts of the *GRA* and therefore it seems appropriate that I should assess the matter in accordance with the steps identified from paras. (b) to (e). The applicants do not invoke the principles of legitimate expectation.

172. Having considered the provision of ss. 3(2), 3(3) and 3(4) of the Act of 2003 as amended, I am satisfied that an express obligation is not placed on the respondent to consult with those who might be affected by a policy directive. While the applicants do not advance a contention that a specific and express statutory right of consultation is provided for, nevertheless they rely on a number of authorities such as *Finn v. Bray UDC* [1969] I.R. 169, *Dunraven Limerick Estates Company v. Commissioner of Public Works in Ireland* [1974] I.R. 113, and *Byrne v. Fingal County Council* [2001] 4 I.R. 565 in support of their claim that as a matter of statutory construction such right arises. Having considered

those authorities, it would seem to me that they are very much dependent upon the facts and the particular statutory provisions under which the respondents in each case were purporting to act, concerning as they did processes where rights, including third party rights, might be affected and it was either expressly or implicitly evident that an obligation to consult arose. I do not believe that they are necessarily authority for any wider principle.

173. I should now consider whether there is any legal principle which would require consultation or an entitlement to make representations in the circumstances.

174. On my interpretation of the authorities, the extent, if any, of the obligation of a decision maker to consult or otherwise afford fair procedures in circumstances such as those under consideration are dependent on factors such as:

a. The nature and quality of the decision under review;

b. The nature and extent of the rights or interests advanced by those alleged to be affected by the decision; and

c. The nature and extent of the impact, actual or potential, which the decision has or may have on those rights or interests.

These are factors which, as has been discussed, tend to pervade a consideration of many issues. At one end of the scale, and always bearing in mind that in considering the nature of the measure, the focus ought to be on substance rather than form, where fundamental constitutional rights are in issue with little doubt about the potential impact of a decision which is overtly administrative in nature, the obligation to comply with fair procedures and natural justice will be at the higher end, most likely requiring those affected to be afforded a full hearing. At the other end of the scale, it seems to me, is where an overtly quasi-legislative measure impacts on individual interests rather than constitutionally protected rights. In those circumstances, the obligation on the decision maker, if any, is much reduced and depending on the circumstances, may be fulfilled simply through consultation, advance notification and/or the invitation to make submissions. In between there are a myriad of situations where the extent of the rights and obligations will vary. The task of this court is to determine where on this scale the applicants case lies, if it has made its way on to the scales, and whether the measures taken leading to the making of the Policy Directive have appropriately balanced matters.

175. When one considers the process from initial consultation to the taking of the decision, it might be said that the particular position of the applicants must have, and did, become increasingly apparent to the respondent, and the extent of that predicament crystallised when a decision was made on the option being recommended. While the measure was of general application, the number of persons whose interests might be affected was small and capable of identification. The impact on the value of their landings at least in the short term was acknowledged in the briefing note. It is stated in the executive summary that:-

"*For just over 1% of over 18 m vessels, sprat constitutes a high proportion of the value of their landings. Sprat is not subject to EU quotas and fishing is concentrated in coastal bays. To allow these vessels to transition effectively to other fishing strategies, it is recommended that restrictions on trawling for sprat are introduced on a phased basis, based on catch records for recent years. A total allowable catch of up to 2000 tonnes of sprat should be permitted for over 18 m vessels inside six nautical miles during 2020, reducing to 1000 tonnes 2021, with all trawling being entirely curtailed from 2022 onwards."* (emphasis added)

176. Thus their particular situation was recognised and acknowledged by the phasing out of sprat fishing over a period of two years. On the evidence, the phasing out process, although perhaps considered to be in ease of the applicants, was first mentioned in the briefing note. It was never discussed with them. The briefing note includes a paragraph which seems to recognise the importance that any amendment to the current legislation is introduced in a way that allows vessel owners to prepare for changes. The note continues:-

> "Many of the target species of the over 18 m vessels currently trawling inside 6nm are capable of being obtained outside that area and, as set out earlier, some of the stocks in question appear to straddle the 6nm so. The only exception appears to be sprat. Therefore a phased introduction of the Total Allowable Catch of sprat, leading to a complete exclusion of vessels over 18 m using trolls inside the 6nm zone and the baselines by 2022 is recommended. This measure would provide the affected vessels with an opportunity to transition away from their current fishing strategies, including potential gear adaptations, to target alternative stocks. The catch records for recent years identify that over 18 m vessels have landed on average just less than 3000 tons per annum of sprat…"

177. Other factors support the proposition that the measure in question was not targeted at any particular individual. The owners of all vessels over 18m in length will be affected by this measure which has national application. It is also a measure which the court has found was taken in pursuance of a national policy objective. These factors would tend to suggest that it is more of a decision at the legislative rather than administrative end of the scale.

178. Taking all things into consideration, I am satisfied that although a legislative or quasi-legislative measure in nature, it was one which, in my view had the potential to, and on the facts, impacted on the interests of a defined and narrow class and number of fishermen. I am also satisfied, on a consideration and application of the authorities, that the circumstances of this case are more at the end of the scale necessitating consultation, rather than anything more. The issue therefore, it seems to me, thus boils down to whether the respondent has discharged that obligation in the particular circumstances.

179. Mr. McCann S.C. submits that any consultation obligations have been fulfilled and that as a matter of construction of the consultation document the respondent never had in mind a second consultation. A careful reading of the consultation document, particularly the use

of the words, which were used largely in the singular sense, suggest one consultation process only. He submits that there is no reference to a second consultation and that is evident from the reaction of the applicants in their initial letter to the respondent which, he says, does not evidence an understanding that there would be a second consultation. The consultation document speaks of the Minister "*now undertaking*" a full public consultation. He further submits that the consultation as promised was not a multiple or sequential one and that what the respondent was doing was effectively inviting submissions from those who might be affected by the policy or a change in policy. It is suggested that this is in line with the applicant's own expectation. It is contended that the statement that "*all relevant issues put forward will be carefully evaluated and subject to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified...*" is a reference to the issues which had already arisen from the reports and the feedback received from Producer Organisations, the IFPEA and NIFF, being up for discussion in the context of the public consultation process to follow, not a commitment that any issues arising from the public consultation process would be subject to a further period of consultation with stakeholders. That it was stated that the Minister had not made any decision to change the current arrangements at this time, was an indication that the respondent had not yet come to a final decision in relation to the issues arising from the reports and the feedback received from the fisheries organisation; and that the submissions made in the public consultation process to follow would be taken into account before any such decision was made. The consultation paper merely indicated that all matters arising from the reports and the feedback of the relevant bodies would form part of the consultation process.

180. Mr. McCann S.C. also submits that insofar as a right to consultation has been established, the respondent has afforded the applicants such right to be heard as was reasonably required and that the respondent has complied with the *Coughlan* principles in this regard. This is evident from the fact that the applicants have been able to provide an intelligent consideration in response. Reliance is placed on the detail of the report of Dr Shotton as a clear example of how, without having had access to the material, any further necessary observations were capable of being made. The applicants were aware that a prospective exclusion from the 6nm zone was "*on the menu*" and this was addressed by them and they had the opportunity to make whatever submissions they thought appropriate, and this option was not departed from.

181. The applicants submits that in the light of the clear commitments made in the consultation paper in relation to future stakeholder engagement, the court need go no further than to examine whether such further engagement was required by reason of the applications of general principles of fair procedures. While the applicants had a general level of understanding that the issue was being considered, sea fishing boat licence holders were specifically cautioned in the consultation document that they "*should not carry out any activities or make any plans on an assumption that a change in policy may happen".* It is also submitted that to make effective representations in respect of a measure, one must know what it is.

The Duty to Consult and the Coughlan Principles

182. It may be said that the measures required to fulfil the obligation to consult were addressed in *Teahan v. Minister for Communications Energy and Natural Resources (No. 2)* [2009] IEHC 399, in the context of a complete withdrawal of a licence. I have already addressed the decision of Laffoy J. in *Teahan v. Minister for Communications Energy and Natural Resources (No 1*) [2008] IEHC 194. Following that decision, the respondent sought further advice as to how best to ensure compliance with the State's obligation under EU law with respect to the area. The respondent received that advice and by means of an advertisement published in a national newspaper on the 3rd July, 2008, he informed the public of the annulment of the original bye-law. He also notified the public of his intention to introduce the second bye-law. On this occasion a short consultation process was proposed with all interested parties. The applicants had sought and were granted an extension of the consultation period until the 18th July, 2008. Eleven separate submissions were received by the respondent during the consultation process, including a scientific report. Further expert opinion was received by the respondent, following receipt of the submissions from the applicants. The advices were provided to the applicants on the 29th July, 2008 and any observations based thereon were sought within 24 hours. The applicants sought an extension of time which was denied. On the same day, three final submissions were received from interested parties on foot of the respondent's invitation to put forward supplementary observations by that date but they were not forwarded to the applicants. Having considered the totality of the evidence before him, the respondent decided to introduce the second bye-law on the 1st August, 2008. The applicants brought an application for judicial review. This gave rise to the second case. Hedigan J. was satisfied that the respondent, like all organs of state, was obliged to adhere to certain principles of natural and constitutional justice in the exercise of what he described as administrative power. He continued as follows at para. 35:-

> *"35. The need for the fairness of administrative action to be assessed subjectively does not mean, however, that no guidance may be drawn from previous decisions relating to similar subject matter. As a general rule, for example, it would seem that decision-making bodies, whose determinations are likely to impact heavily upon the livelihood of individual citizens, are obliged to afford a certain degree of consultation and to provide certain items of information. In East Donegal Co-Operative Livestock Mart Limited v. Attorney General [1970] IR 317, the Supreme Court addressed the obligations which befell the Minister for Agriculture and Fisheries in circumstances where he was purporting to revoke a licence for a livestock market. Walsh J. stated the following:-*
>
> > *'[The Minister] is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be.'"*

183. Having regard to the earlier decision of Laffoy J. in respect of the original bye-law, it was clear to Hedigan J. that the respondent was obliged to examine and address thoroughly the submission made by the applicants as to why the second bye-law ought not to be adopted. As a necessary corollary of this obligation, the respondent was also enjoined to furnish the applicants with information that was material to the proposed decision on the issue. He concluded at para. 37:-

> *"37. I am satisfied that the consultation process which occurred between the 3rd and the 30th of July 2008 amounted to an adequate discharge of the respondent's obligations. The applicants were given ample and extended time within which to make their case; they were furnished with all of the submissions of the other interested parties, bar one which was excluded due to an honest oversight and which did not possess the same level of significance as many of the others; they were made fully aware of the scientific basis for the respondent's proposed initiative, and that the opinions and data had remained constant throughout the entire proceedings. It is true that the applicants were not provided with copies of the three supplementary submissions which the respondent received on the 30th of July 2008 and, as such, they were not given the opportunity to address the contents thereof. Had there been matters of significance contained within these documents, requiring comment or rebuttal, this failure might well amount to a failure of duty on the part of the respondent. However, in the circumstances, it is clear that nothing new arose on foot of those final submissions and thus no unfairness occurred. The same may also be said of the original Cromane Community Council submission which contained no scientific data and was generally supportive of the applicants' position."*

Hedigan J. also observed that many of the opportunities to become involved in the process that were afforded to the applicants arose by virtue of the respondent's own initiative. The chance to comment upon the submissions of the other interested parties were something that was never requested by the applicants themselves, and only arose owing to an offer made by the respondent. He continued at para. 38:-

> *"38 Furthermore, it is essential to examine the conduct of the respondent in the context in which it arose. The respondent had received expert scientific advice, from numerous sources, that the fishery in the harbour posed an immediate, serious and enduring threat to the conservation status of the fish involved. The respondent was obliged to act as swiftly and as decisively as possible. In the circumstances, a period of almost one month was an adequate window within which to discuss the measure."*

184. Refusing the relief sought, Hedigan J. observed that the requirements necessary to comply with fair procedures must depend on the circumstances of each individual case. He was satisfied that the process of consultation and provision of information that was undertaken by the respondent, in relation to the second bye-law, was adequate in light of the surrounding facts and that no injustice or unfairness had been occasioned as a result

of what he referred to as "*that limited quantity of information that was withheld from the applicants".*

185. Thus, that some limited frailties exist in the consultation process, will not render it unlawful or illegal. I should point out, however, that the nature and extent of the consultation process required was very much determined by the conclusion of the court in relation to the nature and extent of the effect of the bye-law under consideration on the rights of the applicants whose licences had been completely revoked. It is also clear that each case is very much fact dependent.

186. In *R v. North and East Devon HA ex parte Coughlan* [2001] 1 Q.B. 213, Lord Woolf stated at para.108 that:-

> *"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account…"*

187. These have been described as the Coughlan principles. In *R (on the application of Milton Keynes Council) v. Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575, a consultation had been undertaken in which three options were canvassed. One was chosen but on a change of government, another, less popular option was adopted without any new consultation. The applicant had made submissions on the options and it was held that no duty arose to carry out a fresh consultation since the applicant already had taken advantage of the opportunity to make its views known on the proposal ultimately adopted. Pill L.J. rejected the contention that upon a change of government policy, the entire process had to be re-started.

188. In *Save Our Surgery Ltd v. Joint Committee of Primary Care Trusts* [2013] EWHC 439 the court considered a challenge to the consultation process which preceded a decision which identified a limited number of specialist centres for the future performance of paediatric cardiac surgery in England. Of twelve options considered, the respondent chose the option which excluded the applicant's surgery at Leeds General Infirmary. The process was challenged on the basis, *inter alia*, of a failure by the respondent to disclose sub-scores awarded by a panel which were key to understanding the material difference in quality between the centres. This failure deprived the consultees of the opportunity to make "*intelligent and informed responses*" which had they been taken into account may have influenced the decision. Nicola Davies J. described the question to be addressed as being whether the duty of fairness required disclosure of the panel sub-scores. She was satisfied that fairness required the disclosure of the sub-scores to enable the applicants to provide a focussed and meaningful response and observed:-

"27 In considering the authorities cited by the parties I have paid particular attention to and given weight to those which consider a challenge to the consultation process. From the authorities the following principles can be identified:

i) The issue for the court is whether the consultation process was "so unfair it was unlawful" – Devon County Council ;

ii) Lawful consultation requires that: i) it is undertaken at a time when proposals are still at a formative stage; ii) it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; iii) adequate time must be given for this purpose; iv) the product of the consultation must be conscientiously taken into account when the ultimate decision is taken;

iii) Disclosure of every submission or all of the advice received is not required. Save for the need for confidentiality, those who have a potential interest in the subject matter should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made. The degree of significance of the information is a material factor;

iv) The fact that the information in question comes from an independent expert or from the consultee is relevant but it is a combination of factors including fairness, the crucial nature of the advice, the lack of good reason for non disclosure and the impact upon consultees which are to be considered upon the issue of fairness;

iv) What fairness requires is dependent on the context of the decision; within that the court will accord weight and respect to the view of the decision-maker;

v) If the person making the decision has access to information but chooses not to consider it, that of itself, does not justify non-disclosure; it will be for the court to consider the reason for non-disclosure;

vi) A consultation process which demonstrates a high degree of disclosure and transparency serves to underline the nature and importance of the exercise being carried out; thus, non-disclosure, even in the context of such a process, can limit the ability of a consultee to make an intelligent response to something that is central to the appraisal process;

vii) The more intrusive the decision the more likely it is to attract a higher level of procedural fairness;

viii) If fairness requires the release of information the court should be slow to allow administrative considerations to stand in the way of its release."

At issue was, inter alia, a failure to disclose information which was potentially adverse to one of the consultees. The same cannot be said of the instant case where the relevant

reports which were central to the respondent's decision were made available to the applicants.

Conclusion

189. I am satisfied that given the chronology, the sequence of events and the wording employed in the consultation document when read as a whole, it is and was not unreasonable for the applicants to have formed the impression that before the publication of any directive, the taking of any final decision, or the making of the Policy Directive, all stakeholders *would be fully consulted*. In my view the applicants were stakeholders, perhaps the only ones who would be adversely affected and whose position was effectively recognised in the briefing note and in the phasing out provision introduced by the respondent. As such, I am satisfied that they were persons who had an interest in the process and its outcome, within the meaning of *Mohan v. Ireland and the Attorney General* [2019] IESC 18 and as such enjoyed certain rights, however limited, in that process . The applicants were aware that a number of options were being considered but, it seems to me, were unaware of the particular option as recommended to the Minister by the Department officials and as subsequently decided upon. The issue is whether, in those circumstances, the failure to further hear, consult or revert to the applicants was unlawful.

190. In my view, the obligation placed on the respondent in respect of consultation, while at the lower end of the scale must be viewed against the process which was expressly outlined in the consultation document. As was stated in *Coughlan, "whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly*". In this case, the ground rules were established by the respondent and it seems to me that it is unlikely that any grounds for complaint of unfairness or unfair procedures would arise if the procedure established by the respondent had been complied with. A proper interpretation of the consultation document, in my view, can only lead to the conclusion that at a minimum, the preferred option would be outlined to the affected stakeholders before a final decision was taken. This was not done.

191. The essence of the applicants' claim is that the particular preferred option had not been identified when it made its submission which deprived it of the opportunity to make more focussed submissions. The applicants were aware of the options being considered and were critical of them; they opposed any of the proposals for exclusion, including not only for the over 18m vessels but also the over 15m length vessels. Nevertheless, they were not at the time of the making of the submissions aware of the particular option which was to be preferred, or that the respondent proposed to add an amendment to that option. While it may also be said that many of the criticisms made by Dr Shotton are a reflection of the earlier criticisms made by the applicants, individually and through their producer organisations, when he prepared his report all parties were then aware of the preferred option which at that time had become operative. It may well be that Dr Shotton's views, or those of any other expert retained by the applicants, or the applicants themselves, might have made no difference to the ultimate decision, but it

does not appear to me that that is an answer to what I consider to be an unfairness in the process which in the peculiar and individual circumstances of this case, resulted in non-compliance by the respondent with his legal obligations. In so holding, I wish to make it clear, that it is not the ruling of this court that a second consultation process would or should be undertaken, simply that the process which was adopted by the respondent should be adhered to as a matter of fairness, justice and law.

192. In the circumstances, I am satisfied that the applicants are entitled to succeed on this ground. I invite the parties to make submissions by electronic means on the form of order and such other matters that arise within twenty days of the date hereof, or such further period as the parties agree.