



Irish South and West

Fish Producers Organisation CLG

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Submission of IS&WFPO to Joint Oireachtas Committee on Agriculture

Food & Marine Meeting to be held on Tuesday 11th May 2021

We wish to thank the Chair and Members of this Joint Oireachtas Committee for granting us and our fellow Producer and Processor Organizations the opportunity to address the Committee on these two issues of such enormous and critical importance to the entire Irish Fishing industry and to the often-remote Coastal Communities which rely so much on Fishing for their survival.

1. On draft Legislation to impose Administrative Sanction on Skippers of Fishing Boats

When a system of Administrative Sanction for regulation of the Fishing Industry was first proposed for adoption by the EU Commission in 2008 and accepted and agreed to by both the Parliament and Council of the EU, a separate system of Justice affecting the owners and Skippers of Fishing Boats was created to operate parallel to the existing Criminal Justice system which has regulated Fishing in these islands for 150 years.

The reasoning put forward by those wishing to create this separate and parallel system of justice to be applied only to the Fishing industry was based on a supposition that it would enable National Enforcement authorities to deal expeditiously with IUU Fishing but when adopted by the Institutions of the EU, the Control Regulation sprouted both legs and wings and became capable of being applied to all alleged “**serious infringements**” of EU

Fisheries-control legislation with Sanctions ranging from the imposition of a number of Penalty Points on a License to Suspension of a License for a period of 3 months or more up to Confiscation of Licenses.

Although a vast array of Regulation accompanies this measure the term “serious infringement” was never defined and remains undefined up to today’s date. We deal with this issue in greater detail below.

While this new and parallel system of Enforcement of the CFP is perfectly acceptable to our Continental Partners’ Civil & Administrative Law Systems. this newly created system of enforcement of EU Fisheries Law constitutes a significant departure from our Irish Constitutionally-guaranteed Common Law system of Criminal prosecution of persons suspected of engaging in illegal fishing - including the breaching of a vast array of EU Regulations governing Sea-fishing and the Maritime sphere, with the **creation of a parallel system of enforcement** relying only on the SFPA having to prove their case before a Tribunal whose Members are appointed by the Minister on the evidentiary test of Guilt **“on the balance of probabilities”**.

Given the range of Punitive Sanctions available to these Tribunals, at the prompting of the SFPA, where decisions are arrived at on the basis of the far less onerous evidentiary test than that which is required to be met in Criminal prosecutions, where cases and Guilt must be established and proven on the basis of **“Beyond a Reasonable Doubt”** it is difficult to understand why successive Irish Governments agreed to and signed off on the establishing and coming into operation of this parallel system of *“justice”* to be applied only to those engaged in Fishing.

The only other EU Member States having a Constitutionally-guaranteed Common Law system of Criminal prosecution of persons suspected of engaging in illegal fishing at that time - including the breaching of that vast array of EU Regulations governing Sea-fishing and the Maritime sphere, were Malta and the United Kingdom with the UK insisting that Penalty Points could not be applied to and imposed on Sea Fishing-boat Licenses where the Owners and/or Skippers of Fishing Boats were/are alleged to have engaged in breaches of the CFP unless and until either the Owner or Skipper had been convicted on foot of a Criminal Prosecution before a Court of Law.

In other words, our British counterparts, then fellow Members of the EU rejected this parallel system of Civil Law Enforcement of the CFP and rejected the notion that those Fishers accused of Serious Infringements of the CFP could or should be subjected to Punitive Penalties, including the stripping of a person’s Right to earn a livelihood, that are no lesser than those imposed by Judges following Criminal Trials heard before Courts, Judges and Juries. Our British counterparts rejected the notion that **Punitive Sanctions** could or should be imposed on the basis of **proof established to a lesser and lower**

standard following “*trials*” conducted in front of Tribunals whose Members are appointed by the Minister. Unfortunately, **our Government took the bait** and accepted and adopted this parallel system of “**justice**” while our British counterparts insisted that Fishers accused of breaches of the CFP should only be found Guilty on the basis of **Evidence Proven Beyond a Reasonable Doubt**.

The Commission of the EU accepted the British position while the UK remained a Member of the EU but, here in the Ireland our Government departed from our Justice system, created and perfected over a period of 800 years since the Magna Carta was signed by King John on 15 June 1215 and it opted to implement the lesser system of Administrative Sanction adopted by the Civil Law Jurisdictions of the Continental EU.

This “*justice system*” has been applied by our Government to the Owners and License Holders of Sea Fishing Boats on foot of a number of successive Statutory Instruments issued in accordance with Section 3 of the European Communities Act 1973 ever since 2013 and revoked, replaced and amended following 2 separate and successful challenges made to the legality of such Instruments by members of the IS&WFPO leading to their being struck down by our Supreme Court.

Despite Submissions made by this Organization that any system of Administrative Sanction should only apply in circumstances where Guilt had been proven **Beyond a Reasonable Doubt**, much like is the case in Britain, our Taoiseach, while acting in his capacity as Acting Minister for Agriculture Food and the Marine, during late August of 2020 signed a new Statutory Instrument into Law and thereby gave birth to a renewed and parallel system of Administrative Sanction in respect of Fisheries Offences affecting the Owners & License Holders of Sea Fishing Boats and rejected our Constitutionally-based and protected system of Criminal Justice.

Now, our Government has decided that a like system of Administrative Sanction as that being applied to Owners of Sea Fishing Boats should also apply to the Skippers of those Fishing Boats.

We in the Irish South & West Fish Producers Organization reject the proposition that the hard won and fought for Rights of our Citizens should be cast aside in order to appease the Commission of the EU when it is crystal clear from the British experience that it is open to Ireland to adopt a system whereby Penalty Point should only be applied to either Owners, Licensees or Skippers of Sea Fishing Boat when they have been found Guilty by a Court of Law.

Specifics of what is proposed in the Legislation regarding Skippers:

Following the adoption of the EU Control Regulation – **EU Council Regulation No 1224 of 2009** - regarding the system of Administrative Sanction & Penalty Points to be applied to the **Owners & Licensees** of Sea Fishing Boats, the EU Commission brought forward a Commission Implementing Regulation - **EU Commission Regulation No 404 of 2011** – which set out the various elements of how this new system of Administrative Sanction was to be implemented across all EU Member States. That Commission Regulation was implemented into Irish Law by means of Statutory Instrument with the SI and system of implementation of the Council & Commission Regulation being overturned by the Supreme Court in 2 separate but joined cases taken by 2 Fishermen from here in the south-west. The overturned SI was finally replaced by the SI promulgated by Taoiseach Micheal Martin on 26 August 2020 following 3 previous failed attempts including Dail Eireann voting to overturn and annul a Statutory Instrument on 30 May 2018 and, no doubt, this latest SI will be examined by our Courts in due course.

Meanwhile, although the original EU Council Regulation No 1224 of 2008 made reference to the new system of Administrative Sanction also applying to the Skippers of Sea Fishing Boats, the EU decided that Member States should be allowed to construct their own system(s) of Administrative Sanction to be based on the content of the Council Regulation but **conferring considerable latitude and discretion on Member States as to the extent to which Penalty Points should be applied to Skippers** and in what circumstances, rather than the EU Commission drafting an implementing Regulation itself.

Arising out of that conferral of discretion on Member States as to the method of implementation of the Council Regulation, Minister Micheal Creed undertook a Public Consultation with the Industry but nothing ever came of it and neither the Department nor Minister Creed nor any of his successors ever published the outcome of that Consultation.

It has always been the position of the IS&WFPO that the introduction of Penalty Points Legislation into Irish Law should only occur by means of primary Legislation of Dail & Seanad Eireann and the draft Legislation now before this Committee represents the Government's opening salvo whilst merely repeating and parroting what has already been applied to Owners & Licensees without exercising any discretion whatsoever as to how the EU Council Regulation should be applied to Skippers of Fishing Boats.

All of our previous objections as to the manner of implementation of the Penalty Points system against Owners, Licenses and Skippers remain and specifically (briefly):

- (a) The abject failure of the Minister & Government to allow for Appeals to be brought to the High Court on both a substantive and procedural basis against Decisions made by the newly constituted Authority.

- (b) The attempt being made by the Minister to limit Appeals to Points of Law is patently absurd in circumstances where the burden of proof itself has been substantially diluted and weakened to that of “*on the balance of probabilities*”
- (c) In circumstances where an accumulation of Penalty Points against a Skipper can lead to his/her losing their means of earning their livelihood it is outrageous that our Government seeks to ram through Legislation that substantially infringes upon long established Rights conferred upon our Citizens by both Bunreacht nah Eireann and the Statement of Fundamental Rights set forth and annexed to the Treaty of Lisbon – including the Right to Substantive Appeal to the High Court.
- (d) One of the most ridiculous aspects of the draft legislation arises where, although a Skipper is found Guilty by one of these quaint Administrative Tribunals being set up by the Minister with the Tribunal imposing Penalty Points on that Skipper’s License, one would expect that that Skipper would be entitled to have those Penalty Points and the fact of his/her Conviction removed from his/her License in the event of a successful challenge being brought before the High Court and our Independent Judiciary quashing the Findings, Conviction and Imposition of Sentence upon the aggrieved Skipper. Extraordinary to say but that the draft Legislation requires that the Quashed Conviction and Penalty Points imposed on that Skipper’s License must remain on his/her License with the Courts being unable to rectify the damage caused by a wrongful Conviction. This is one of the most extraordinary attempts ever made by any Government to nullify another Arm of Government under our Constitution, that is to say, our Independent Judiciary.
- (e) The Committee Members should note that the mechanics of the Disciplinary Panel Model adopted by An Taoiseach in the Statutory Instrument he brought into force on 26th August 2020 are repeated in this draft Legislation so that although Panel Members are appointed by the Attorney General they effectively serve *at the pleasure* of the Sea Fisheries Protection Authority in which is vested the power to remove any Person sitting on the Disciplinary Panel. This is akin to vesting the power to remove a Judge of our Courts in the Office of the DPP (Director of Public Prosecutions) which prosecutes allegations of Criminal Offences having been committed. Imagine the public outcry if the Office of our DPP were to be vested with the power to remove Judges of our Courts? What is so different here? Why is there no public outcry?
- (f) In other words, taking all of the foregoing into consideration, a person who is not a Judge duly appointed in accordance with Bunreacht na hEireann and who is appointed to his/her position by the Minister for the Marine is enabled and entitled to make a finding of Guilty on the lesser evidentiary basis of proof “*on the balance of probabilities*” and impose Penalty Points on that person’s Certificate of Competence as a Skipper of a Sea Fishing Boat which will damage that person’s Rights and abilities to earn a living forever and neither High Court nor Supreme Court Justices can remove those Penalty Points from the aggrieved Skipper even in circumstances where those Courts find that the decision made by the Nominee of the Minister is infirm and should be struck down.

What is patently obvious is that European Civil Law System of Administrative Sanction is being rammed through against Irish Citizens without any regard to the Natural and Constitutional Rights of our Citizens.

FINALLY:

It should be noted by the Members of this Committee that a Report prepared for the Fisheries Committee of the EU Parliament on the operation of the Penalty Points System & the operation of both the Administrative Sanctions and Criminal Sanctions on Fishers across all Member States of the EU was published in July of 2020.

We attach a copy of that Report wherein we have highlighted a significant number of passages and Greagoir O’Cathasaigh has written some critical notes that can be read by clicking on the little Yellow Box in the Adobe Acrobat document.

You will read that there are significant differences in the levels of implementation of Administrative Sanctions and the levels of Penalty actually imposed in the various Member States. At the end of the Report you will find a List of Recommendations made to the Fisheries Committee for changes to the Law including, and most significantly, the issue of Definition of what is a Serious Infringement given the wide differences across Member States as to what constitutes a Serious Infringement.

It is curious that nowhere within the Report is any mention made of Irish Fishers telling the people who conducted the investigation that the Evidence Test applied in the Irish Penalty Points legislation of "On the Balance of Probabilities" creates a significant difficulty when compared to the "Beyond a Reasonable Doubt" Test applied for Criminal Prosecutions. Moreover, no mention is made of the fact that Penalty Points will remain on a License despite the fact that a Criminal Prosecution fails. Finally, there is no mention made of the fact that the Irish Legislation imposes Sanctions on the Skippers as well as the Owners of Fishing Boats despite the fact that the Public Consultation process with the Irish Fishing Industry on the issue of the Penalisation of Skippers was never completed as was required to be done in accordance with the parent EU Regulation(s)

We submit that these are issues that require to be notified to the Chair & Liaison MEP's of the Fisheries Committee of the EU Parliament

The implementation of the Penalty Points system in Ireland by means of the SI issued against Owners and Licensees on 26th of August last was a wholly peremptory exercise on the part of the Government in circumstances where the outcome of the Study &

Investigation ordered by the ***Peche*** Committee of the EU Parliament (apparently) remained outstanding at the time the SI was issued as its recommendations certainly do not appear to have been taken into account in the drafting of that Statutory Instrument.

Whatever about the failure of the Government to take account of the findings of this Report in August 2020, it cannot be open to the Government to claim they are currently unaware of its content and we therefore proffer the Report to the Members of this Committee so that all Members of both Dail and Seanad act on the basis of knowledge when crafting this new legislation and taking into account the content of the Report.

2. On Weighing of Fish on Piers & SFPA

According to a letter circulated by Dr Susan Steele of the SFPA on 16th April 2021 (see copy attached) the EU Commission had conducted an Audit in Ireland during 2018 aimed at monitoring the implementation of the Irish Control Plan pertaining to the controls on (generally bulk) Pelagic Fisheries which allowed the Industry to weigh fish in factories following transport away from the Piers of Landing in lorries.

We understand that the EU Commission Audit pertained to the years between 2012 and 2015 with the Audit examining practices which are of no more than historic interest given the very considerable investment in upgraded and improved Control Systems across the overwhelming majority of processors during and since the time the Audit was conducted.

We are all operating at a very considerable disadvantage insofar as the Audit Report prepared by the EU Commission and (apparently) shared with the SFPA remains unavailable to us as access to a copy of the Report has been refused by both the EU Commission, the SFPA and Government despite the fact that significant portions of that Report, if not the entire Report were clearly leaked to Irish Media including to, and significantly, both the National Broadcaster, RTE and the Irish Times.

In her letter, Dr Steele stated that:

“The findings of that audit identified irregularities, including the manipulation of weighing systems in some instances”

And went on to advise that these apparent irregularities:

*“were subsequently confirmed by the **ADMINISTRATIVE INQUIRY** conducted by the SFPA*
Dr Steel then recited that the EU Commission had therefore deemed that Ireland’s obligations arising from Regulation (EC) No 1224 of 2009

“were not being met by the Control Plan as the risk of industry’s non-compliance with the rules of the CFP could not be minimized.”

According to Dr Steele:

“The failure to ensure appropriate weighing also puts at risk the accuracy of the data reported that are essential for control purposes and monitoring of the uptake of fishing quotas.”

AND:

*Consequently, the Control Plan and specifically the derogation from the basic requirement set in Article 60 (2) of Regulation (EC) No 1224 of 2009 according to which all fishery products are to be weighted at landing prior to transport, **has been revoked with immediate effect.***

The most important words in all of the foregoing are those where Dr Steele states that the findings of the EU Commission Audit *“were subsequently confirmed by the **ADMINISTRATIVE INQUIRY** conducted by the SFPA.”*

Our view of this is that faced with the allegations being made by the EU Commission regarding historical instances of alleged manipulation of weighing systems in some instances, the SFPA did not engage in a Substantive Audit of the information identified by the Commission Audit but rather conducted a mere “Administrative Inquiry”, leading to the SFPA agreeing with what was being alleged by the Commission with neither notification to nor consultation with the Fish Processors identified in the Commission Report to establish whether what was being alleged by the Commission was or could be fair, true and accurate.

We have read the entire of the Submission made to this Committee by the Irish Fish Processors and Exporters Association and we endorse and support every word made in that Submission.

We believe it may be helpful to the Members of this Committee if they are to have the relevant text of ***EU Council Regulation No 1224 of 2009*** in front of them when listening to and considering

the Submissions being made by ourselves and our colleagues from fellow Producer and Processing Organizations.

Article 60

Weighing of fishery products

1. A Member State shall ensure that all fishery products are weighed on systems approved by the competent authorities unless it has adopted a sampling plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.
2. Without prejudice to specific provisions, the weighing shall be carried out on landing prior to the fisheries products being held in storage, transported or sold.
3. By way of derogation from paragraph 2, Member States may permit fisheries products to be weighed on board the fishing vessel subject to a sampling plan as referred to in paragraph 1.
4. Registered buyers, registered auctions or other bodies or persons which are responsible for the first marketing of fisheries products in a Member State shall be responsible for the accuracy of the weighing operation unless, in accordance with paragraph 3, the weighing takes place on board a fishing vessel, in which case it shall be the master's responsibility.
5. The figure resulting from the weighing shall be used for the completion of landing declarations, transport document, sales notes and take-over declarations.
6. The competent authorities of a Member State may require that any quantity of fisheries products first landed in that Member State is weighed in the presence of officials before being transported elsewhere from the place of landing.
7. Detailed rules on the risk-based methodology and procedure of weighing shall be established in accordance with the procedure referred to in Article 119.

Article 61

Weighing of fisheries products after transport from the place of landing

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

2. By way of derogation from paragraph 1, the competent authorities of the Member State in which the fisheries products are landed may permit the transport before weighing of these products to registered buyers, registered auctions or other bodies or persons which are responsible for the first marketing of fisheries products in another Member State. This permission shall be subject to a common control programme between the Member States concerned as referred to in Article 94 which has been approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.

Regarding Article 60 we believe it is important to note the following:

1. A Member State shall ensure that all fishery products are weighed on systems approved by the competent authorities unless it has adopted a sampling plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.
2. Without prejudice to specific provisions, the weighing shall be carried out on landing prior to the fisheries products being held in storage, transported or sold.
3. By way of derogation from paragraph 2, Member States may permit fisheries products to be weighed on board the fishing vessel subject to a sampling plan as referred to in paragraph 1.

We therefore believe that weighing on board Fishing Vessels is prohibited UNLESS a "Sampling Plan" has been approved by the Commission AND that Plan complies with the "risk-based methodology" adopted by the Commission.

Nowhere is it explained what is a "sampling plan" or how such a plan could or should operate.

Moreover, we have no idea what that "risk-based methodology" is or whether such a methodology was EVER adopted by the Commission - either in respect of Ireland or any other Member State and we are singularly unaware of any such "methodology" having been adopted by the SFPA. Whatever the case, it is clear that absent an immediate revocation of the EU Commission Decision notified by Dr Steele, Armageddon is about to befall the Irish Fishing Industry and the Coastal Communities that depend on Fishing for their livelihoods.

As for something being approved in accordance with Article 120, it is clear that that Article makes no mention of how such an Application can be made and nor does it provide any guidance on how "the Committee" - which appears to be set up as a form of QUANGO - should operate and work. Who is on that Committee and how anyone can make an Application to them is a complete mystery to us but perhaps a representative of the SFPA might care to explain this to us.

Although Article 119 of the consolidated and up-to-date version of this Regulation recites that the Committee set up in accordance with Article 30 of Regulation (EC) No 2371 of 2002 should apply everyone should note that the entire of Regulation (EC) No 2371 of 2002 was revoked with affect from 31st December 2013.

Article 119

Committee procedure

1. The Commission shall be assisted by the Committee set up under Article 30 of Regulation (EC) No 2371/2002.
2. Where reference is made to this Article, Articles 4 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at one month.

Accordingly, it appears to us that in the midst of this enormously threatening mess that has befallen the Irish Fishing industry, there may well be a legislative gap in the Control Regulation that prevents the mapping of a way out other than the Commission revoking it's withdrawal of approval for Ireland's Control Plan.

Dated the 9th of May 2021

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