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A Critical Analysis of Sea-Fisheries Enforcement in Ireland

Thesis presented by

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Declaration

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism.

Abstract

Effective regulation goes hand in hand with a normatively effective enforcement regime. In the context of sea-fisheries law, it is crucial that the law is fit for purpose and that it is enforced effectively in order to meet sustainability and conservation objectives under the Common Fisheries Policy. Therefore, it is essential that Ireland is compliant with its enforcement obligations under EU fisheries law. Although regulation and enforcement has been researched extensively worldwide, sea-fisheries law and its enforcement in Ireland has been almost entirely neglected in the literature. Fisheries are a politically contentious issue and yet this intensely regulated area has never been the subject of dedicated academic research in Ireland. To the author's knowledge, this research is the first comprehensive analysis of the sea-fisheries enforcement regime in Ireland.

As the author is employed in the legal division of the national enforcement agency for sea-fisheries, the Sea-Fisheries Protection Authority, the research benefits from unique insights into how enforcement operates in practice, which would not otherwise be accessible. Therefore, the research takes a distinctly practical view of regulation and enforcement of sea-fisheries law in Ireland, with the benefit of a practitioner focus based on professional experience.

The thesis undertakes a review of the key pieces of legislation governing sea-fisheries law which is enforced exclusively by criminal prosecution without any alternative sanction options. The effectiveness of this reliance on criminal prosecution is considered with a view to determining whether administrative sanctions could be introduced to supplement or replace the existing enforcement

system. This may also have implications for other areas of regulation in Ireland, many of which are also reliant on criminal prosecution to enforce regulatory norms. In particular, the nature of what constitutes a crime is considered in order to inform a discussion of the utility of defining and prosecuting regulatory breaches as criminal offences. Discussion of the difficulties associated with criminal prosecution of regulatory offences is informed by the case law and selected case studies.

A range of administrative sanction options are explored to establish whether they could provide an alternative solution to sea-fisheries enforcement. The constitutional hurdles which administrative sanctions in Ireland must overcome are analysed in order to determine the limits and boundaries of any potential administrative sanction regime. The thesis proposes how such a system might operate in practice, in light of various enforcement theories which may assist the regulator in the challenging task of implementing an effective, proportionate and dissuasive enforcement policy which upholds fair procedures and can withstand judicial scrutiny.

Chapter 1 - Introduction

Effective regulation goes hand in hand with a normatively effective enforcement regime. In the context of sea-fisheries law, it is crucial that the law is fit for purpose and that it is enforced effectively in order to meet sustainability and conservation objectives under the Common Fisheries Policy (CFP)¹. Therefore, it is essential that Ireland is compliant with its enforcement obligations under EU fisheries law. Although regulation and enforcement has been researched extensively worldwide, sea-fisheries law and its enforcement in Ireland has been almost entirely neglected in the literature. Fisheries are a politically contentious issue and yet this intensely regulated area has never been the subject of dedicated academic research in Ireland. To the author's knowledge, this research is the first comprehensive analysis of the sea-fisheries enforcement regime in Ireland.

As the author is employed in the legal division of the national enforcement agency for sea-fisheries, the Sea-Fisheries Protection Authority (SFPA), the research benefits from unique insights into how enforcement operates in practice, which would not otherwise be accessible. Therefore, the research takes a distinctly practical view of regulation and enforcement of sea-fisheries law in Ireland, with the benefit of a practitioner focus based on professional experience.

¹ The Common Fisheries Policy consists of four interrelated policies: markets, structures, external fishery relations and conservation. It was first introduced in the 1970s. The CFP was intended to manage a common resource and create a level playing field for fishers by giving all fishers equal access to all EU waters while at the same time ensuring sustainability of stocks. It has proved to be quite a controversial instrument which is frequently the subject of intense scrutiny and criticism. See further Holden M. And Garrod D., *The Common Fisheries Policy: Origin, Evaluation and Future* (Oxford: Fishing News Books, 1996) and Khallilian S., Froses R., Proelss A. and Requate T., "Designed for Failure: A Critique of the Common Fisheries Policy of the European Union" (2010) 34(6) *Marine Policy* 1178.

The thesis undertakes a review of the key pieces of legislation governing sea-fisheries law which is enforced exclusively by criminal prosecution without any alternative sanction options. The effectiveness of this reliance on criminal prosecution is considered with a view to determining whether administrative sanctions could be introduced to supplement or replace the existing enforcement system. This may also have implications for other areas of regulation in Ireland, many of which are also reliant on criminal prosecution to enforce regulatory norms. In particular, the nature of what constitutes a crime is considered in order to inform a discussion of the utility of defining and prosecuting regulatory breaches as criminal offences. Discussion of the difficulties associated with criminal prosecution of regulatory offences is informed by the case law and selected case studies.

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Objectives and Research Questions

The objective of this thesis is to critically assess, within the broader context of regulatory enforcement in Ireland, whether sea-fisheries law and its enforcement is fit for purpose. The primary research questions are:

Is the current legislative framework for enforcement of sea-fisheries law effective?

This thesis critically examines the effectiveness of the myriad EU and national legislative measures which apply to enforcement of sea-fisheries law and identify any deficiencies in terms of enforcement. An effective rule is one which creates a result that meets its objective. Measuring the effectiveness of laws means measuring the extent to which laws solve the problem they were designed to address.² However, the concept of “effectiveness” as it relates to legal rules is difficult to describe and also to assess.

Compliance, implementation, effectiveness and efficiency are terms which are often used interchangeably but are quite distinct from one another when considering whether a legal rule is effective. If a legal rule is not well-designed, it will not be effective in the sense that the problem will not be solved, even where a high compliance rate exists.³ “Implementation” refers to the process of applying the legal rule such as providing the administrative infrastructure and resources necessary and instituting effective monitoring and enforcement mechanisms.⁴ Again there may

² Maljean-Dubois S. (ed) *The Effectiveness of Environmental Law* (Cambridge: Intersentia, 2017) 3.

³ *Ibid* 4.

⁴ Risse T. “Rational Choice, Constructivism and the Study of International Institutions.” in Katznelson I., Milner H. (eds.) *Political Science as Discipline? Reconsidering Power, Choice and the State at Century’s End* (New York: WW Norton, 2001).

be a high compliance rate without any implementation. A more efficient legal rule may be more easily implemented and should therefore be more effective, but this is not guaranteed.

A legal rule may be described as “effective” if it is well-designed and well-implemented in that it solves the problem it was designed to address.⁵ However, appropriate effectiveness indicators are lacking and any assessment of effectiveness essentially remains a value judgment dependant on criteria used. Therefore, effectiveness remains challenging to assess.⁶ In general terms, commentators advocate better legislation and better implementation to improve effectiveness of the law.⁷ This research is informed by this view of “effectiveness” in examining the possibility of better legislation and better implementation to improve the effectiveness of sea-fisheries law in Ireland and the effectiveness of regulatory norms in general.

Creating better legislation may present a challenging task. Law is traditionally bound by the need for legal certainty. However, sea-fisheries law concerns biodiversity which is a complex, dynamic, evolving and still widely unknown reality.⁸ If we accept the notion that a law is effective if it solves the “needs” of the issue or problem, an additional challenge is presented by sea-fisheries law where often the “needs” are unknown.⁹ Stock assessments and maximum sustainable yield cannot be completely exact, and, therefore the actual state of stocks is never fully clear. This makes better legislation extremely challenging to achieve,

⁵ Maljean-Dubois *supra* note 2, 6.

⁶ *Ibid* 3 & 8.

⁷ *Ibid* 8-12.

⁸ *Ibid* 9.

⁹ *Ibid* 6.

particularly where political considerations are at play. Fisheries quotas are set for each Member State at a dedicated EU meeting each year which is reputed to be one of the most contentious meetings at EU level. EU ministers must balance scientific advice on stocks with national demands for quota. Therefore, a double challenge to creating better legislation exists at EU level where stock assessments are estimates and are not always prioritised over national political concerns.

Similarly, improving implementation of sea-fisheries law in terms of administrative infrastructure and resources can be problematic, particularly where there are multiple possible enforcement mechanisms. Enforcement of sea-fisheries law in Ireland, as indeed with many other branches of regulation, currently relies on criminal sanctions. However, criminal sanctions may not constitute the best tool of implementation. They are not always well-tailored and not always possible. Faure remarks in the context of environmental law, that the likelihood of a violation ending up in court and sanctioned is extremely low.¹⁰ Where alternative sanctions or incentives are used as the mechanism of enforcement, then the implementation in terms of infrastructure and resources will differ. Often the preferred approach is to have a mix of cooperation and deterrence, incentives and sanctions which makes implementation all the more challenging.

The problems unique to criminal enforcement of sea-fisheries law are identified based on the author's personal experience gained working in the national enforcement body for sea-fisheries, the SFPA. The thesis examines whether a system based primarily on the criminal law is appropriate for dealing with breaches of sea-fisheries law, particularly in the context of minor infringements which currently must

¹⁰ Faure M. "The Effectiveness of Environmental Law: What Does the Evidence Tell Us?" (2012) 36(2) *William & Mary Environmental Law and Policy Review* 293, 321.

still proceed through the criminal courts. In light of this, the thesis discusses if Ireland should consider moving more, or exclusively towards administrative sanctions, as is the practice in most EU Member States. In particular, it considers if administrative sanctions offer a better means of enforcement than the criminal law, an issue which may have implications for other areas of regulation in Ireland. Ireland does not have a tradition of administrative sanctions. Most other EU Member States have a civil law tradition and impose administrative sanctions for fisheries infringements and other regulatory breaches. The thesis assesses whether it would be possible to successfully introduce administrative sanctions for breaches of sea-fisheries law in Ireland, and if so, what types of administrative sanctions. Scotland, which has a mixed legal system traditionally relying on criminal enforcement, has introduced an administrative sanction system for fisheries which is studied as an example of how an administrative sanction regime could operate in Ireland. Having examined the problems with the criminal system and the possibility of administrative sanctions, the thesis identifies options for an effective regulatory and enforcement framework for sea-fisheries, which may also be applicable to other regulatory fields. To the best of the author's knowledge, this study comprises the first root and branch analysis of sea-fisheries law and enforcement ever conducted in Ireland.

What type of enforcement strategy would be most effective?

The classic Ayres and Braithwaite enforcement pyramid¹¹ is favoured by many regulators. Under this pyramid, regulators have a number of enforcement options which escalate in severity. However, more recent literature suggests that regulators should be able to tailor the sanction to the offence to achieve the desired

¹¹ Ayres I. and Braithwaite J., *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford: Oxford University Press, 1992).

outcome, without having to proceed up the chain.¹² There exists a vast range of regulatory offences which can vary drastically in their seriousness from a minor, technical offence, to a large-scale environmentally damaging established practice. An effective enforcement strategy should be able to appropriately address both extremes and everything in between. However, in terms of sea-fisheries infringements, criminal prosecution is often the only option. Criminal prosecution is disproportionate as a mechanism to address minor offences and can also conversely result in derisory fines for serious offences. The thesis undertakes an in-depth analysis of enforcement theory, including discussion of the nature of crime and punishment and the role of the criminal law in the enforcement of regulatory crime in contrast to traditional notions of crime. Various commentators have proposed how regulatory norms can be enforced most effectively. This commentary is critically analysed to determine which enforcement strategy, or combination of strategies, would be most suitable for sea-fisheries offences. It suggests how such a strategy could be implemented in practice so as to result in a more effective enforcement regime which promotes compliance and meaningfully sanctions offenders. Each major step in the chain of regulation and enforcement of sea-fisheries law is examined in order to fully understand the regulatory and enforcement landscape.

Rationale

The Irish government has stated its intention to significantly grow the “blue economy” in Ireland, including sea-fisheries, over the next number of years.¹³

¹² For example, Baldwin R. and Black J., “Really Responsive Regulation”, (2008) 71(1) *Modern Law Review* 59.

¹³ *Harnessing Our Ocean Wealth: An Integrated Marine Plan for Ireland* (July, 2012) <https://www.ouroceanwealth.ie/mwg-internal/de5fs23hu73ds/progress?id=e9oN1Huru5nUnewFtD2dp9aBa5lWKXvVkornOM0vH3M,&dl> accessed 4 April 2022. This plan is due to be updated..

However, it is estimated that a large proportion of fish stocks are currently overfished.¹⁴ If the marine economy is to successfully grow into the future, then conservation and sustainable exploitation must be prioritised. Effective regulation of the sea-fishing industry goes hand in hand with a normatively effective enforcement regime to ensure conservation. This area of law has never been the subject of an in-depth analysis. There is little to no academic literature in the area of enforcement of sea-fisheries law in Ireland,¹⁵ despite it being an island nation, now seeking to expand its blue economy. It is crucial that sea-fisheries law is fit for purpose and that it is enforced effectively if the sea-fisheries economy is to be successfully expanded long-term and if Ireland is to meet its obligations under the CFP. The findings and recommendations of this study in relation to enforcement systems and strategies may also be useful for the improvement of regulatory enforcement in general in Ireland, at a time when the creation of regulatory crimes by the legislature has proliferated.

There is consensus among the legal community in Ireland that sea-fisheries law and its enforcement lack coherence.¹⁶ Sea-fisheries cases are often delayed indefinitely due not only to the delays inherent in the Irish criminal justice system, but also the lack of priority assigned to sea-fisheries cases. When cases finally make it to court, penalties imposed are often not in proportion to the seriousness of the

¹⁴ Stocks fished above maximum sustainable yield (MSY) are classed as overfished. A number of species in Irish waters have been identified by the Marine Institute as fished above MSY see further Marine Institute, *The Stock Book* (Marine Institute, November 2020).

¹⁵ However, a number of EU studies assessing Ireland's enforcement regime have been conducted. See for example Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. *Implementation of the current EU fisheries control system by Member States (2014-19)* (European Union, 2020) [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022 and Blomeyer & Sanz: Beke M., Ackermann R. and Blomeyer R. *The CFP-Infringement Procedures and Sanctions Imposed Throughout the EU 2014* (European Union, 2014) <https://op.europa.eu/o/opportal-service/download-handler?identifier=2f47e0b9-b69f-43b0-8688-57773bd330a8&format=pdf&language=en&productionSystem=cellar&part=> accessed 1 April 2022.

¹⁶ This was agreed by both the prosecution and defence counsel to whom this work was submitted as part of informal discussions and is frequently pointed out by both prosecution and defence counsel as well as District and Circuit Court judges in cases attended by the author.

harm caused or to the value of the infringement. There are also no alternatives to criminal prosecution for minor offences where criminal prosecution is clearly disproportionate. This thesis explores the possibilities for alternative means of enforcing regulatory norms which may include a redefinition of the role of the criminal law in regulatory enforcement.

Methodology

The research makes use of aspects of doctrinal, socio-legal and comparative research methods in order to provide a comprehensive analysis of sea-fisheries enforcement from multiple perspectives.

Doctrinal methodology

This thesis adopts an explanatory, theoretical or doctrinal approach to study the “law in books” (what is the law).¹⁷ This involves locating the legal source to be examined and interpreting and analysing it.¹⁸ This thesis conducts a doctrinal analysis of the regulatory quality of key enforcement provisions of sea-fisheries legislation, with special regard to the Irish framework’s almost exclusive reliance on the criminal law to the exclusion of alternative sanctions for minor offences. The disadvantages of predominantly criminal-based enforcement are numerous and include, for example, high costs for both the State and the accused, lengthy delays and problems with the proportionality and dissuasiveness of penalties. These issues with the criminal system are identified and analysed in the specific context of sea-

¹⁷ Hutchinson T. and Duncan N., “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17(1) *Deakin Law Review* 83, 85.

¹⁸ *Ibid* 110.

fisheries law but are also considered in the broader context of regulatory enforcement in general.

The doctrinal analysis includes a comprehensive examination of the literature and case law in the area. It undertakes extensive research on the general literature in the area of enforcement theory and enforcement strategies. However, the literature which deals specifically with sea-fisheries is extremely limited having regard to the almost total lack of academic research on sea-fisheries law in Ireland or its implementation. Therefore, the research relies on case law to understand the parameters of the role of enforcement in achieving compliance with the law in Ireland. The majority of sea-fisheries prosecutions are unreported but are accessible due to the author's position within the SFPA. Without this level of professional access, the in-depth insight contained in this study would not be possible.

The author also conducts a doctrinal analysis of the operation of the institutional regime for the implementation of sea-fisheries law in Ireland based on extensive professional experience of enforcement of sea-fisheries law while working within the SFPA. This involves a critical examination of issues such as the independence of the regulator and investigative procedures with a view to understanding the difficulties experienced in achieving normatively effective enforcement at a practical level. At all times, the author respects the confidentiality of her role in the Legal and Case Management Unit of the SFPA. The author does not conduct formal structured or semi-structured interviews but relies instead on anecdotal evidence and a wealth of practical experience to determine the normative effectiveness of the institutional regime. The management of the SFPA fully support this research to PhD level.

The author draws upon the analytical framework of legal realism in order to mitigate the limitations of solely doctrinal research, specifically that of balanced realism advocated by Tamanaha.¹⁹ Tamanaha argues that the realist/formalist divide is an artificial one and that in fact they share the common position of balanced realism. Balanced realism is made up of two conjoined aspects - the sceptical aspect and the rule-bound aspect.²⁰ The sceptical aspect propounds that law, in its application is indeterminate. It cannot cover every single situation and will always contain gaps, otherwise there would be no need for judges. Judges fill those gaps with so-called “judge-made law” or case law. Judges, as human actors, are inevitably influenced by their own biases, prejudices and social views. However, this must be considered in light of the rule bound aspect of balanced realism, which holds that in the majority of cases, the law can simply be applied by judges in a straightforward manner. Decisions are predictable and consistent because judges are bound by the law.

Llewelyn argued that judges are indoctrinated into the legal tradition such that they “see things...through law spectacles”.²¹ Much legal doctrine including rules, principles, and statutes, is reasonably clear and well developed.²² Judges follow accepted doctrinal techniques, strive to produce a just result, and to come up with the right legal answer.²³ Judges sitting together on an appellate bench interact “to smooth the unevenness of individual temper” and judges’ desire and commitment to live up to the obligations of the judicial role, to earn the approval of their legal

¹⁹ Tamanaha B, “Balanced Realism on Judging” (2010) 44(4) *Valparaiso University Law Review* 1243.

²⁰ *Ibid* 1258.

²¹ Llewelyn K., *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co, 1960) 19-20.

²² *Ibid* 20-21.

²³ *Ibid* 20-25.

audience for appropriate judicial behaviour, and their desire to avoid reversal by a higher court, prompts judges to engage in a good faith effort to conduct an unbiased search for the correct legal result.²⁴

MacCormick also recognises that knowledge of “law on the books” does not capture the knowledge of the law in practice. The success of lawyers in practice “derives from a great deal more practical knowledge, know-how, and wisdom than could be gleaned from however voluminous a grasp of the whole body of statute law, whether or not supplemented with voracious reading of cases and precedents”.²⁵

Therefore, although Tamanaha and Llewelyn focus on the role of judges in the legal system and MacCormick is using the example of a successful lawyer, balanced realism is a useful methodology in order to analyse the gap between sea-fisheries law as it appears in the statute books and how the law is enforced in practice. Balanced realism is particularly useful in analysing the case law due to the lack of academic literature in the area. Enforcement of sea-fisheries law, and many other areas of law, does not always function as set out by statute and frequently practices have emerged over a number of years which are best understood by reference to case studies rather than “law in the books”.²⁶ Balanced realism reflects this position by acknowledging the influence of the judiciary on the law. However, it can also be utilised to analyse the institutional framework for enforcement of sea-fisheries law as a whole, making it particularly suitable to examining the

²⁴ *Ibid* 45-51.

²⁵ MacCormick N., *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007) 71.

²⁶ For example, the detention and bond procedures see Chapter 3.

effectiveness of the enforcement regime in the extremely under-explored field of sea-fisheries.

Socio-Legal Methodology

Those who developed socio-legal research usually argued that a more rounded picture of the law could be gained by examining the disparity²⁷ between “law in the books” and “law in action”.²⁸ This thesis examines both aspects of the law by adopting a practitioner perspective due to the author’s professional experience, which ties in with balanced realism as a methodology. Due to the lack of academic literature in the area of Irish sea-fisheries law, it is submitted that the only way to answer the above research questions is to take a scholarly practitioner perspective, which may be classified as a type of socio-legal method, or a type of action research.²⁹ Academic researchers usually work with practitioners and policy-makers to inform their research. While this approach has value, often such research does not address the practitioner’s concerns and serves to widen the gap between research and practice.³⁰ Practitioner research facilitates research from within the field to deliver improvements rather than the more detached view of the academic researcher.

Practitioner research has the potential to offer more informed, accurate, relevant and practical conclusions and solutions than traditional research methods alone. Such a perspective affords direct professional access to investigations, enforcement proceedings and prosecutions and allows for an in-depth analysis of the

²⁷ McCrudden C., “Legal Research and the Social Sciences” (2006) *Law Quarterly Review* 632.

²⁸ Pound R., “Law in Books and Law in Action” (1910) 44 *American Law Review* 12.

²⁹ The process of action research is aimed at change as well as the generation of knowledge. See further Waterman H., Tillen D., Dickson R and de Koning K. “Action Research: A Systematic Review and Guidance for Assessment” (2001) 5(23) *Health Technology Assessment*, 3.

³⁰ Punch K.F., Oancea A., *Introduction to Research Methods in Education* (London: Sage, 2014) 45.

area that mere examination of the literature and case law alone could never provide. Empirical research would not offer the fully rounded and nuanced view that working as a lawyer in the national enforcement agency automatically provides due to the author's inside knowledge and understanding of the subject-matter.

Bias must be acknowledged as a risk of the practitioner perspective taken by the author, particularly institutional bias due to the author's position.³¹ However, the methodology which the author has employed, namely doctrinal and comparative research from the theoretical standpoint of balanced realism seeks to minimise such bias. The author has also submitted the research findings to a diverse group of professionals working in the area in order to gain a multiplicity of perspectives from civil servants, defence counsel and prosecuting counsel. The number of people working in this area is quite small. The professional community were extremely generous with their time as regards reviewing this research by means of informal discussion as opposed to structured interviews. Multiple professional perspectives allowed the author to reflect on and in some instances reconsider research conclusions based on their feedback.³² It also assisted the author in identifying and mitigating any institutional bias which may exist as a result of the author's position.

Comparative Methodology

The author conducts a comparative analysis of the institutional frameworks employed in other jurisdictions by means of a law-in-context method.³³ The

³¹ It has been argued that action research is anecdotal and subjective, and that it is inherently biased due to a lack of researcher independence or separation from the research process. See Greenwood D, and Levin M. *Introduction to Action Research: Social Research for Change* (London: Sage, 1999) 110.

³² Action research, unlike traditional research, includes those who are being studied, whether they are practitioners or clients, as "co-researchers". See further Waterman *et al. supra* note 29.

³³ Van Hoecke M., "Methodology of Comparative Legal Research" *Law and Method*, 16-18.

comparative element is utilised as an instrument of learning and knowledge³⁴ to contribute to the improvement and advancement of domestic law. Given that one of the main aims of the CFP is harmonisation in enforcement, the comparative analysis also helps to determine how enforcement of sea-fisheries law in Ireland might operate in greater harmony with the largely administrative enforcement regimes of other Member States.³⁵ The comparative analysis assists identification of alternatives to criminal enforcement and the critical analysis of the effectiveness of different regulatory and enforcement regimes. Effectiveness is considered in light of the EU requirement for sanctions for breaches of sea-fisheries law to be “effective, proportionate and dissuasive”.³⁶

In particular, the Scottish regime of fisheries enforcement is examined, due to its similar legal tradition and previous membership of the EU. The author is privileged to be able to liaise with colleagues in Marine Scotland to ensure understanding of the whole system in practice rather than relying solely on the legislation for the comparative analysis. The law-in-context method in combination with the scholarly practitioner perspective of the thesis as a whole, helps to mitigate some of the pitfalls of comparative research. In particular, there is an inherent danger in conducting comparative research that the researcher may not be aware of gaps between the black-letter law and practice which have evolved over time, but which are undocumented. What seems to work well in another legal system may fail to do

³⁴ *Ibid* 2.

³⁵ *Ibid*.

³⁶ Art. 90 of Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L343/1. In Case C-304/02 *Commission v France*, para. 69 the court held that the obligation on Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance in the field of fisheries. If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised.

so in one's own legal system because of a different context.³⁷ Professional access to colleagues in Scotland assists in highlighting such gaps and provide a more nuanced view of the Scottish system.

Scope and limitations

In order to fully ensure sustainability of fish stocks, sea-fisheries law and its enforcement across all Member States needs to be assessed. Ireland is the focus of this study due to the author's position in the legal unit of the Irish enforcement agency. Ireland also provides an interesting case study due to its minority position as a common law system among the majority civil law systems of the EU. Since the UK has left the EU, Ireland is the only common law Member State³⁸ which may increase pressure to introduce administrative sanctions for fisheries similar to all other Member States. Sea-fisheries law and its enforcement may change radically in the UK due to Brexit. However, an in-depth analysis of the potential impact of Brexit on enforcement of sea-fisheries law in Ireland is outside the scope of this study.³⁹

³⁷ *Ibid* 30.

³⁸ Malta and Cyprus operate a hybrid civil/common law system.

³⁹ A briefing for the European Parliament notes that a number of potential serious challenges to the Irish sea-fisheries sector derive from the Brexit process with the issues of access to waters and quota share being the most important. Other issues include the implementation of the landing obligation and the transposition of the Community control system into Irish law. See Smith E. *Fisheries in Ireland* (European Parliament, 2018).

Chapter 2- The Background to Sea-Fisheries Enforcement

The International Dimension

Before delving into the issues associated with sea-fisheries enforcement in the present day, it is important to be cognisant of the overarching framework which applies to sea-fisheries enforcement. Historically, the fisheries jurisdiction of the State was linked with the territorial sea¹ i.e. three nautical miles (nm) from the baseline. The Maritime Jurisdiction Act 1959 for the first time reflected the Irish preference for separation of the concepts of the territorial sea and exclusive fishery limits.² Symmons notes that fishery interests have been at the heart of all past Irish moves to expand maritime jurisdiction.³

The Maritime Jurisdiction (Amendment) Bill 1964 was introduced in order to ratify the European Fisheries Convention (the so-called London Convention) of 1964 and extended Irish fishing limits to 12 miles, whilst retaining a three-mile territorial sea.⁴ The European Fisheries Convention had, in the context of western Europe, implemented the then-growing idea that a coastal State should have exclusive (or at least priority) fishery rights in an inner belt of waters, with a ‘phasing out’ period for States with traditional fishing rights in the outer (six-mile) band.⁵ This concept was approved by the International Court of Justice in the *Icelandic Fisheries* case,⁶ where

¹ Symmons C. *Ireland and the Law of the Sea* (Dublin: Round Hall, 1993) 73.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid* 75.

⁵ Churchill R.R. and Lowe A.V. *The Law of the Sea* (Manchester: Manchester University Press, 1983) 228.

⁶ [1974] ICJ Rep. 3, para 52.

the Court declared the 12-mile exclusive fishery zone to be a customary rule of international law.⁷

Fisheries management has a considerable international dimension, both because management frequently requires cooperation between States and because a good deal of fishing takes place beyond the waters subject to national jurisdiction.⁸ Before the first UN Conference on the Law of the Sea, held in 1958, fisheries were regulated to a limited degree by treaties and customary international law.⁹ The four Geneva conventions on the Law of the Sea, adopted at that Conference, marked the start of the development of a comprehensive international legal framework for fisheries management.¹⁰

The approach to fishery law enforcement in the CFP conforms with State practice in both customary and convention law.¹¹ The United Nations Convention on the Law of the Sea 1982 (UNCLOS) separates fisheries enforcement responsibilities between the coastal and flag State. Under Art. 62 and 73 the coastal State is empowered to ensure compliance with its fisheries laws applicable in the Exclusive Economic Zone (EEZ). In terms of penalties, coastal State may not impose imprisonment as a sanction for breach of fisheries law.¹² Where the coastal State detains a vessel, both the vessel and its crew must be released promptly upon the posting of a reasonable bond or other security.¹³ The flag State still retains both

⁷ Symmons *supra* note 1, 75.

⁸ Churchill R. and Owen D. *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010) 78.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Long R. and Curran P. *Enforcing the EC Common Fisheries Policy* (Oxford: Wiley, 2000) 63.

¹² Unless they are not a party to the Convention. Some Member States do have imprisonment available as a sanction.

¹³ Discussed below in the context of detentions, 43. The International Tribunal for the Law of the Sea (ITLOS) stated in *Japan v Russia*, Judgment of 6 August 2007, *ITLOS Reports* 2007, para 76 that the decision to detain should not be taken in such a way as to prevent the shipowner from having

legislative and enforcement authority over its vessels on the High Sea under Art. 6 of the Geneva Convention on the High Seas and Art. 92 of UNCLOS.

There are three other major international agreements which are relevant to enforcement of fisheries law. The first is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement). This agreement sought to further effective compliance and enforcement by placing an obligation on all States to ensure that their vessels comply with international management and conservation goals on the high seas. It seeks to prevent the reflagging of vessels in order to avoid complying with fisheries laws. The EU accepted this agreement and it entered into force in 2003.

The second is the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the conservation and management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Straddling Stocks Agreement). The agreement enhances coastal State responsibility for EEZ enforcement, elaborates further on the concepts of flag State responsibility and the duty to cooperate, and gives non-flag States, in the context of regional agreements, a range of authority to board and inspect vessels of other parties to the agreement.¹⁴ Art.19 imposes an obligation on the flag State to carry out investigations and judicial proceedings expeditiously and to apply

recourse to available domestic judicial remedies, or to prevent the flag State from resorting to the prompt release procedure under UNCLOS, nor should it be taken through proceedings inconsistent with international standards of due process of law. See further Trevisanut S. "Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends" (2017) 48 *Ocean Development & International Law* 300.

¹⁴ Balton, D.A., "Strengthening the Law of the Sea: the New Agreement on Straddling Stocks and Highly Migratory Fish Stocks" (1996) 27 *Ocean Development and International Law* 125, 141.

sanctions adequate in severity to be effective in securing compliance, to discourage violations and to deprive offenders of the benefits accruing from their illegal activities. Therefore, it is a highly significant instrument in terms of the international enforcement context to which the EU is a party.¹⁵

The third is the FAO Code of Conduct for Responsible Fishing which is a voluntary agreement and sets out principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources, with due respect for the ecosystem and biodiversity.¹⁶ Under Art.6 and 7, there is an obligation on States to establish effective monitoring and control mechanisms and States are obliged to ensure that their vessels do not undermine the effectiveness of conservation and management measures. Significantly, Art. 7 states that sanctions imposed should be of sufficient severity to be effective, an obligation which also exists under EU law.

Relevant Case Law of the European Union

In terms of the CFP, it is well established that the EU has exclusive competence to legislate for fisheries laws but Member States retain the power to enforce it,¹⁷ leading to perennial difficulties with uniformity and effectiveness of enforcement across all of the Member States.¹⁸

Perhaps one of the most significant cases in terms of sea-fisheries enforcement is Case C-304/02 *Commission v France* where the court held that the obligation on Member States to make sure that penalties which are effective,

¹⁵ Since 1996.

¹⁶ Introduction to FAO Code.

¹⁷ Long and Curran *supra* note 11, 62.

¹⁸ The reasons why enforcement of the CFP has proved so difficult are discussed fully in Lado E. P. *The Common Fisheries Policy: The Quest for Sustainability* (Oxford: Wiley Blackwell, 2016) 287.

proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance in the field of fisheries. If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised.

The importance of this uniform approach was recently highlighted by McKechnie J in the *Fitzpatrick & Flannery* case where he stated that the entire regime is designed to ensure compliance with the detail of the CFP and that whilst “each Member State has responsibility over its relevant area such must be carried out as part of a global and integrated approach; therefore, in principle there should be no disparity between one State and another”.¹⁹

Of particular relevance to Ireland given the reliance on criminal sanctions for fisheries offences is Case C-176/03 *Commission v Council Community* where the Court held that the Community had the competence to require criminal penalties in the field of environmental protection. It stated that the Community has the power to require Member States to employ “effective, dissuasive and proportionate criminal penalties” to protect the environment. Furthermore, the Court stated that although the Community lacks express criminal competence, it is capable of defining criminal offences and requiring “necessary, dissuasive and proportionate criminal penalties” for those offences. Ireland cannot blame the difficulties associated with criminal prosecution of regulatory offences for any failure to impose sanctions to the standard required in fisheries cases as under Case C-38/05 *Commission v Ireland*, Member

¹⁹ *Pat Fitzpatrick and Michael Flannery v The Minister for Agriculture, Food and the Marine and the Sea-Fisheries Protection Authority*, Supreme Court 25 February 2020, para 126.

States may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from Community law.²⁰

Competent Authorities for Sea-Fisheries Enforcement in Ireland

The primary agency which will be discussed in this thesis is the Sea-Fisheries Protection Authority as the body responsible for sea-fisheries enforcement in Ireland. In 2020, sea-fisheries protection officers (SFPOs) of the SFPA undertook a total of 1,808 fishing vessel inspections. 79% of these inspections were of Irish registered vessels with French registered vessels accounting for 6%, vessels registered to Spain accounting for a further 6% and UK registered vessels accounting for 4% of these inspections. The remaining 5% pertaining to vessels from 6 different countries.²¹

However, other national agencies also have a role to play. The SFPA works closely with the Licensing Authority in relation to vessel licensing and the Department of Agriculture, Food and the Marine in relation to legislation and policy. The Irish Naval Service is also an important enforcement agency as the body responsible for sea-fisheries enforcement at sea. Where the Naval Service detects an offence at sea, officers may detain the vessel and crew and hand the vessel over to the Gardaí to make an application for a detention order in the nearest District Court. It is also responsible for the Fisheries Monitoring Centre located in Haulbowline, Co.Cork which is key to remote at sea vessel monitoring for control and enforcement purposes.

²⁰ See further Case C-209/88 *Commission v Italy* [1990] ECR I-4313 para 11 and Case C-406/03 *Commission v Ireland*, not published in the ECR, para 14.

²¹ Sea-Fisheries Protection Authority, *Annual Report 2020* (SFPA, 2020) 38 https://www.sfpa.ie/LinkClick.aspx?fileticket=nQuYG_ILhvs%3d&portalid=0&resourceView=1 accessed 4 April 2022.

To put its role in context, the Irish Naval Service patrols 220 million maritime acres of sea, an area over 12 times the landmass of Ireland, which represents 15% of the EU's fishing waters. The Naval Service carried out 309 inspections of fishing vessels at sea in 2020. Of the fishing vessels inspected, 47% were Irish vessels, 22% were French vessels, and a further 16% were Spanish vessels while 10% were UK vessels. The remaining 5% of vessels inspected were from 5 other nations.²²

The Irish Air Corps also have a role in fisheries control by conducting flights over vessels fishing and photographing their activities in some instances. This evidence can be used to prove the position of the vessel or may add to evidence alleging the vessel was undertaking some type of illegal fishing. In 2020, the Irish Air Corps CASA Maritime Patrol Aircraft undertook 152 Patrols during which 788 fishing vessels were observed and monitored.²³

Other agencies which sometimes interact with sea-fisheries enforcement include Inland Fisheries Ireland, which is charged with protecting, managing and conserving Ireland's inland fisheries and sea angling resources.²⁴ Some of its officers are warranted by the SFPA to carry out sea bass control and enforcement. The Marine Survey Office acts as the maritime transport regulator for the safety, security, environmental protection and living and working conditions for vessels and ports in Ireland and Irish ships abroad.²⁵ The National Standards Authority of Ireland is Ireland's official standards body under the National Standards Authority of Ireland

²² *Ibid* 40.

²³ *Ibid* 41.

²⁴ See <https://www.fisheriesireland.ie> accessed 18 January 2022.

²⁵ See <https://www.gov.ie/en/organisation-information/111f0e-marine-survey-office-mso/> accessed 18 January 2022.

Act 1996.²⁶ In the context of sea-fisheries, it is responsible for certifying the accuracy of scales used by the fishing industry to weigh catches. Finally, the Food Safety Authority of Ireland contracts out its responsibility in the area of seafood safety control and enforcement to the SFPA. Other agencies such as the Marine Institute, Bord Iascaigh Mhara and the Seafood Development Centre contribute to scientific knowledge and development of the sea-fisheries industry but are not generally involved in enforcement.

The results of this enforcement activity are central to any consideration of the effectiveness of Ireland's sea-fisheries enforcement regime. There is no data available on the number of serious infringements detected and the action or sanction taken in Ireland between 2015 and 2020 due to the legal challenges to the point system which meant that no determinations in relation to potential serious infringements took place. However, an EU wide study of enforcement of the CFP found that fines in Ireland from 2014-2019 were rather low and not sufficiently high to be dissuasive. It observed an apparent low level of detection of infringements (about 1%) in relation to control and even fewer, almost negligible cases of convictions.²⁷ The study also noted that the average length of time of infringement proceedings in Ireland is 419 days based on the period examined by the study but that there also seemed to be a backlog of cases.²⁸ Due to this backlog, it is submitted that the estimated length of time to case completion may not be wholly accurate and that in fact fisheries cases on average take even longer.

²⁶ See <https://www.nsai.ie> accessed 18 January 2022.

²⁷ Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. Implementation of the Current EU Fisheries Control System by Member States (2014-19) (European Union, 2020) 50 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022.

²⁸ *Ibid* 120 and 125.

Chapter 3

The Building Blocks of Regulatory Enforcement

Overview of the Legislative Framework for Sea-Fisheries

Introduction

It is estimated that as many as 80% of all fish species in EU waters are currently overfished.¹ However, in 2014 the marine sector contributed an estimated €1.4bn to Ireland's GDP,² with the sea-fisheries sector alone contributing €268 million.³ In light of these conflicting statistics, the primary aim of the CFP is to conserve marine resources and ensure their sustainable exploitation. Sea-fisheries law in Ireland is made up of a complex suite of Irish and European legislation which aims to give effect to the conservation measures set out in the CFP. Therefore, effective enforcement of sea-fisheries law is essential to the success of conservation measures. Despite this, Hardiman J stated in a 2013 fisheries case that “[n]either the Irish nor the European Fisheries Legislation is aimed at clarity or transparency and at times seem deliberately to court complexity and obscurity”.⁴

¹ http://ec.europa.eu/ireland/key-eu-policy-areas/common-fisheries-policy/index_en.htm accessed 27 April 2015. The WWF *Living Blue Planet Report* (WWF, 2015) shows a decline of 49 per cent in the size of marine populations worldwide between 1970 and 2012 https://files.worldwildlife.org/wwfcmprod/files/Publication/file/5dqysd8gh6_Living_Blue_Planet_Report_2015_Final_LR.pdf?_ga=2.267222281.647300073.1649080933-988327063.1649080932 accessed 4 April 2022.

² Vega A., Hynes S. and O'Toole E., *Ireland's Ocean Economy* (Socio-Economic Marine Research Unit, 2015) 1.

³ *Ibid* 25.

⁴ *Montemuino v The Minister for Communications, Marine and Natural Resources, Ireland and the Attorney General* [2013] 10 J.I.C. 1401, 6. In the same case Clarke J stated at 1.1 “[i]t can, I think, safely be said that the legislation governing fisheries and fishing in Ireland is both complex and highly technical”. Churchill also notes that EU fishery rules (especially those relating to technical conservation measures and quotas) are made more difficult to enforce than they might be because

This chapter discusses the history and evolution of the key pieces of legislation pertaining to enforcement of sea-fisheries law. Both national legislation and EU regulations are set out and analysed in detail. In particular, the penalties provided by and imposed under national legislation are considered with reference to the obligation under EU law that sanctions for a breach of sea-fisheries law must be “effective, proportionate and dissuasive”⁵ and deprive the offender of the economic benefit derived from the infringement.

History and Evolution of Sea-Fisheries Law

A Tradition of Criminal Enforcement

One of the most striking features of enforcement of sea-fisheries law both historically and up to the present day, is its reliance on criminal enforcement. Ireland does not have a legal tradition of administrative sanctions. Therefore, breaches of sea-fisheries law have historically been dealt with by means of criminal prosecution of the Master of the vessel. This is in stark contrast to the majority of the other EU Member States who not only deal with breaches of sea-fisheries law by means of

of their considerable complexity and that a simplification of the rules would make the task of enforcement easier. See Churchill R.R. *EEC Fisheries Law* (Nijhoff, Dordrecht, 1987) 146 and Churchill R.R. “Enforcement of the Common Fisheries Policy, with Special Reference to the UK” in Harding C. And Swart B. (eds.) *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth Publishing, 1996) 95 and Holden M, *The Common Fisheries Policy* (Oxford: Fishing News Books, 1996) 161.

⁵ Art.89 of EU Regulation 1224/2009 provides that “Member States shall ensure that appropriate measures are systematically taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons suspected of a breach of any of the rules of the common fisheries policy”. “The overall level of sanctions and accompanying sanctions shall be calculated, in accordance with the relevant provisions of national law, in such way as to make sure that they effectively deprive those responsible of the economic benefit derived from their infringement without prejudice to the legitimate right to exercise their profession. Those sanctions shall also be capable of producing results proportionate to the seriousness of such infringements, thereby effectively discouraging further offences of the same kind”. Art.90 provides that a serious infringement is punishable by either administrative or criminal “effective, proportionate and dissuasive” sanctions. Therefore, this research proceeds on the basis that in essence it may be summarised that both serious and non-serious infringements must be dealt with by effective, proportionate and dissuasive sanctions under EU law.

administrative sanctions, but also operate under a completely different legal system. Since the departure of the UK, Ireland is the only common law country in the EU. Criminal prosecution in this jurisdiction differs greatly to the more administrative nature of a prosecution in a civil law jurisdiction. By treating all breaches of sea-fisheries law as crimes, masters are entitled to the full procedural protections of the common law criminal trial. However, the criminal law may not be the most appropriate means of addressing breaches of sea-fisheries law.

For a large part of Irish history, boards of conservators were responsible for fisheries. The boards were dominated by the landlord class who owned virtually all of the private fisheries in Ireland.⁶ The Fisheries Act 1980 brought about a total change in the structure of the management and control of fisheries by abolishing the boards of conservators and dividing their functions between two entirely new entities, the Central Board and regional fisheries boards, of which there were seven in number. Comerford describes this as “hugely innovative function”.⁷ The 1980 Act also introduced new enforcement measures in the form of increased penalties and the availability of trial on indictment for certain offences. The Act also sought to create an aquaculture licensing system but this was not achieved until 1997.⁸

Sea Fisheries Act 1952

The 1952 Act set up the modern licensing system for sea-fishing vessels. Therefore, the 1952 Act will be briefly examined, although it has since been replaced. The requirement to have a licence to fish is significant. It suggests that it is a privilege and not an inherent right to take fish from the sea. However, the historical

⁶ Comerford H. *Consolidated Fisheries Legislation 1959-2003* (Dublin: Thomson Round Hall, 2005) x.

⁷ *Ibid.* viii.

⁸ Fisheries (Amendment) Act 1997.

view is that fish are *nullius in bonis* (no one's property). According to Longfield, historically there has always been an individual right to fish "[t]here were recognised as vested in all the subjects of the realm two well established rights, that of free navigation and free fishing".⁹ In *R. (Moore) v Hanrahan*,¹⁰ Murnaghan J quoted a Canadian case with approval "the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike".¹¹ As Birmingham J observed in *Barlow v Minister for Agriculture, Food and the Marine*, the State does not own marine species but the State is responsible for their management.¹² Under Art.10 of the Constitution, the State has jurisdiction over its waters. Indeed the territorial sea is regarded as the sovereign territory of the State.¹³ Under Art.10.3 provision may be made by law for the management of the property of the State. Therefore, although the State does not own sea-fish, it may make the taking of such sea-fish subject to licence in order to effectively manage its waters.¹⁴

Fishers must agree to comply with certain conditions in order to be granted a licence. If these conditions are subsequently not complied with, the licence may, under certain circumstances, be revoked. This calls the traditional view of fishing as a right into question. However, there may be reluctance on the part of the State to revoke sea-fishing licences.¹⁵ This reluctance despite, in some cases, alleged

⁹ Longfield R., *Fishery Laws of Ireland* (Dublin: E. Ponsonby, 1863) 3.

¹⁰ [1927] I.R. 406.

¹¹ *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 153, 443.

¹² [2014] IEHC 471.

¹³ As defined under Art.2 and 3 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

¹⁴ Due to the sovereign rights of the State within its exclusive economic zone *ibid*.

¹⁵ The Licensing Authority is responsible for vessel licensing since 2003 under the Fisheries (Amendment) Act 2003. Prior to this, licensing was the responsibility of the Minister. The apparent reluctance of the Licensing Authority to suspend or revoke fishing licences is discussed in greater detail below.

repeated breaches of the law, may be recognition of the historical right to fish and the concept of *nullius in bonis*.¹⁶

Under the 1952 Act, licences could be subject to such conditions as the Minister saw fit,¹⁷ including restrictions on sea-fishing either generally or in regard to methods of sea-fishing in particular places. The Minister could vary any condition or impose new conditions.¹⁸ Under s.10 the Minister “shall grant a licence” to an applicant unless a former licence granted to him has been revoked.¹⁹ Therefore, the Minister could only refuse to grant a licence in limited circumstances. Again, it is possible that this limitation on his discretion reflects the traditional view of fishing as a right.²⁰ Similarly, a prosecution for breach of a licence condition was confined to summary disposal only, despite the potential for serious breaches resulting in environmental damage for which summary prosecution would not be a proportionate response.²¹ The Minister could revoke the licence where the accused received a second conviction for breach of licence.²² Therefore, powers in relation to licence revocation were limited and in the opinion of the author, it is unlikely they were used due to a reluctance to exercise this power.

¹⁶ Churchill also notes a reluctance in the UK to suspend or revoke licences due to the loss of livelihood for the fisherman concerned, at least for a time. It is also attended by fewer legal safeguards than a criminal prosecution thus the preference is to prosecute for breach of condition. See further Churchill in Harding *supra* note 4, 91.

¹⁷ At the time the Minister for Agriculture.

¹⁸ S.9(5).

¹⁹ Or the applicant or any other person who, if the licence were granted, would be concerned in the management of the vessel, was concerned in the management of a vessel at a time when an offence was committed by reason of which a licence for that vessel was revoked.

²⁰ The public right to fish was argued in a series of cases where the courts failed to uphold the statutory right under the Fisheries (Ireland) Act 1842, preferring instead to uphold private property rights. See for example *Morrissey v Kilkenny* [1884], 14 L R Ir 349 and *O'Neill v Johnston* [1909] 1 IR 237. See further discussion in Hamill S.E. “The Public Right to Fish and the Triumph of Colonial and Dispossession in Ireland and Canada” (2017) 50 *U.B.C. Law Review* 53.

²¹ S.13 of the 1952 Act.

²² *Ibid* s.11.

Fisheries (Consolidation) Act 1959

Deficiencies in the 1959 Act and its enforcement resulted in the introduction of the Sea-Fisheries and Maritime Jurisdiction Act 2006 and the creation of a dedicated enforcement agency, the SFPA.²³ Therefore, it is proposed to discuss the 1959 Act alongside the 2006 Act as it demonstrates the persistent difficulties with sea-fisheries law and its enforcement, particularly in relation to enforcement of EU fisheries law at national level. In addition, there may still be criminal prosecutions in the list awaiting trial under the 1959 Act as they predate the 2006 Act. These cases cannot proceed due to their antiquity. However, such a delay can occur where the case is postponed pending a relevant Supreme Court decision which may take a number of years.

This situation serves to highlight the delays inherent in a system of regulation which is wholly reliant on criminal prosecution as the means of enforcement. It is undesirable for both the regulator and the accused that cases can remain in a state of limbo for such lengthy periods, often never to resurface. In the author's experience, some old cases which predate the 2006 Act are simply lost in the system. It is difficult to pinpoint at what stage and how the cases disappear into the system. A number of cases remain technically open but with no chance of proceeding as they are not in the court list and they are not with the applicable State Solicitor. If an old case comes up in the court list, the applicable State Solicitor can contact the Director of Public Prosecutions (DPP) for a direction to enter a *nolle prosequi* where appropriate. However, due to the fact that some cases are not resting with any actor in particular, they cannot be closed. Therefore, the accused, who should be entitled

²³ Discussed further below under the Sea-Fisheries and Maritime Jurisdiction Act 2006 *infra* p 37.

to at least a relatively efficient hearing of his/her case when facing a criminal charge, cannot be informed of the status of the case. Similarly, the regulator cannot enforce the law effectively when cases are delayed indefinitely with no visibility of their status. The DPP has greatly improved on its electronic case management system which means that there is now greater transparency in the progress of files, making it easier to track cases. However, delays in the criminal system, as it operates currently, are inevitable. Delay and other issues with criminal enforcement of regulatory law are discussed further in Chapter 5.

The 1959 Act does not charge any particular body with enforcement of sea-fisheries law. Instead, a number of persons may be considered as sea-fisheries protection officers (SFPOs).²⁴ An SFPO is every officer authorised by the Minister, every member of the Defence Forces (not below the rank of sergeant or the rating of petty officer) serving on board any ship or vessel belonging to or employed in the service of the State, every member of the Garda Síochána, every officer of Customs and Excise authorised by the Revenue Commissioners and every officer of the Minister for Industry and Commerce authorised by the Minister.²⁵ The list of authorised officers is extensive due to the need for SFPOs on land and at sea (Naval Service). The Gardaí are authorised as SFPOs in order to take custody of a vessel where it has been detained.²⁶

An SFPO possesses extensive powers including the power to stop and search any person conveying or believed to be conveying sea-fish. This is an extraordinarily wide power given that the statutory powers of the Gardaí only empower them to

²⁴ SFPOs were first authorised by the Sea Fisheries Act 1933, which was consolidated into the 1959 Act.

²⁵ S.220 of the Fisheries (Consolidation) Act 1959.

²⁶ The detention procedure is discussed further *infra* p 42.

require a person to stop in certain circumstances.²⁷ The Gardaí can search a person without their consent only where he/she believes the person has committed an offence. There is no such restriction placed on SFPOs which is noteworthy. In addition, a Garda may only search a premises if he/she has a valid search warrant.²⁸ However, an SFPO has the power to open and search any vehicle or package in which sea-fish are believed to be conveyed and can at all reasonable times enter any premises in which fish are believed to be sold or kept.

An SFPO also has the power to take, remove and detain in his custody any sea-fish or other instrument found in respect of which an offence is being or is suspected of being committed. An SFPO may demand and take the name and address of the person having custody of any sea-fish or other article, and also demand and take from such person the name and address of the owner of such sea-fish or other article.²⁹ An SFPO may also order a boat to be stopped. If he/she suspects that there has been a contravention by any person on board such boat he may without summons, warrant or other process take the boat and all persons on board to the nearest or most convenient port and detain the boat and persons pending court proceedings. SFPOs may, for the purpose of exercising any their powers, use such force as considered necessary. If an order to stop is disobeyed or disregarded, the boat could even be fired at by the SFPO under the 1959 Act.³⁰ Any person who impedes or obstructs an SFPO, including refusing to give a name and address, can be arrested by an SFPO without a warrant.³¹ The astonishing breadth of the powers

²⁷ Eg. A Garda can require a motorist to stop where he/she suspects a motoring offence has been committed under s.109 of the Road Traffic Act 1961.

²⁸ Or where there is a statutory or common law power to enter without a warrant. Such circumstances are limited eg. where a person's life is believed to be at risk.

²⁹ S.231 of the 1959 Act.

³⁰ This power is not contained in the 2006 Act.

³¹ S.231(7) of the 1959 Act.

granted to SFPOs may be considered as recognition of the importance of effective enforcement of sea-fisheries law. It is significant that such an awareness existed prior to Ireland joining the EU and becoming subject to EU fisheries law.³²

Similarly, the 1959 Act also empowered the Minister to introduce a number of conservation measures³³ prior to any EU requirements becoming applicable, suggesting the need for conservation of stocks and effective enforcement of conservation laws was already recognised, although these rules were not as technically detailed. This type of enabling legislation which grants extensive powers to the Minister to make laws is quite common in areas where legislation must be introduced quickly in order to reflect the fast-moving nature of the market. The current 2006 Act contains a general provision covering all EU law.³⁴ Therefore, a prosecution for breach of an EU regulation may be taken under this general section of the 2006 Act rather than necessitating that every aspect of the EU regulation be reflected in a dedicated national provision which would not be feasible from a practical viewpoint.

However, the State often introduces a new statutory instrument (SI) where a penalty for a breach of a particular EU regulation applies. Due to the continuing elaboration of European legislation, new SIs are constantly introduced leading to

³² See Seanad deb 17 Dec 1958, vol 50, no 4 recognition of the need to modernise the law in the area.

³³ For example, s.9 introduces a number of now familiar concepts, including closed seasons, mesh size and general conservation of the fishery and grants extensive powers to the Minister to “make such bye-laws as are in his opinion expedient for the more effectual government, management, protection and improvement of the fisheries of the State”. S.223 also allows the Minister to prohibit trawling in certain areas. It is now standard practice to prohibit certain methods of fishing in specified areas for the purposes of conservation. S.225-229 grants the Minister power to prohibit the catching of undersized fish, including carriage of nets under a minimum mesh size. Undersized fish retained onboard for the purposes of sale must be forfeited and destroyed.

³⁴ Due to *Browne v Ireland* [2003] 3 I.R. 205 and *Kennedy v The Attorney General and Minister for Marine and Natural Resources* [2005] 2 I.L.R.M. 401 see further discussion below.

considerable fragmentation of sea-fisheries law.³⁵ This makes enforcement extremely challenging, as SFPOs must keep up to date with new developments. It is also difficult for fishers to keep informed of changes in the law, particularly amendments to technical measures. This may lead to gaps in enforcement where a new SI is required but has not yet been introduced. The fragmentation of legislation becomes highly problematic in court, when practitioners and judges struggle to understand the legislation, making it extremely challenging to explain the issues concisely to the jury.

It is clear that the 1959 Act is heavily reliant on criminal enforcement of sea-fisheries law, as is the case up to the present day. It is the Master of the vessel who is usually held to be criminally responsible. Liability of the Master for offences committed onboard a vessel is still the default position under the 2006 Act, while the owner escapes any liability. The practice of attributing liability to the Master is related to the principle of “effective control”.³⁶ For example, when a company director exercises effective control over the company’s affairs, the court may attribute his intention to that of the company. The principle is analogous to a State exercising effective control over a vessel or its crew in terms of human rights abuses committed in international waters. Any act or omission may then be attributable to the State under the European Convention on Human Rights.³⁷ In the *Čelebići* case,

³⁵ Fragmentation of the law is also a major problem in the context of planning law. See further Scannell Y., “The Catastrophic Failure of the Planning System (2011) 33 *Dublin University Law Journal* 393.

³⁶ Derrington notes that it is a unique feature of English Admiralty law, and of those legal systems derived from it such as Ireland, that the claim form in an action *in rem* may be served on a thing, usually a ship. Broadly speaking, such process is possible in three circumstances: first, where a party is proceeding on a proprietary maritime claim, secondly, where a party is proceeding on a claim giving rise to a maritime lien (or other charge); and thirdly, where a party is proceeding on a general maritime claim (otherwise described as a statutory claim *in rem*). See Derrington S. “The Continuing Utility of the Action in Rem” (2007) *Law Quarterly Review* 358, 358.

³⁷ Szuniewicz M. “Problems and Challenges of the ECHR’s Extraterritorial Application to Law-Enforcement Operations at Sea” (2015) *International Community Law Review* 445, 472. See

effective control was defined as the material ability to prevent and punish the commission of criminal offences committed by subordinates.³⁸ The Master may be deemed to exercise effective control over the crew and can therefore be held criminally responsible for offences committed by them. However, the owner of the vessel may also exercise effective control over the Master. The point system for licence holders, discussed below, represents an attempt to hold the owner responsible for offences committed onboard a vessel. However, in almost all cases the Master is also prosecuted for the same offence.

Forfeiture

Contravention of a number of sections in the Act are dealt with by means of summary prosecution. For certain offences, summary conviction results in both a fine and automatic forfeiture of any or all catch, gear or fishing engines used in the commission of the offence. For example, any person who acts or attempts to act in contravention of any bye-law made in relation to prohibition of certain trawling methods is liable to a fine which may increase in the case of further offences.³⁹ Where a person is convicted of such an offence, any fishing gear used to commit the offence must also be forfeited as a statutory consequence of conviction.⁴⁰ In the case of a third or subsequent offence, the Court may order forfeiture of the boat in question, regardless of whether the same person committed the offence.⁴¹ Clearly, this is a serious penalty which may effectively deprive the owner of his/her

Rigopoulos v Spain, decision of 12.01.1999, appl. no. 37388/97, *Medvedyev v France*, judgment of 10.07.2008, appl. no. 3394/03, *Vassis v France*, judgment of 27.06.2013, appl. no. 62736/09.

³⁸ *Prosecutor v Zejnil Delalić Zdravko Mucić and Hazim Delić Esad Landžo*, Trial Judgment of 16 November 1998, International Tribunal for former Yugoslavia, 378.

³⁹ S.224(2) of the 1959 Act.

⁴⁰ *Ibid* s.224(3).

⁴¹ *Ibid* S.223(4).

livelihood and therefore, the constitutional right to earn a livelihood may be invoked. In practice, it is highly unlikely that a judge would invoke such a provision. An increased fine is the more likely course of action as forfeiture of a boat would likely be considered an extremely disproportionate penalty by the courts. To date, an Irish court has never ordered forfeiture of a boat for a fisheries offence. This sentencing option no longer exists under the forfeiture provisions of the 2006 Act.

Forfeiture under s.224B(3) of the 1959 Act as inserted by s.5 of the Fisheries (Amendment) Act 1983 was challenged in the case of *Montemuino v The Minister for Communications Marine and Natural Resources, Ireland and The Attorney General*.⁴² S.224B(3) provides:

“A person who fishes or attempts to fish in contravention of regulations under this section shall be guilty of an offence and shall be liable on conviction on indictment to a fine not exceeding £100,000, and, as a statutory consequence of the conviction, to forfeiture of *all or any* of the following found on the boat to which the offence relates: (a) any fish, (b) any fishing gear.”⁴³

The Supreme Court held that the phrase “all or any” conferred a discretion on the trial judge as to the amount of catch and gear to be forfeited. Therefore, the 1959 Act does not impose mandatory forfeiture of catch and gear as had been previously interpreted. However, Hardiman J emphasised that “all or any” did not confer a discretion to order no forfeiture at all on conviction.⁴⁴ Therefore, forfeiture of at least a portion of the catch and gear is mandatory.

⁴² *Supra* note 4.

⁴³ Emphasis added.

⁴⁴ *Ibid* 35.

It should be noted that in the High Court, Feeney J was satisfied that mandatory forfeiture was a proportionate sanction and stated that:

[t]he capacity of a Court to impose a fine from zero to £100,000 on conviction as well as the consequent forfeiture of all fish is recognition of the requirement for proportionality in sanction.⁴⁵

He added that regard must be paid to the fact that the penalty provided is dissuasive and discourages further offences of the same kind. The proportionality of automatic forfeiture as a sanction is still the subject of legal argument, with a preliminary reference on the subject being sent to the Court of Justice of the European Union (CJEU) by the Court of Appeal.⁴⁶ *Montemuino* is still relevant in interpreting the forfeiture provisions for summary offences under the 2006 Act.

Current National Legislative Framework for Sea-Fisheries Enforcement

Sea-Fisheries and Maritime Jurisdiction Act 2006

The introduction of new sea-fisheries legislation became necessary for a number of reasons. In both *Browne v Ireland*⁴⁷ and *Kennedy v The Attorney General and Minister for Marine and Natural Resources*,⁴⁸ the Supreme Court held that the Minister had acted *ultra vires*⁴⁹ in purporting to create an indictable offence under an SI in order to give effect to an EU measure.⁵⁰ As previously discussed, in response to these cases the 2006 Act contains a general enabling provision under s.14

⁴⁵ *Ibid* 6.7.

⁴⁶ *DPP v Klaas Meijvogel*. This case is discussed further below in the context of forfeiture under the 2006 Act.

⁴⁷ [2003] 3 I.R. 205.

⁴⁸ [2005] 2 I.L.R.M. 401.

⁴⁹ Specifically under s.223A of the 1959 Act as inserted by s.9 of the Fisheries (Amendment) Act 1978 and amended by s.4 of the Fisheries (Amendment) Act 1983.

⁵⁰ The Mackerel (Licensing) Order 1999 to give effect to Council Regulation (E.C.) No. 2847/93.

authorising the Minister to prescribe measures to give effect to EU law. The majority of sea-fisheries prosecutions are taken under this section.

The introduction of a new Act was also necessary due to the need to establish a new enforcement agency as a result of an EU Commission case against Ireland.⁵¹ The SFPA was set up under s.41 of the 2006 Act as an independent fisheries control authority to respond to the need for improved enforcement of EU fisheries legislation, in particular the CFP. As discussed above,⁵² under previous legislation, the Minister was usually responsible for both policy and enforcement. In Case C-317/02 *Commission v Ireland*⁵³ the European Court of Justice was extremely critical of Ireland's deficient enforcement of the CFP. The court stated that Ireland had failed to comply with community rules on conservation and that there was inadequate monitoring of fishing activity. The court also stated in strong terms that there had been a failure to ensure appropriate inspection of landings, a failure to record catches, inspections and other controls, a failure to put in place criteria and detailed rules for the use of fishing quota, a failure to prohibit fishing in excess of quota and a failure to initiate administrative and criminal proceedings. Therefore, it became clear that an independent body at a remove from the Minister and the Department of the Marine was necessary to effectively enforce sea-fisheries law.⁵⁴ The SFPA came into being on 1st January 2007. Its main functions are to secure efficient and effective enforcement of sea-fisheries law and food safety law and to deter and detect contraventions of sea-fisheries and food safety law.⁵⁵

⁵¹ Case C-317/02 *Commission v Ireland* JUDGMENT OF THE COURT (Sixth Chamber) of 18 November 2004 in Case C-317/02: Commission of the European Communities v Ireland OJ C 261 of 26.10.2002.

⁵² 29-30 and 33.

⁵³ *Ibid.*

⁵⁴ A new independent body was generally welcomed see Dáil deb 17 November 2005, vol 610, no 3.

⁵⁵ S.43 of the 2006 Act provides "the principal functions of the Authority are—

Under the 2006 Act, SFPOs have extensive powers, which are essentially the same as under the 1959 Act with the addition of being entitled to inspect all documents relating to the CFP and an entitlement to inspect positioning equipment. SFPOs also have immunity under the 2006 Act. An SFPO is not liable in any proceedings for anything done in the purported exercise of the powers of a SFPO if the court is satisfied that the act was done in good faith and that there were reasonable grounds for doing it.⁵⁶ This provision recognises the need for inspectors of regulatory agencies to be able to go about their duty freely without fear of prosecution so long as they are acting in good faith.⁵⁷

The 2006 Act defines almost all breaches of sea-fisheries law as indictable offences with the option for the accused to consent to summary disposal where appropriate. At the bill stage, several TDs made submissions that the new act should provide for administrative sanctions and that fishers should not be criminalised.⁵⁸ However, the justification given by the Minister for treating all breaches of sea-fisheries law as criminal offences was that the new system of increased maximum penalties was necessary to satisfy the EU requirement for deterrent and dissuasive

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- (a) to secure efficient and effective enforcement of sea-fisheries law and food safety law,
 - (b) to promote compliance with and deter contraventions of sea-fisheries law and food safety law,
 - (c) to detect contraventions of sea-fisheries law and food safety law,
 - (d) to provide information to the sea-fisheries and seafood sectors on sea-fisheries law and food safety law and relevant matters within the remit of the Authority,
 - (e) to advise the Minister in relation to policy on effective implementation of sea-fisheries law and food safety law: the Minister shall consider any such advice in his role in the regulation of sea-fishing,
 - (f) to provide assistance and information to the Minister in relation to the remit of the Authority,
 - (g) to collect and report data in relation to sea-fisheries and food safety as required by the Minister and under Community law,
 - (h) to represent or assist in the representation of the State at national, Community and international fora as requested by the Minister, and
 - (i) to engage in any other activities relating to the functions of the Authority as may be approved of by the Minister”

⁵⁶ S.26 of the 2006 Act.

⁵⁷ The 2006 Act also makes it an offence to obstruct or assault an SFPO under s.24 and s.25.

⁵⁸ Dáil Deb 17 November 2005, vol 610, no 3.

penalties.⁵⁹ He further stated that he had been advised that it would not be constitutionally permissible to implement an administrative sanction system due to the fact that penalty levels which would satisfy the deterrent and dissuasive requirement would trespass on the exclusive role of the courts in the administration of justice.⁶⁰ Therefore, the 2006 Act only provides for criminal enforcement.

It should be noted that the 2006 Act took a number of years to pass and was forcefully debated in the Dáil due to the criminalisation of all breaches of sea-fisheries law. Delays associated with passing new legislation are problematic generally within Irish law but are even more pronounced in the context of sea-fisheries due to the lack of priority assigned to the area and its contentious nature, both politically and in the public consciousness. This lack of priority coupled with the controversial status of sea-fisheries regulation and enforcement will affect the introduction of any potential alternatives to criminal prosecution. However, conservation and sustainability objectives must be prioritised, particularly in terms of fulfilling the obligation to impose effective, proportionate and dissuasive sanctions for breaches of sea-fisheries law.

Penalties

Penalties under the 2006 Act cannot be considered in isolation and are inextricably connected to EU regulations, and EU 1224/2009 (the Control Regulation)⁶¹ in particular. As previously stated, most prosecutions proceed under s.14 of the 2006 Act which empowers the Minister to make regulations which give

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* This argument is discussed further in Chapter 6.

⁶¹ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L 343/1.

effect to the CFP. As almost all offences are indictable, the Act provides for potentially onerous fines and mandatory forfeiture of the value of the catch and gear attached to a conviction. However, the DPP often elects for summary disposal instead where the offence does not justify prosecution on indictment. There are considerable disadvantages to exclusive criminal enforcement with no other alternative enforcement options available, particularly in terms of the penalties imposed.

Fines

In theory, the 2006 Act provides for fines of up to €100,000 for cases on indictment, depending on the length of the boat in question. However, in practice, the fines imposed tend to be quite low in proportion to the value of the infringement. For example, in 2012 the *Skellig Light* was found to possess illegal catch to the value of €250,000. The vessel was fined €37,000 in addition to forfeiture of catch to the value of €60,000 and gear worth €15,000.⁶² As the accused pleaded guilty, the prosecution and defence agreed a lower figure for the value of catch and gear subject to forfeiture. Although the accused is entitled to benefit from a guilty plea,⁶³ it is excessive, in the opinion of the author, that a €112,000 profit was retained and highlights a gap between legislation and practice.

The *Skellig Light* case, in terms of the quantity of fish involved, is one of the most serious cases which the SFPA has dealt with since its inception. The Master of the vessel had under recorded Monkfish, a highly valuable species, by approximately

⁶² *DPP v Jose Blanco* (Cork Circuit Court, 15 March 2012).

⁶³ Director of Public Prosecutions, *Guidelines for Prosecutors*, 5th edition (December, 2019) 37 <https://www.dppireland.ie/app/uploads/2021/01/Guidelines-for-Prosecutors-5th-Edition-eng.pdf> accessed 1 April 2022.

19 tonnes. This equates to the vessel being 18 tonnes over its Monkfish quota for that particular month. Disproportionate fines do not deprive the owner of the economic benefit derived from their infringement, as required under EU law and therefore, do not dissuade future non-compliance. This may also fail to provide a deterrent to other fishers which in turn adversely effects conservation and sustainability objectives. Crucially, low fines also fail to fulfil the EU requirement for sanctions to be effective, proportionate and dissuasive.⁶⁴

Detention

Detention is not technically considered a penalty but is a means to complete an inspection. However, the loss of fishing time and payment of a potentially large bond may have negative financial consequences akin to a penalty. Under s.19, where an SFPO suspects an offence has been committed, he must, as soon as may be, apply to a judge of the District Court for an order authorising the detention. The requirement to be brought before a court “as soon as may be” has been interpreted strictly by the courts.⁶⁵ Therefore, the detention order is usually applied for the day after the detention at the first available hearing in the area. In practice, once the SFPO has detained the vessel, it is the Garda who takes custody of the vessel who applies for a detention order, which has historically come under the function of the Gardaí so that any Naval ship involved in a detention can return to sea as soon as possible.⁶⁶ The Gardaí do not receive training in enforcement of sea-fisheries law. In the experience of the author, many Gardaí are not aware that they are authorised as

⁶⁴ See Case C-304/02 *Commission v France* *supra* note 35 in relation to the obligation on Member States to comply with this requirement.

⁶⁵ *AG v David Andrew* referred to in Boohig M., “Sea Fishery Prosecutions”, lecture delivered to DPP Sea Fishery Lecture Series, 7 September 2020.

⁶⁶ *AG v Pierre Sangan* *ibid*.

SFPOs and are ill-equipped to manage detention of a vessel.⁶⁷ Often, they do not know what procedures they should follow or what their role is and rely considerably on the expertise of the SFPA. Staffing levels may often mean that the vessel cannot be guarded overnight to ensure evidence is not tampered with. Since the primary purpose of detention is to facilitate further investigation, it is essential that the vessel is properly secured. There is also no established practice within the Gardaí for how the officer detaining the vessel is to secure the vessel and crew. They have no power to prevent the Master and crew from leaving and no power to bring the Master or crew before the court. Despite having no legal basis to require the attendance of the accused in court, in the experience of the author, all masters comply with the process as advised by their solicitor.

The legislation in relation to the detention of the Master and crew requires review and clarification, as does the involvement of the Gardaí in detentions. If it is deemed that only the Gardaí can take custody of vessels, then they must receive adequate training and resources. Alternatively, the SFPA as the specialised enforcement agency could deal with detentions exclusively or in conjunction with the Naval Service as the case may be.

A 48 hour detention order is granted where the judge is satisfied that the suspicion that an offence has been committed is a reasonable one.⁶⁸ An application may be made before the expiration of the 48 hour period for further detention of the boat.⁶⁹ However, this has never occurred in the experience of the author and the more usual practice is that the boat is released on payment of a bond at the same

⁶⁷ The author frequently receives phone calls from the Gardaí present at a detention for guidance on their role and how they should proceed.

⁶⁸ S.19 of the 2006 Act.

⁶⁹ *Ibid.*

hearing at which the detention order is granted. Under the legislation, the bond must be sufficient in the opinion of the judge to provide for payment of the maximum fine in respect of the offence, the estimated amount of the costs of any trials, appeals or other proceedings, and the estimated value of any forfeitures ordered.⁷⁰ However, the procedure which occurs in practice varies significantly from the legislation.

In practice, an SFPO from the SFPA, due to their greater expertise than that of authorised SFPOs from other bodies, values the catch and gear of the vessel which has been detained. This is typically based on sales notes from other boats for each species, which the SFPO would have access to from around the time of the offence. There is a risk that a high valuation may result in the operators of the vessel deciding to leave the SFPA holding the fish, which involves storage and transport costs and a risk of spoilage. While the operator would remain at a loss, the State would incur significant risk. Therefore, it is standard practice that fishers are permitted to “buy back” the confiscated fish to avoid such risk which allows fishermen to reduce the costs incurred from being detained.

In terms of the bond ordered by the District Court, the procedure differs for foreign and Irish boats. In the case of a foreign boat, there is a perceived risk that the accused may not return for trial. Therefore, the operators are required to pay a financial bond which amounts to the full market value of the catch and gear. In practice, the amount of the potential fine and cost of trial and appeal are not always included. However, the value of the catch and the gear alone can be a substantial

⁷⁰ *Ibid* s.21.

amount of money, particularly for larger vessels, which some operators struggle to raise.⁷¹

In the case of an Irish boat, the operators may be permitted to issue a cheque to the SFPA for the value of the catch and gear, usually valued low, which is held in abeyance pending the trial. Often, the matter is dealt with by way of summons rather than seeking a detention order. The DPP may agree to the Master being prosecuted on the basis of a summons without the requirement to bring the Master to the District Court, where an offence is detected and there is no need to detain to complete the investigation. In other cases, a personal bond on the Master as opposed to a financial bond is ordered by the court. This was originally allowed by the courts due to the financial crisis and the difficulty in obtaining loans from financial institutions. It is quite common to deal with detention of an Irish fishing boat by means of a personal bond. There is no legal basis under the legislation for this differential treatment but rather the practice is grounded in the reasoning that a foreign master presents a greater flight risk. However, the practice may be perceived as unfair given the huge disparity in the bonds which must be produced by foreign versus Irish operators and may also offend Art.14 of the European Convention on Human Rights which prohibits discrimination on the grounds of nationality.⁷²

Despite the serious consequences of a detention, there is no requirement under the 2006 Act for SFPOs to consider an offence serious before applying to

⁷¹ For example, in *DPP v Jose Ramon Perez Sampedro* (Cork Circuit Court, 28 November 2019) the catch and gear were valued at €153,254 and a bond in this amount was originally imposed. However, the bond was subsequently reduced to €80,000 due to the difficulty the operators faced in raising the funds.

⁷² ITLOS may assess whether the bond is reasonable under Art.292 of UNCLOS and whether the bond consists of a fair balance between the rights of the flag state, the ship owner and the crew, to prompt release and the right of the coastal state to try and punish. ITLOS elaborated further on “reasonableness” in *Panama v France*, Judgment of 7 February 2000, *ITLOS Reports* 2000, para 67.

detain a vessel. It may result in inconsistency in enforcement since SFPOs may have differing views about what types of offence justify a detention. Therefore, a boat may be detained by one SFPO and not by another for similar offences. This may offend the right to legal certainty which is a central requirement of the rule of law and a recognised principle of EU law.⁷³ The judge has no jurisdiction under the legislation to refuse to authorise a detention on the basis that the offence is not serious enough to justify a detention. Therefore, it is possible that a boat could be detained for a minor offence which would constitute a disproportionate enforcement action.

In practice, the application for a detention order is made in conjunction with the State Solicitor for West Cork with delegated authority from the DPP to direct on all fisheries cases.⁷⁴ Where there is evidence that the infringements are minor, they are dealt with summarily. However, a lack of clear guidance as to what type of offence(s) initially justifies a detention may lead to inconsistency in enforcement which may be detrimental to the relationship between the enforcement agency and fishers. For example, the Naval Service previously detained a vessel for having nets on board with an incorrect mesh size in the Hake Restriction Area.⁷⁵ While incorrect mesh size certainly constitutes an offence, there was no evidence of undersized fish which would indicate use of the nets. Therefore, it is arguable that the case did not justify a detention, demonstrating the subjective nature of the decision to detain and potential for inconsistency in its application.

⁷³ See Joined Cases 42 and 49/59 *SNUPAT v High Authority* [1961] ECR 109.

⁷⁴ His role is discussed further in Chapter 5.

⁷⁵ Vessel detained 30 April 2014. The Hake Restriction Area is an area of the sea with special protections in place such as larger minimum mesh sizes to allow smaller juvenile fish to escape.

A further issue with detention under the 2006 Act concerns detentions by the Naval Service at sea. It is standard practice for the Naval Service to detain boats at sea following detection of an offence. The boat is escorted to a port specified by the Naval Service where custody of the boat is handed over to a member of An Garda Síochána pending application to the District Court, as previously discussed. However, under s.18(i)(i) where an SFPO suspects an offence has been committed and the boat is not in port, he must take or instruct the boat to port before he can proceed to detain the boat in accordance with s.20 and 21. Therefore, it is submitted that the Naval Service may not be acting in accordance with the 2006 Act by detaining boats at sea without first proceeding to a port. Detention at sea by the Naval Service is common practice, the legislative basis of which has never, to the author's knowledge, been argued before a court. As detention at sea by the Naval Service has been standard practice for so long, it is debatable whether this argument would succeed before a court or whether it may be considered a matter of semantics with the outcome i.e. detention of the boat, being the same regardless of whether the boat is at sea or in port.

Forfeiture

Arguably, the most severe penalty which a court may impose is forfeiture of catch and gear. S.28(5) provides:

“[w]here a person is convicted on indictment of an offence specified in a Table, in addition to any fine the court may impose under this section—

(a) in the case of a conviction under section 8 or 9, it may order the forfeiture of all or any fish and fishing gear found on the boat to which the offence relates, or

(b) in the case of a conviction under any other provision mentioned in a Table, any fish and fishing gear found on the boat to which the offence relates or in any other place where they may be are, as a statutory consequence of the conviction, forfeited”.

Therefore, under part (a) of this section, forfeiture is optional due to the use of the word “may” and also the phrase “all or any” which *Montemuino*⁷⁶ establishes as conferring a discretion on the trial judge as to the amount to be forfeited. However, part (b) imposes mandatory forfeiture of catch and gear as a statutory consequence of conviction which is to be distinguished from *Montemuino* because it does not contain the phrase “all or any”. The wording “in addition to any fine the court may impose under this section” has caused significant confusion in the courts. The word “may” refers to the fine rather than the forfeiture and therefore, although the amount of the fine is optional, forfeiture is not.

This interpretation of s.28(5) was judicially reviewed in the case of *Augustin Ferradas Martinez and Ireland v Attorney General and District Judge James McNulty*⁷⁷. The court held that mandatory forfeiture of the entire catch and gear is expressly mandated by EU law and that there is no discretion afforded to the trial judge in this regard. The court further stated that the sanction satisfies the proportionality test in that forfeiture is “an appropriate and probably necessary means to achieve the aim pursued.... in light of the express requirement in the EU Regulation for deterrence of further offending”⁷⁸.

⁷⁶ *Supra* note 4.

⁷⁷ *Ex tempore* judgment of O’Neill J delivered on 27th November 2008.

⁷⁸ *Ibid* 19.

However, confusion persists in the lower courts in relation to this section, possibly due to the fact that *Martinez* is an unreported *ex tempore* judgment. *Ex tempore* judgments do not create a strong precedent in the same manner that a reserved judgment does. This is due to the fact that the judge is not seen to have put in as much thought and preparation into an *ex tempore* judgment because it is delivered shortly after the case is heard. Where a judge delivers a reserved judgment, he/she has taken a number of weeks or months in most cases between the hearing of the case and the judgment. Therefore, the judgment is deemed to be of a higher quality and sets a stronger precedent. *Ex tempore* judgments are of persuasive authority only and lower courts are not bound by them as they would be by other cases from the superior courts.⁷⁹

In *DPP v Gerrit Plug*,⁸⁰ discussed in Chapter 5, O'Hagan J held that he did have discretion as regards forfeiture and refused to impose forfeiture of catch and gear worth approximately €5,812,544. Therefore, although the maximum fine for each count was imposed, this only amounted to €101,000. This fine, without the corresponding forfeiture attached, is completely disproportionate to the value of the illegal catch. Without an order of forfeiture, the penalty imposed in this case does not satisfy EU sanction requirements. As previously discussed, there is little incentive to comply with the law where a significant profit is maintained even after a conviction in court. It is also detrimental to morale amongst SFPOs when offenders do not receive proportionate penalties.

⁷⁹ See further Zander M. *The Law-Making Process* (Cambridge: Cambridge University Press, 2005) 273-276. See also further elaboration on *ex tempore* judgments in *Walsh v Walsh* [2017] IEHC 181.

⁸⁰ Donegal Circuit Court, 27 March 2015.

Not only have judges sometimes failed to impose forfeiture due to arguments on whether forfeiture is mandatory under this section, but defence counsel have often also argued that mandatory forfeiture only applies to the illegal portion of the catch as opposed to the whole catch. This is due to the phrase “to which the offence relates” contained in part (b) as discussed above.⁸¹ However, it is submitted that as the phrase “all or any” is used in part (a), meaning the judge has a discretion as to the amount subject to forfeiture, but only the word “any” is used in part (b), then this refers to the whole catch and not just the illegal portion. It would seem that this is the established logic on foot of both *Montemuino* and *Martinez*.

It appears that the Court of Appeal agree with this interpretation based on the question it has referred to the CJEU, which refers to forfeiture of the whole catch and gear in the appeal of *DPP v Klaas Meijvogel*. At trial, the Court imposed a fine of €500 and forfeiture of €399,000.⁸² The accused appealed the conviction to the Court of Appeal which was rejected and subsequently appealed the sentence itself, specifically that mandatory forfeiture of the value of the catch and gear was a disproportionate sanction. A preliminary reference is currently underway to determine if mandatory forfeiture for conviction on indictment under national legislation is compatible with Art.89 and 90 of the Control Regulation and also with the principle of proportionality under the EU treaties and Article 49(3) of the Charter of Fundamental Rights. The author expects the CJEU to answer the question in the affirmative given the copious amount of European case law on the issue of interpretation of proportionality⁸³ which suggests mandatory forfeiture is a

⁸¹ p 49.

⁸² *DPP v Klaas Meijvogel* (Cork Circuit Court, 27 July 2015).

⁸³ See for example, *Queen v. The Minister for Agriculture, Fisheries and Food, Ex Parte National Farmers Union and Others* Case C-354/95, *Astipesca v. Commission* T-180/00, *Emsland-Staerke*

proportionate sanction. It should be noted that until the CJEU issue a judgment, no cases on indictment can proceed to sentencing as they involve the question of mandatory forfeiture, compounding the already significant issue of delay in fisheries cases.

Licensing under the 2006 Act

The 2006 Act maintains the system of licensing for sea-fishing boats. The Licensing Authority is a separate, independent entity to the competent authority for enforcement of legislation. The Registrar General of the Licensing Authority is responsible for the issuing of sea-fishing licences. In deciding whether to grant or refuse a licence or in attaching terms and conditions to licences, he/she may take account of economic and social benefits which operation of a boat would likely contribute to the coastal communities and regions.⁸⁴ Where he/she is satisfied that a person has fished in contravention of a term or condition attached to a licence, the licence may be suspended or revoked.⁸⁵ However, in practice, to the author's knowledge, a licence has never been suspended or revoked by the Licensing Authority for breach of a licence condition since the inception of the SFPA. A fleet of vessels owned by one group of licence holders was ordered to port by the SFPA and Department of Agriculture, Food and the Marine (DAFM) and forbidden from fishing for a period of time due to alleged repeated serious breaches of sea-fisheries law.⁸⁶ This action has a similar effect to suspension of licence and was raised in

GmbH v. Landwirtschaftskammer Hannover C-94/05, *Reindl v. Bezirkshauptmannschaft Innsbruck* C-443/2013.

⁸⁴ S.4 of the Fisheries (Amendment) Act 2003 as inserted by s.97 of the 2006 Act.

⁸⁵ S.4(8)(c) of the 2003 Act.

⁸⁶ Lorna Siggins, "Fishing vessels ordered back to port over whitefish quotas" *Irish Times* (18 November 2013).

objection by several TDs in the Dáil.⁸⁷ However, this is the only incidence of such enforcement action since the inception of the SFPA. The potential for greater use of licence suspension and revocation as an enforcement tool is examined in Chapter 7.

Due to a reference error in s.28 of the 2006 Act which provides for penalties on indictment, no prosecution on indictment can be taken for fishing without a licence or for breach of a licence condition. S.28 should provide for a maximum fine of €75,000 for fishing without a licence or fishing in breach of a licence. However, it refers to the wrong section and, therefore, there is no penalty available on indictment, although summary prosecution is possible. Instead, prosecution on indictment for fishing without a licence must proceed under the equivalent EU provision,⁸⁸ meaning a reduced maximum penalty of €35,000 applies. There is no equivalent EU provision for breach of a licence condition, leaving a potentially wide gap in enforcement. For example, it is a condition of the licence of vessels over a certain length that they cannot use trawls within 6 nautical miles of the baseline. This measure is designed to protect the marine environment from damage caused by large trawlers. It is also beneficial for smaller local boats who can only fish close to the shore. However, the SFPA is tied to summary prosecution only, even where a serious breach of this condition occurs.

Although the error in the Act could easily be corrected by means of an amendment, it has never been rectified, demonstrating the lack of priority assigned to sea-fisheries legislation. Where the original intent of the Oireachtas was to provide for a higher fine, it is plainly undesirable that a lower fine should apply, or indeed that no prosecution on indictment is possible due to a simple drafting error. In the

⁸⁷ Dáil Deb 20 November 2013, vol 821, no 3.

⁸⁸ Art. 6 of the Control Regulation.

absence of an amendment to the Act, the Licensing Authority may need to begin to actively consider suspension and revocation of licences which may not always represent a proportionate response to the breach. This conundrum exposes the weaknesses in the current system of enforcement and the exclusive reliance on criminal prosecution without any viable alternatives.

Regulation and Enforcement under EU Fisheries Law

The Control Regulation was an attempt by the EU institutions to improve compliance with the CFP and is the main instrument of enforcement. The Control Regulation recognises that the success of the CFP involves implementing an effective system of control⁸⁹ and seeks to establish a common system for control, inspection and enforcement with a global and integrated approach in accordance with the principle of proportionality, so as to ensure conservation and sustainable exploitation of aquatic resources. Art (4) recognises that overlapping and complex legal texts undermine effective, consistent enforcement across all Member States. However, the Control Regulation has not remedied this situation. Art (5) recognises the need to develop a culture of compliance among all operators to ensure conservation and sustainability. It is submitted that the Control Regulation has also not achieved this aim.⁹⁰

Lado notes that the control policy of the CFP has for a long time been considered complex, expensive and not conducive to producing the desired results.⁹¹

⁸⁹ Para 2 of the Recitals. The Recitals are not legally enforceable. However, they are valuable in the sense that they describe the aims of the regulation. See generally Klimas T. and Vaiciukaite J., "The Law of Recitals in European Community Legislation" (2008) 15 *ILSA Journal of International and Comparative Law* 62.

⁹⁰ Khalillian *et al.* note that a culture of non-compliance undermines the CFP, *supra* note 1.

⁹¹ Lado E. P. *The Common Fisheries Policy: The Quest for Sustainability* (Oxford: Wiley Blackwell, 2016) 284.

Both the Commission's Green Paper⁹² in 2001 and the report of the European Court of Auditors⁹³ in 2007 were highly critical of enforcement of the control system. The Green Paper found that the current arrangements were insufficient to secure a level playing field, that monitoring and control were fragmented and that there was unsatisfactory follow-up of infringements. The European Court of Auditors found that the EU did not yet have a sufficiently effective system for fisheries controls in place to support the success of the CFP.⁹⁴ The evidence that the CFP was a policy seriously hampered by poor enforcement was one of the main factors leading the Commission to promote an ambitious reform of the policy⁹⁵ in the form of the 2009 Control Regulation.

The Fishing Logbook - The Key to Control

The obligation to keep and maintain a fishing logbook is the primary method by which control authorities monitor fishing activities. Art. 14 of the Control Regulation provides that masters are obliged to keep a fishing logbook of their operations which records the quantities of each species caught and retained onboard.⁹⁶ This allows authorities to monitor stock levels which determine quotas, seasons and conservation species and areas. Therefore, it is essential to sustainability of stocks that logbook records are accurate. Masters must send the logbook information by electronic means to the competent authority of the flag Member

⁹² Commission's Green Paper (COM, 2001) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0135&from=EN> accessed 4 April 2022.

⁹³ European Court of Auditors, *EU Fisheries Controls: More Efforts Needed* (2017) https://www.eca.europa.eu/Lists/ECADocuments/SR17_8/SR_FISHERIES_CONTROL_EN.pdf accessed 1 April 2022.

⁹⁴ *Ibid* 51.

⁹⁵ Lado *supra* note 91, 286-287.

⁹⁶ Masters are now also required to record the quantity of discards.

State⁹⁷ at least once a day,⁹⁸ or at the request of the competent authority.⁹⁹ The Master must submit this data after the last fishing trip has been completed and before entering into port.¹⁰⁰ A 10% margin of tolerance is allowed for estimates of fish retained on board.¹⁰¹ This means that a 10% discrepancy is permitted between the operational estimate and the quantity actually landed as recorded in the landing declaration. The Master must complete a landing declaration indicating the quantities of each species landed.¹⁰² A margin of tolerance was allowed due to the impossibility while at sea of recording exact quantities retained on board.

The accuracy of all data recorded in the logbook is the responsibility of the Master.¹⁰³ While most Member States deal with contraventions of fisheries regulations by means of administrative sanctions, Ireland imposes criminal sanctions. Therefore, it is highly significant in terms of enforcement that the Control Regulation assigns responsibility to the Master as it must be the Master who is prosecuted for logbook offences, which are the most common type of offence prosecuted by the DPP.¹⁰⁴ It is submitted that this lack of cohesion between Member States creates inequality of treatment which is in direct conflict with the purpose of

⁹⁷ The flag Member State is the Member State in which the vessel is registered.

⁹⁸ Art.15 of the Control Regulation. Under EU 404/2011 (the Implementing Regulation) masters must also transmit their logbook information no later than 24.00 each day even where there are no catches and at the time of an inspection at sea.

⁹⁹ *Ibid* Art.15(2).

¹⁰⁰ *Ibid*. The Master must submit his logbook information as soon as possible and not later than 48hrs after landing to their flag Member State and, where the landing takes place in the port of another Member State, to the competent authority of that Member State under Art.14(6).

¹⁰¹ *Ibid* Art.14(3).

¹⁰² *Ibid* Art.23. The landing declaration must be submitted as soon as possible and no later than 48hrs after the completion of the landing to their flag Member State and, where the landing takes place in the port of another Member State, to the competent authority of that Member State under Art.23(3).

¹⁰³ *Ibid* Art.14(9).

¹⁰⁴ See discussion above on liability of the Master, p 34.

the Control Regulation. A Master is given a criminal record under the Irish system but may only have to pay an administrative fine in another Member State.

However, administrative fines imposed in other Member States tend to be extremely high whereas fines resulting from criminal prosecution in this jurisdiction can be lower. Furthermore, there is a greater likelihood that an offence will be dealt with quickly in an administrative system, whereas frequently criminal prosecutions take a number of years to conclude or may never reach the courts. For example, in *DPP v Salvador Otero Pastoriza*¹⁰⁵ the Master was fined €1,000 and was ordered to forfeit the illegal portion of the catch to the value of €6,000. The Spanish Authorities subsequently banned the Master from fishing for a period of two year as a result of the judgment against him in Ireland which would have a far more detrimental effect than the level of fine imposed in this jurisdiction. Similarly, in September 2017 when the Master of an Irish vessel was found to have under recorded his catch of Tuna when landing into Spain, the Spanish authorities imposed an administrative fine of €60,000. The Spanish authorities sought to transfer the second aspect of the case, namely non-transmission of logbook data to Ireland for prosecution. However, the DPP directed no prosecution due to the evidence not meeting the required standard of proof. One of the aims of the Control Regulation was to harmonise enforcement across Member States. However, a stark difference remains between administrative and criminal enforcement regimes. Given that the Control Regulation is currently being reviewed, there is a possibility that Member States will be required to impose administrative sanctions for breaches of the CFP to bridge the gap between criminal and administrative enforcement regimes.

¹⁰⁵ Clonakilty District Court, 4 July 2016.

Reform of the CFP

Substantial reform of the CFP was undertaken during the Irish Presidency of the Council of the European Union in 2013. The reformed CFP came into force on 1st January 2014. It was estimated that discards amounted to 23% of total catches in 2013.¹⁰⁶ Discarding is the practice of returning unwanted catches to the sea because they are under the minimum conservation size, because the vessel does not have a quota for the particular species, or because of certain catch composition rules. The landing obligation, or “discard ban” requires that all catches must be retained onboard, landed and counted against the quotas.¹⁰⁷ The landing obligation has necessitated a major change in the enforcement approach and procedures of competent authorities.

It is submitted that the landing obligation presents a number of considerable challenges to enforcement practices, particularly criminal enforcement where the burden of proof is beyond a reasonable doubt. The most obvious challenge is that in order to prove a vessel is discarding illegally it would require either the Naval Service or Air Corps to actually observe the vessel discarding. The likelihood of this is extremely low. The current quota management system in operation in Ireland may also be incompatible with the landing obligation. For example, a vessel with quota for Nephrops (prawns) only may have a large by-catch¹⁰⁸ of Monkfish, which is a highly valuable species. Vessels are required to move area or switch gear if they are approaching their quota or by-catch limit, otherwise there is a risk the quota for the whole area could be exceeded resulting in an area closure for all vessels. This leaves

¹⁰⁶ Available at http://ec.europa.eu/ireland/key-eu-policy-areas/common-fisheries-policy/index_en.htm accessed 28 April 2015.

¹⁰⁷ Fish under the minimum conservation size cannot go for direct human consumption.

¹⁰⁸ By-catch is fish which is caught while fishing for a different species.

other vessels with no opportunity to fish the area. However, it is almost impossible to enforce this requirement.¹⁰⁹

In the opinion of the author, there is no incentive to comply with the requirements of the landing obligation when there is such a large economic benefit to non-compliance and a low risk of detection. It may even result in targeted fishing for species for which vessels do not have quota. Since vessels are required to land all catch it is difficult to ground a prosecution for fishing over quota or for a species for which the vessel has no quota. Vessels are subject to so-called “quota balancing” where their quota for the next month is reduced if they have exceeded quota. However, this system relies on masters accurately recording catches. There is also a possibility that if a prosecution was taken the court would take the reduction in quota into account and reduce any fine issued. Therefore, there are a number of serious barriers to enforcement of the landing obligation which further highlights the inherent weakness of exclusive reliance on criminal enforcement. In October 2021, the Commission sent letters of formal notice to Ireland for non-compliance with obligations relating to control and enforcement of the landing obligation.¹¹⁰ Ireland had two months to respond to the letter and address the shortcomings raised by the Commission. Otherwise, the Commission may decide to issue a reasoned opinion.

One potential alternative to criminal prosecution for enforcement of the landing obligation as well as other fisheries offences already exists under the legislation. There is a possibility under s.31 of the 2006 Act, that a court may order forfeiture of the value of the fish where it is satisfied on the balance of probability

¹⁰⁹ CCTV monitoring is possible however resources to monitor the CCTV and detect offences may be an issue as well as data protection concerns.

¹¹⁰ And also to Belgium and The Netherlands.

that the fish were caught illegally. The logbook or other records may be adduced by an SFPO as *prima facie* evidence that the fish were caught illegally. This provision applies even where no prosecution has taken place for the alleged offence in question and may be brought by, or at the suit of the Minister. Therefore, it may be useful for breaches of the landing obligation where no prosecution can take place as the case would not meet the criminal burden of proof, but an application for forfeiture could still be made to the court at the lower burden of proof. This provision has never been used but may be a viable option as an alternative means of enforcement as long as the accused is given the opportunity to defend the application and has a right of appeal if necessary.

Serious Infringements under EU Fisheries Law

Nineteen types of behaviour were identified by the Commission in 1999 as constituting serious infringements of the CFP rules and broadly concern non-cooperation with monitoring authorities, non-cooperation with observers, non-observance of fishing conditions, non-compliance with the rules during fishing operations, non-compliance with monitoring requirements, and non-compliance with the rules on landing and marketing of fishery products.¹¹¹ Despite identifying these types of behaviour, the Commission merely required Member States to report instances of these types of behaviour and the resultant action taken.¹¹² In order to advance the aim of harmonised enforcement across Member States, Art.90 of the Control Regulation also provides a list of activities

¹¹¹ Council Regulation (EC) No. 1447/1999 of 24 June 1999 establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy OJ L 167, 2.7.1999. See Johnson C. "Fisheries Enforcement in Community Waters Since 2002-Developments in Non-Flag Enforcement" (2008) 23 *International Journal of Marine and Coastal Law* 249, 266.

¹¹² *Ibid.*

which are considered “serious infringements”, depending on the gravity of the infringement in question.¹¹³ Therefore, it is a matter for the competent authority to assess whether an infringement is serious based on the gravity of the infringement. This list is in addition to serious infringements under Art.42 of EU 1005/2008 (the IUU Regulation).¹¹⁴ Art.42 refers back to Art.3 of the IUU Regulation which provides a list of scenarios where a vessel is presumed to have been engaged in illegal, unreported and unregulated fishing (IUU fishing).¹¹⁵ This list also has points attached to each infringement under the point system for serious infringements

¹¹³ Art. 90 of the Control Regulation provides for the following serious infringements:

“(a) the non-transmission of a landing declaration or a sales note when the landing of the catch has taken place in the port of a third country;
(b) the manipulation of an engine with the aim of increasing its power beyond the maximum continuous engine power according to the engine certificate;
(c) the failure to land any species subject to a quota caught during a fishing operation, unless such landing would be contrary to obligations provided for in the rules of the common fisheries policy in fisheries or fishing zones where such rules apply”.

¹¹⁴ Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286/1.

¹¹⁵ *Ibid.* Art. 3 provides a number of situations in which a vessel shall be presumed to be engaged in IUU fishing:

“(a) fished without a valid licence, authorisation or permit issued by the flag State or the relevant coastal State; or
(b) not fulfilled its obligations to record and report catch or catch-related data, including data to be transmitted by satellite vessel monitoring system, or prior notices under Article 6; or
(c) fished in a closed area, during a closed season, without or after attainment of a quota or beyond a closed depth; or
(d) engaged in directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited; or (e) used prohibited or non-compliant fishing gear; or
(f) falsified or concealed its markings, identity or registration; or
(g) concealed, tampered with or disposed of evidence relating to an investigation; or
(h) obstructed the work of officials in the exercise of their duties in inspecting for compliance with the applicable conservation and management measures; or the work of observers in the exercise of their duties of observing compliance with the applicable Community rules; or
(i) taken on board, transhipped or landed undersized fish in contravention of the legislation in force; or
(j) transhipped or participated in joint fishing operations with, supported or re-supplied other fishing vessels identified as having engaged in IUU fishing under this Regulation, in particular those included in the Community IUU vessel list or in the IUU vessel list of a regional fisheries management organisation; or
(k) carried out fishing activities in the area of a regional fisheries management organisation in a manner inconsistent with or in contravention of the conservation and management measures of that organisation and is flagged to a State not party to that organisation, or not cooperating with that organisation as established by that organisation; or
(l) no nationality and is therefore a stateless vessel, in accordance with international law”.

established under Annex XXX of EU 404/2011 (the Implementing Regulation). Art. 3 of the IUU Regulation provides that gravity is determined by the competent authority, taking into account criteria such as the nature of the damage, its value, and the extent of the infringement or its repetition. Art. 90 of the Control Regulation provides the same definition of gravity, with additional consideration of the economic situation of the offender.

In terms of infringements in general, Art.89 of the Control Regulation provides that “Member States shall ensure that appropriate measures are systematically taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons suspected of a breach of any of the rules of the common fisheries policy”. Sanctions should be calculated in such way as to make sure that they “effectively deprive those responsible of the economic benefit derived from their infringement” and should produce results “proportionate to the seriousness of such infringements, thereby effectively discouraging further offences of the same kind”.¹¹⁶

Broadly similar standards apply in relation to infringements which have been determined by the competent authority as being serious. Art. 90 imposes an obligation on Member States to ensure that serious infringements are punishable by “effective, proportionate and dissuasive **administrative** sanctions”.¹¹⁷ Sanctions should be calculated on the basis of the value of the fisheries products obtained from committing a serious infringement and the value of the prejudice to the fishing resources and the marine environment. However, Art. 90(5) provides that “Member

¹¹⁶ Art.89(2) of the Control Regulation.

¹¹⁷ Emphasis added.

States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions”.

Therefore, the Commission stopped short of requiring a common sanction system across Member States.¹¹⁸ The Protection of the Environment through Criminal Law (PECL) Directive represented a fundamental shift in terms of the EU’s competence in requiring Member States to criminalise certain environmental offences.¹¹⁹ In the case of serious infringements of the CFP, administrative sanctions may be just as effective as criminal sanctions, if not more effective in many instances. In fact, it appears that the Commission envisage administrative sanctions as the default position, with criminal sanctions being an alternative. In either case, the basic standard is that the sanction is effective, proportionate and dissuasive.¹²⁰

The principle of effectiveness is enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union. Art. 47 provides that procedural rules must not make it in practice impossible, or excessively difficult to exercise rights conferred by European law. In the context of national sanctions for a breach of EU fisheries law, the principle of effectiveness requires national law to ensure the full effectiveness of EU law. Therefore, sanctions imposed must be sufficiently high to ensure that EU law is being enforced effectively.

¹¹⁸ Minimum and maximum sanctions as part of a common framework were proposed but subsequently deleted from the final regulation. See European Parliament Debates 21 April 2009.

¹¹⁹ McIntyre O., “The Emerging European Community/Union Competence in Respect of Environmental Crime” (2009) 16(3) *Irish Planning and Environmental Law Journal* 91, 91.

¹²⁰ The concept of effective, proportionate and dissuasive remedies has its origins in EU sex equality law, although the European Court of Justice has declared this to be generally relevant. See Tobler C., “Remedies and Sanctions in EC non-discrimination law ‘Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination’” (European Communities, 2005) 8.

Proportionality is a long established general principle of EU law.¹²¹ In terms of assessing the proportionality of punitive sanctions in the context of EU competition law, the General Court has applied a two-stage test: the sanction must not be disproportionate to the aim pursued i.e. compliance with sea-fisheries law and the sanction must be proportionate to the gravity of the infringement.¹²² Furthermore, in determining the amounts of fines, the need to ensure that fines have a sufficient deterrent effect should be taken into account.¹²³

Repeat offences might be an indication that the sanction is not having a dissuasive effect.¹²⁴ Sanctions must not be purely symbolic, but they do not necessarily have to be pecuniary.¹²⁵ However, the words “effective”, “proportionate” and “dissuasive” should not be analysed in isolation, as the phrase is often used in EU legislation in order to give Member States freedom to transpose the measures into national law as they see fit.¹²⁶

As previously discussed, it is questionable whether criminal sanctions imposed by the Irish courts are effective, proportionate and dissuasive. Certainly, the criminal system does not satisfy the immediacy obligation under Art.91 of the Control Regulation given the long delays associated with criminal prosecution. In the experience of the author, prosecutions are predominantly taken against the same set of repeat offenders, which indicates sanctions imposed do not have a dissuasive

¹²¹ See De Burca G., “The Principle of Proportionality and its Application in EC Law” (1993) 13 *Yearbook of European Law* 105. See further Schermers H.G. and Waelbroeck D.F., *Judicial Protection in the European Union* (Kluwer Law International: The Hague, 2001) 180.

¹²² Case T-138/07 *Schindler Holding Ltd and Others v European Commission*, 367.

¹²³ *Ibid.*

¹²⁴ Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, 67.

¹²⁵ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 39.

¹²⁶ For example, this wording also appears in Art. 7 of the PECL Directive in relation to criminal sanctions and in Art. 13 of the Data Retention Directive 2006.

effect.¹²⁷ The fine and forfeiture imposed, or not imposed, even in the most serious cases does not satisfy the EU standards for sanctions. Therefore, it is questionable whether the CFP is being enforced effectively in Ireland and whether conservation objectives are being achieved,¹²⁸ suggesting a need for an alternative to criminal prosecution for enforcement of fisheries law in Ireland.¹²⁹

An Experiment in Administrative Enforcement: The Point System

The point system for fishing vessels provides an excellent example of the challenges Ireland continues to face in reconciling national law with the EU regulatory framework. The point system is particularly interesting as a juxtaposition of administrative sanctions stipulated by EU law with traditional national criminal proceedings. The introduction of the point system in Ireland has evolved into a long-running saga which shows no signs of conclusion and has resulted in a reasoned opinion being issued to Ireland from the EU Commission, which will likely result in infringement proceedings against Ireland for non-implementation of EU law.

The point system for EU fishing vessels was introduced in order to develop an immediate, common system of enforcement across Member States for serious infringements of the CFP. Member States have been obliged to have a point system

¹²⁷ This follows the general trend in both fisheries and crime generally see Sutinen J.G., Rieser A., and Gauvin J.R. "Measuring and Explaining Noncompliance in Federally Managed Fisheries" (1990) *Ocean Development and International Law* 21(3) 335, 337. See also Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. *Implementation of the current EU fisheries control system by Member States (2014-19)* (European Union, 2020) [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022 who found that fines in Ireland from 2014-2019 were rather low and not sufficiently high to be dissuasive.

¹²⁸ Blomeyer & Sanz *ibid*, 50 determined that from 2014-2019, there was a low detection of infringements (about 1%) in Ireland in relation to control and even fewer, almost negligible cases of convictions.

¹²⁹ Berg notes that following criticism of the effectiveness and proportionality of its system of criminal sanctions, the Netherlands moved to administrative sanctions. See Berg A. Enforcement of the Common Fisheries Policy, with Special Reference to the Netherlands in Harding and Swart *supra* note 4, 74.

since 2012. There have been multiple attempts to implement the point system in Ireland, demonstrating the difficulty with integrating the EU regulatory framework with Irish national law. This section examines the point system under the EU regulatory framework and why its implementation into Irish law did not withstand judicial scrutiny, which may be relevant to any future administrative sanctioning systems introduced in Ireland.

The Point System under EU Legislation

Finding the appropriate balance between the need for greater harmonisation of EU fisheries law for the purposes of conservation of fish stocks and the obligation to take into account the specificities of the legal system of each EU Member State is an ongoing challenge.¹³⁰ Different Member States enforce the CFP in different ways. In order to achieve commonality in enforcement across all Member States, the Control Regulation introduced a point system for serious infringements of the CFP. The point system is an ambitious attempt to introduce a type of common sanction system which operates in tandem with the individual Member State's own sanctioning system, which may be either administrative or criminal in nature.¹³¹ Thus, the point system seeks to further the notion of the level playing field envisaged by the CFP and to bridge the gap caused by the differing enforcement regimes operating across Member States.

¹³⁰ Clientearth, *The Control and Enforcement of Fisheries in Ireland* (November, 2016) 21 available at <http://www.documents.clientearth.org/wp-content/uploads/library/2016-12-02-the-control-and-enforcement-of-fisheries-in-the-republic-of-ireland-ce-en1.pdf> accessed 20 December 2016.

¹³¹ Blomeyer & Sanz: Beke M., Ackermann R. and Blomeyer R. *The CFP- Infringement Procedures and Sanctions Imposed Throughout the EU 2014* (European Union, 2014) 46 <https://op.europa.eu/o/opportal-service/download-handler?identifier=2f47e0b9-b69f-43b0-8688-57773bd330a8&format=pdf&language=en&productionSystem=cellar&part=> accessed 1 April 2022.

Member States are obliged to introduce a point system for licence holders as well as masters of sea-fishing vessels.¹³² Therefore, the two point systems target both licence holders and masters. This is a departure from the usual practice under most EU fisheries law of assigning all liability for infringements to the Master. In the experience of the author, it is usually the same vessels which are continuously involved in prosecutions, meaning the same licence holder is involved but often a different master is prosecuted on each occasion.¹³³ Therefore, repeat offending by the same licence holder responsible for the vessel or fleet of vessels is not targeted. Where there are a number of masters, a pattern of offending may not emerge and so is not taken into account in the setting of a fine in court. The point system may provide a mechanism address this issue. However, it is important to note that in some instances, the Master and the owner, and hence the licence holder, are the same person.

Most Member States already operate a Demerit Point System (DPS) for driving offences. Therefore, the concept is a familiar one. A standard DPS includes a number of specified offences. Each offence leads to a fixed number of penalty points. The more severe the offence, the more points attached. If during a specified time period a set number of points is reached, the driver's licence is withdrawn. If drivers are free of offences for a particular period, points are gradually erased. Points assigned are additional to, and do not replace fines or other penalties.¹³⁴ DPS

¹³² Art. 92 of the Control Regulation provides that "Member States shall apply a point system for serious infringements...on the basis of which the holder of a fishing licence is assigned the appropriate number of points as a result of an infringement of the rules of the common fisheries policy."

¹³³ Blomeyer & Sanz note that failing to impose deterrent penalties undermines the effectiveness of the system, potentially causing recidivism *supra* note 131, 11.

¹³⁴ Klipp *et al.*, *The BestPoint Handbook Getting the Best Out of a Demerit Point System* (BestPoint Project, 2012) 7.

attempts to target repeat offenders in that the additional punishment of licence withdrawal only occurs in the case of repeated offences within a specified time period.¹³⁵

However, there are a number of ways in which systems can differ between countries. A specified number of points may be attached to certain offences, or points may depend on the severity of the offence. This makes administration of the system more difficult as it requires assessment. However, it may add to its credibility.¹³⁶ The point system for fishing licence holders attaches a definite number of points to specific infringements, which range in number from three to seven points per infringement.¹³⁷ The accumulation of 18, 36, 54, 72 points¹³⁸ triggers suspensions of two, four, eight and twelve months respectively.¹³⁹ Where the licence is suspended for a fifth time¹⁴⁰ or the licence accumulates 90 points,¹⁴¹ the licence is permanently withdrawn. However, in the interest of fairness, when two or more serious infringements by the same licence holder are detected in the course of one inspection, a maximum of 12 points can be applied.¹⁴² This is to avoid suspension of the licence before the licence holder has had a chance to reform his/her behaviour. If the holder of a fishing licence does not commit another serious infringement within three years from the date of the last serious infringement, all points on the fishing licence are deleted.¹⁴³

¹³⁵ *Ibid* 5.

¹³⁶ *Ibid* 13.

¹³⁷ Infringements and corresponding points are provided in Annex XXX of the Implementing Regulation.

¹³⁸ *Ibid* Art.129.

¹³⁹ Art.92(3) of the Control Regulation.

¹⁴⁰ *Ibid*.

¹⁴¹ Art.129(2) of the Implementing Regulation.

¹⁴² *Ibid* Art.126(2).

¹⁴³ Art. 92(4) of the Control Regulation.

The Control Regulation demands that Member States also implement a point system for masters, recognising that licence holders and masters should be treated differently under a point system. Ireland has not implemented a point system for masters. The consultation process revealed a number of issues with the implementation of a point system for masters.¹⁴⁴ The most obvious problem is that masters do not require a licence to fish and, therefore, there is no licence to which points can be attached. This suggests a disconnect between EU and Irish law, in that the mechanisms to introduce a point system for masters do not currently exist. It is likely there would be considerable objections from industry if a licence was required to be the Master of a fishing vessel. However, masters do undertake a safety course and logbook training to which perhaps a licence system could be attached.¹⁴⁵

A further issue is that while the Control Regulation and the Implementing Regulation set out the number of points corresponding to each offence for licence holders, the regulations are devoid of detail as to the point system for masters. Therefore, it is likely that any point system for masters which the government might introduce by SI would fall foul of the “principles and policies” requirement, which allows the Minister to introduce laws by SI rather than by statute.¹⁴⁶ Thus, a new act of the Oireachtas is required in order to introduce the point system for masters.

¹⁴⁴ Department of Agriculture, Food and the Marine, *Responses to the Consultation on Proposed Amendments to the Sea Fisheries and Maritime Jurisdiction Act 2006* (February, 2015) <https://www.agriculture.gov.ie/seafood/sea-fisheriespolicymanagementdivision/completedpublicconsultations/> accessed 4 April 2022.

¹⁴⁵ Since the time of writing, an amendment to the Act is proposed which creates a Master Register and certificate to which points may be attached.

¹⁴⁶ *Cityview Press v An Comhairle Oiliuna* [1980] I.R. 381. The case set down the test for determining the constitutionality of delegated legislative authority from the Oireachtas to a Minister. O’Higgins CJ at 399: “the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself”. See also “standards, goals, factors, and purposes” test set out by Denham J in *Laurentiu v Minister for Justice* [1999] 4 I.R. 26, 62.

The Implementation of the Point System in Ireland

S.I. No. 3/2014¹⁴⁷ (the Points Regulation) represented an attempt to implement the point system in Ireland in such a way so as to circumvent the delays normally associated with the criminal court system and thus satisfy the EU objective for the point system to impose an immediate sanction. However, the Points Regulation was struck down by the High Court in 2016, which was subsequently confirmed by the Supreme Court. Thus, it is necessary to examine the Regulation to ascertain why it did not survive judicial review.

The Points Regulation designated the SFPA as the competent authority for assigning points.¹⁴⁸ The most common serious infringements committed, in the experience of the author, included failure to report catch related data, which is essentially any logbook offence, and fishing in excess of quota.¹⁴⁹ A Determination Panel consisting of three members of the SFPA determined whether infringements detected by SFPOs were serious and warranted the application of points to the fishing licence. In determining whether an infringement was serious, the Panel considered the gravity of the infringement, a concept which, as previously discussed, is elaborated on by EU regulations.¹⁵⁰ However, the Points Regulation only referenced the definition of gravity under the IUU Regulation which does not include the economic situation of the offender added by Art.90 of the Control Regulation. Although the list of factors for determining gravity should be interpreted as non-exhaustive, given the use of the word “including”, the additional economic factor

¹⁴⁷ European Union (Common Fisheries Policy) (Point System) Regulations 2014, SI 3/2014.

¹⁴⁸ *Ibid* Regulation 4.

¹⁴⁹ See *SFPA Annual Report 2015* (SFPA, 2015) 28

https://www.sfpa.ie/LinkClick.aspx?fileticket=Wc2o0FAs_Z4%3d&portalid=0&resourceView=1 accessed 4 April 2022.

¹⁵⁰ Regulation 5(2) of the Points Regulation.

may have been deliberately omitted by the drafters, an argument which later became significant as part of a judicial review of the point system.¹⁵¹

The SFPA could also issue guidance notes on the factors considered by the Panel in determining whether a case was serious enough to warrant points, but never did so.¹⁵² It is submitted that this would have brought a greater level of transparency to the decision-making process. The factors could then have formed the basis of the reasons issued by the Panel for its decision, which would have added further transparency. Reasons would have assisted licence holders in understanding the Panel's decision, whether to appeal that decision and on what grounds. The lack of any type of publicly available document to illustrate the Panel's decision-making process, coupled with the failure to release reasons for its decision meant that licence holders were entering into appeals without vital information and at a severe disadvantage to the SFPA.

Licence holders could appeal to an Appeals Officer against the proposal to assign points within 21 days of the notification.¹⁵³ Such an appeal had to be made in writing and be accompanied by a statement of grounds relied on by the appellant, along with the appropriate fee.¹⁵⁴ This was an extremely short period of time for appellants to engage legal advice and produce a statement of grounds given that they were not furnished with the case file at this stage and were never provided with reasons for the Panel's decision.

¹⁵¹ See below *Crayden Fishing Company Ltd v Sea-Fisheries Protection Authority, The Minister for the Marine, Ireland and the Attorney General* [2016] 1 JIC 2601.

¹⁵² Regulation 5(2) of the Points Regulation.

¹⁵³ *Ibid* Regulation 10.

¹⁵⁴ *Ibid* Regulation 10(2).

The lack of access to the case file and absence of reasons for the decision could prove particularly significant where the appeal was based on written submissions only, given that the Appeals Officer had discretion whether or not to grant an oral hearing. Where the Appeals Officer refused an oral hearing, a written appeal was extremely unfair given that the statement of grounds was produced without vital information. The Appeals Officer assessed this statement of grounds against the SFPA statement of opposition, which was prepared with the full benefit of the case file and knowledge of the Determination Panel's reasons for its decision.

The Appeals Officer was limited to four criteria under which an appeal could be allowed. Therefore, his/her discretion was quite limited in comparison to that of a court. The Appeals Officer could allow an appeal if, on the balance of probabilities, he/she considered that the serious infringement in respect of which the points were assigned:

- (a) did not occur;
- (b) occurred before the commencement of the SI;
- (c) involved an infringement which was not serious;
- (d) did not involve the fishing vessel concerned.¹⁵⁵

Categories (a) (b) and (d) are straightforward and never formed the basis of a decision in practice. All decisions made by the Appeals Officer were made under category (c) which constitutes a value judgment of the facts as laid before the Appeals Officer who was obliged to make a decision in relation to an appeal not later

¹⁵⁵ *Ibid* Regulation 10(7).

than 28 days after the date of receipt of an appeal by him/her.¹⁵⁶ The decision of the Appeals Officer could be appealed to the High Court on a point of law only no later than 14 days from the date of notification of the decision. The decision of the High Court on the matter was to be final and conclusive.¹⁵⁷

The short time limit to appeal, the lack of an entitlement to an oral hearing and the finality of the High Court decision reflects the obligation on Member States under the Implementing Regulation to ensure that the suspensory effect of appeal proceedings do not render the point system ineffective.¹⁵⁸ In other words, these elements are indicative of an attempt to speed up the appeal process in order to fulfil the obligation for the point system to impose an immediate sanction. Administrative appeals in Ireland can often become quite protracted once an appeal is made to the High Court or Supreme Court. The points appeal system attempted to sidestep traditional appeal mechanisms such as oral hearings, which can evolve into intensely adversarial legal disputes, and also appeals to the Supreme Court, which inevitably delay the final outcome of the appeal.

In relation to the limitations placed on the Appeals Officer specifically, one of the submissions of the applicants in the *O'Sullivan* case was that the discretion of the Appeals Officer had been fettered by the stipulation that the Appeals Officer could only make his/her decision under four possible headings. However, completely unfettered discretion would also be unconstitutional on the basis of *Laurentiu v Minister for Justice*.¹⁵⁹ The Minister is entitled to place limits on the discretion of the

¹⁵⁶ *Ibid* Regulation 10(9). In exceptional circumstances he could take an extra 14 days under Regulation 10(10).

¹⁵⁷ *Ibid* Regulation 10(12).

¹⁵⁸ Art.126(4) of the Implementing Regulation.

¹⁵⁹ [1994] 4 IR 26.

decision-maker. The decision-maker must then exercise their discretion within these limitations but may not further fetter this discretion.¹⁶⁰

The limitation of the discretion of the Appeals Officer to four grounds was an attempt to avoid a full substantive hearing on appeal. However, in practice due the broad scope afforded by category (c), the limited number of oral hearings which proceeded prior to the instigation of judicial review proceedings were conducted as full substantive hearings with legal representatives and oral evidence, albeit not under oath. Full discovery of all material prior to the appeal applied, whether the appeal was document-based or conducted by means of an oral hearing. Category (c) conferred a wide discretion on the Appeals Officer to take all the facts into consideration in deciding whether an infringement was serious and if points should apply. In one particular oral hearing, the Appeals Officer upheld the appeal on the basis of delay in assigning points, which falls outside the four categories under which an appeal can be decided. This could have been appealed by the State to the High Court on a point of law. However, no proceedings were instituted.

Turning to the attempt to confine appeals to the High Court, it is not unusual for the decision of the High Court to be “final and conclusive” in SIs implementing EU law, particularly with respect to a decision of a designated statutory decision-maker, such as the Appeals Officer in this case.¹⁶¹ However, both decisions of the High Court in relation to the point system were in fact appealed to the Supreme Court. There could be a number of reasons why the Supreme Court allowed the

¹⁶⁰ *The State (Kershaw) v Eastern Health Board* [1985] ILRM 235 and *B v Minister for Social Protection* [2014] IEHC 186.

¹⁶¹ Eg. S.I. No. 36/2012: European Communities (Road Transport) (Organisation of Working Time of Persons Performing Mobile Road Transport Activities) Regulations 2012 and S.I. No. 95/2008: European Communities (European Aviation Safety Agency) (Amendment) Regulations 2008.

appeals. It could be viewed as an implicit acknowledgment by the Supreme Court that the Points Regulation was too restrictive as regards recourse to the courts. It could also be a reaction to a perceived attempt to remove access to justice from a particular community, or to unconstitutionally restrict the role of the courts.

Therefore, all factors considered, in the opinion of the author, and confirmed by both the High Court and Supreme Court, the Points Regulation provided an insufficient appeal system given the potential for suspension or revocation of the licence and the resulting serious economic consequences.

The Points Regulation attempted to balance the administrative nature of the point system with the customary jurisdiction of the criminal courts over fisheries matters. Both systems were intended to operate in parallel. Perhaps the most controversial aspect of the Points Regulation was that points applied before the conclusion of criminal proceedings, remained on the licence, regardless of the outcome of the criminal trial against the Master.¹⁶² On the face of it, this seems unfair. If one takes the example of penalty points for driving offences, a person accepts penalty points on the condition that they will not be prosecuted. However, it should first be borne in mind that the decision to assign points was made by the SFPA on the balance of probabilities, while the criminal case is decided beyond reasonable doubt. An accused may be found not guilty in a criminal court and can still be found liable in a civil case at the lower burden of proof. Second, the licence holder receives points on the licence. The criminal case against the Master, who admittedly may be the same person as the licence holder, technically has no bearing on the decision to assign points to the licence. A finding of guilt or innocence in the

¹⁶² Regulation 6 of the Points Regulation.

criminal case does not necessarily equate to a determination on whether the offence occurred or not. Therefore, points may still be appropriate.

Clearly, the point system represented a fundamental shift in enforcement of sea-fisheries law in Ireland. Most other Member States are accustomed to administrative sanctions for breaches of sea-fisheries law. The point system, which is usually applied administratively, would not constitute a major policy change for those Member States. As Ireland relies on criminal prosecution, the administrative nature of the point system is alien to the Irish system of fisheries enforcement.¹⁶³ The State argued that the “principles and policies” in the EU regulations were sufficiently detailed to make it permissible for the Minister to introduce the point system by SI in line with the *Cityview Press* jurisprudence.¹⁶⁴ Even if one accepts that argument, it would have been more appropriate to introduce such a radical change in enforcement by means of primary legislation to allow for debate in the Dáil. This would have allowed fishers and their lobby groups to participate in the design of the point system.

Human rights standards dictate that participation should be free, active, informed and effective.¹⁶⁵ Participation can often go a long way to increasing buy-in to a new system, something which is still grossly lacking in terms of the point system. A public consultation conducted by DAFM had already revealed serious dissatisfaction among the industry with the point system, particularly with the lack of

¹⁶³ Administrative systems have been introduced in other areas of Irish law which will be discussed in Chapter 6.

¹⁶⁴ *Supra* note 146.

¹⁶⁵ See Office of the High Commissioner for Human Rights, *Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs* https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf accessed 1 May 2022.

consultation in relation to its roll out.¹⁶⁶ A greater level of participation in the design of the point system may also have resulted in a more transparent system with increased accountability. Transparency and accountability are cornerstones of any well-functioning regulatory and enforcement framework but are notably absent from the system created by the Points Regulation.

Most likely the State sought to avoid attempting to introduce primary legislation due to the delays which would have occurred. As previously discussed, the 2006 Act took a number of years to pass and was extremely controversial due to the criminalisation of all breaches of sea-fisheries legislation. A new fisheries act, particularly one which introduced further sanctions against fishers outside of the courts, would have been even more difficult to pass. This would have exposed the State to infringement proceedings and large fines for non-compliance with EU regulations. As the State has still not implemented a point system for masters, it is now facing precisely the proceedings and fines it originally sought to avoid.

Judicial Review Cases

The Points Regulation was fatally undermined by the initiation of two separate judicial reviews of different aspects of the Points Regulation. The Regulation was struck down by the High Court on two main fronts, the first being that the point system should have been introduced by primary legislation, and the second being a lack of fair procedures within the point system as implemented by the Points Regulation. The two cases are highly significant in terms of elaborating on the parameters of administrative sanctioning systems in Ireland, to which Ireland as a jurisdiction is not accustomed. The cases are also significant in terms of outlining the

¹⁶⁶ *Supra* note 144.

requirements for an administrative appeal system which conforms to fair procedures. Lessons learned from these cases are valuable in ensuring any future contemplated administrative sanctioning systems do not fall foul of constitutional demands.

The O'Sullivan Case

In the first judicial review case, the *O'Sullivan* case,¹⁶⁷ the applicants argued that under the Control Regulation and the Implementing Regulation, points could only be applied after a sanction has been imposed, whether administrative or criminal. This would present a major problem in Ireland given the delays associated with criminal prosecution. Under the Irish system, points were to apply from the date of detection of the offence.¹⁶⁸ Points were deleted from the licence if within three years from the date of the last serious infringement, another serious infringement had not been committed.¹⁶⁹ Therefore, if points were not applied until after the conclusion of the criminal case, this could result in points never being applied or points only applying for a very short period before the slate was wiped clean again. This would undermine the *raison d'être* of the point system as an immediate enforcement measure and could in some cases render the point system completely ineffective. It would mean that Irish national law would be essentially incompatible with the EU regulatory framework. Such a situation would also be unfair to compliant fishers and could even undermine compliance.

The applicants argued that the Minister could, by primary legislation, introduce a standalone system which did not depend on the original sanction

¹⁶⁷ *Patrick O'Sullivan and Cathal O'Sullivan v The Sea-Fisheries Protection Authority, The Minister for Agriculture, Food and the Marine, Ireland and the Attorney General* [2016] 1 JIC 1507.

¹⁶⁸ Regulation 5(7) of the Points Regulation.

¹⁶⁹ Art. 92(4) of the Control Regulation.

imposed under criminal law in Ireland but could not do so by SI and that he had acted *ultra vires* by attempting to do so. In the opinion of the author, it would not follow the logic of the point system to be an immediate, common sanction if points could not be implemented until after the initial sanction is imposed.¹⁷⁰ In any event, this argument was not addressed in the judgment.

It was held by O'Connor J that the EU Regulations do not require the Minister "to ignore established systems for independent adjudication and recourse to the courts" and that "effectiveness and dissuasiveness can be achieved without abandoning established norms".¹⁷¹ The judge queried numerous times in his judgment whether such a so-called "novel" approach was necessary. Although delays before the courts are not an excuse to ignore the right of access to the courts, some sort of novel approach is necessary or the point system will be completely ineffective, short of solving the problem with delays in the courts which is an age-old problem. It is clear that access to justice must be prioritised in any administrative sanctioning system and that the courts will not tolerate any attempt to bypass the courts in order to accelerate the administrative process.

O'Connor J also questioned the appointment of SFPA as investigator, judge and regulator with limited rights of review of SFPA action.¹⁷² It is submitted that the lack of transparency in the process compounded this issue. O'Connor J also stated that there was evidence of a reversal of the burden of proof in that the licence holder had to prove his case to the Appeals Officer rather than the SFPA having to prove its

¹⁷⁰ O'Keeffe L. "The Point System for Fishing Vessel: Dead in the Water?" (2016) 39(2) *Dublin University Law Journal* 429, 438.

¹⁷¹ *Supra* note 167, 53.

¹⁷² *Ibid* 49.

decision to apply points.¹⁷³ The respondents argued that this was not the case in practice and that oral hearings were conducted in the usual manner where the State made its case first, followed by the defence. While this may be the case where an oral hearing was granted by the Appeals Officer, in cases where the appeal was based on written submissions only, there is evidence that the burden of proof was indeed reversed. The appellant had to send a statement of grounds to the Appeals Officer without the benefit of the case file used by the Determination Panel to make the decision on seriousness, or the reasons for its decision. As previously discussed, the absence of any guidance document on the objective criteria used to determine “seriousness” compounded the issue and made defence of the licence holder’s position extremely difficult.

O’Connor J concluded that primary legislation was required but did not address the central issue of whether a standalone point system is possible. However, the author concurs with the general conclusion that such a fundamental change in enforcement of sea-fisheries law should have been placed on a statutory footing based on consultation with industry, with a greater focus on ensuring fair procedures in every aspect of the administrative process.

The Crayden Case

The second judicial review case was the *Crayden* case.¹⁷⁴ The main arguments were that the point system as introduced in Ireland was contrary to natural and constitutional justice and that it breached fair procedures. O’Malley J interestingly held that “appeal” was not an accurate description of the process under

¹⁷³ *Ibid* 52.

¹⁷⁴ *Supra* note 151.

the Points Regulation. She stated that the decision of the Panel had a defined legal effect on the licence concerned and the fact that the points were not applied until after the appeal expiry date or until after the appeal, as the case may be, did not alter that position.¹⁷⁵ This suggests that a conventional approach which conforms to “traditional” appeal processes should apply to any administrative sanction system with an emphasis on fair procedures and access to the courts.

O’Malley J also held that the licence holder was entitled to make representations to the Panel before they made their decision in line with fair procedures and the long-standing principle of *audi alteram partem*.¹⁷⁶ Therefore, they should have been provided with the full case file before the Panel sat, in order to give them the opportunity to make representations. Such an observation is unsurprising and reflects precedent in this area.¹⁷⁷

The judge further held that the Panel was obliged to consider the economic circumstances of the licence holder but failed to do so.¹⁷⁸ The economic situation of the offender may be considered in determining the gravity of the infringement under the EU regulations. However, the phrasing in the regulations is suggestive of a non-exhaustive list. Additionally, the Control Regulation refers to the “economic situation of the offender” rather than the economic circumstances of the licence holder as stated by O’Malley J. It is possible that offender could mean the Master rather than the licence holder, therefore, this factor is not entirely clear. Furthermore,

¹⁷⁵ *Ibid* 123.

¹⁷⁶ *Ibid* 125. The right to make representations is derived from the principle of *audi alteram partem* which is an element of natural and constitutional justice. It means that fair procedures should be afforded to individuals during any type of decision-making process. See for example, *Kelly v Minister for Agriculture, Fisheries and Food* [2012] IEHC 558 in which Hedigan J found that the requirement of fairness and justice will vary from case to case.

¹⁷⁷ See for example, *Glover v BLN Ltd* [1973] IR 388, 425 Walsh J; *Dellway Investments Ltd v NAMA* [2011] 4 IR 1, 341-2 Macken J and *Caldwell v Mahon Tribunal and Others* [2011] IESC 21.

¹⁷⁸ *Supra* note 151, 130.

as previously discussed, the Points Regulation only references the IUU Regulation which does not refer to the economic situation of the offender. This factor was subsequently inserted into the list by Art.90 of the Control Regulation which suggests that the drafters of the Points Regulation intentionally chose not to reference it. Even if Art. 90 was not deliberately omitted, the fact that the list of factors in the IUU Regulation was added to in a subsequent regulation supports the argument that “gravity” is not a definite concept consisting of specific elements, all of which must be considered. Rather it is a looser concept and the list provided under the regulations merely constitutes a suggestion of factors to be considered in determining the seriousness of an infringement.

“Seriousness” is a highly subjective concept, particularly in the context of sea-fisheries. The determination of whether an infringement is serious can vary greatly between those tasked with its consideration. Considering the infringement from either an economic, environmental or scientific viewpoint may lead to differing determinations of seriousness. It seems that it was the intention of the Commission to leave the concept open to wide interpretation by EU Member States given that a definitive list of criteria for “seriousness” was not provided. However, the Control Regulation is currently being redrafted and it is proposed to provide a list of infringements which are automatically serious and must have points applied to both the Master and the licence holder without any discretion left to the Member State. It is also proposed to have a second list of infringements where the determination of seriousness will remain with the Member State and will still refer to the “gravity” concept which will likely remain a non-definitive list of considerations.

Culpability may also be relevant in determining the seriousness of the offence. The greater the harm, or risk of harm, the greater the culpability of the

individual.¹⁷⁹ Intention does not necessarily equate to a greater level of culpability. Risk of harm may point to even greater culpability in some cases.¹⁸⁰ However, the focus should not centre entirely on harm as this can detract from culpability. There may be no proof of harm caused but the act itself may be culpable. For example, where the Master fishes in a sensitive spawning ground but is intercepted before he catches any great amount of fish, it may be impossible to prove harm. However, the act of fishing in the sensitive area is culpable in itself.

It may be difficult for the Determination Panel to consider economic status in its assessment of culpability. A Determination Panel does not necessarily have the expertise to assess economic circumstances as this would require a financial professional. Even if it did have the expertise, or if it consulted such an expert, what would it do with such information? If the infringement is committed by an economically disadvantaged person, does this make it less serious even where the damage is extensive? Conversely, does the infringement become more serious if the person is wealthy? In the case of a limited company, how is a panel to take account of earnings, profits and debts? There are many unanswered questions in relation to this factor and how it should be considered in practice.¹⁸¹

The point system presumably seeks to treat licence holders of poor economic status more leniently. The Control Regulation does not specify that poor economic status reduces gravity or that wealth conversely increases it. However, it has been interpreted as such. It is submitted that it is discriminatory under Art.40.1 of the

¹⁷⁹ Halpin A., *The Definition of Criminal Law* (Oxford: Hart Publishing, 2004) 142.

¹⁸⁰ *Ibid* 143.

¹⁸¹ Reference to the economic situation of the offender is included as recognition of the economic difficulties faced by the fishing industry. See Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on Improving the Economic Situation in the Fishing Industry* (2006).

Constitution to treat persons of disparate means differently for the same offence.¹⁸² If the Determination Panel were obliged to consider economic status as part of the decision-making process, it would require elaboration in the reasons for its decision. Wealthy licence holders would very likely challenge such reasoning as being discriminatory under Art.40.1.

O'Malley J also held that the Panel had a duty to give reasons for its decision. The lack of reasons given to the licence holder on notification that points were being proposed was a serious barrier to him/her in deciding first, whether to appeal and second, in challenging the decision to assign points. The duty to give reasons is well established in this jurisdiction as a means of ensuring fairness in the decision-making process.¹⁸³ The reasons provided by decision-making bodies do not need to be lengthy or discursive but must assist the party concerned in understanding the basis of the decision. A set of generic reasons is not sufficient.¹⁸⁴ It is unclear why reasons were not provided to the licence holder given the number of clear statements by both the High Court and Supreme Court that failure by a public body to provide reasons for its decision is grounds for review of that decision. Overall, therefore, the judge held that the system under the Points Regulation amounted to a breach of fair procedures.

Both of these cases were appealed to the Supreme Court. Before the cases were heard in the Supreme Court, a new points regulation, SI 125 of 2016 was introduced to reflect the judgments of the High Court.¹⁸⁵ A motion was put before

¹⁸² Art.40.1 of the Constitution provides that “[a]ll citizens shall, as human persons, be held equal before the law”.

¹⁸³ See for example, *The State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] I.R. 51 and *Mallak v Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297.

¹⁸⁴ See *Kelly v Commissioner of An Garda Síochána* [2013] IESC 47.

¹⁸⁵ European Union (Common Fisheries Policy) (Point System) Regulations 2016, S.I. 125/2016.

the Dáil, which had the support of a number of TDs to annul the new points regulation.¹⁸⁶ Although this annulment did not transpire, the new SI was in any case not implemented due to the fact that the Determination Panel and “Fisheries Adjudicator”¹⁸⁷ who replaced the Appeals Officer were never appointed. If the new points regulation were implemented in practice, it would likely have been subject to a tranche of interim injunctions and judicial reviews which could have been very costly to the State. However, the 2016 SI remained technically in force until after the Supreme Court decision.

Supreme Court Appeals

The Supreme Court was critical of the Minister’s decision to introduce a new SI prior to the hearing in the Supreme Court. In *Crayden*, MacMenamin J questioned counsel for the State as to why the 2016 SI was introduced when it was clearly against O’Connor J’s finding in the High Court that primary legislation was required.¹⁸⁸ At that time, there were indications that the European Commission would be pursuing infringement proceedings against Ireland regarding the delay in implementing a point system for masters. It is likely that the State introduced the 2016 SI in an attempt to avoid two sets of proceedings for failing to implement both the master and licence holder point system.

In *O’Sullivan*, the Supreme Court held that a stand alone system was possible under the EU regulations and pointed out that “[t]he entire thrust of the European Regulations is to seek greater effectiveness and more dissuasive measures for the

¹⁸⁶ SIs can be challenged under s.3A of the European Communities Act 1972 as amended by the European Communities Act 2007. The section allows a motion to be put before the Dáil within 21 working days of the date the SI was advertised in the *Iris Oifigiúil* for the annulling of the SI by majority vote by either House of the Oireachtas.

¹⁸⁷ Regulation 11 of the 2016 SI.

¹⁸⁸ Author present at Supreme Court hearing.

enforcement of the conservation rules.”¹⁸⁹ The Court noted that a stand alone system would increase the possibility of enforcement of the rules and dissuade licence holders from breaching those rules. The Court went on to state that a stand alone system “can also be truly said to be complementary to the existing enforcement regime since it enhances enforcement and therefore compliance.”¹⁹⁰ The Court also held that the EU Regulations provided enough detail to make it permissible for the system to be brought in by means of an SI¹⁹¹ and that it was possible for points to remain on the licence where the Master was acquitted at trial.¹⁹²

As a whole, the Court found that the 2014 SI did not afford fair procedures in that there was an onus on the licence holder to initiate the hearing process where there had already been a presumptive conclusion adverse to him/her and he/she must carry the burden of proof into appeal proceedings. The Court surmised that the State sought to provide for the minimum level of fair procedures in order to avoid delay in the process. The Court reflected that:

[i]t is possible that the Regulations reflect frustration with the criminal process in terms of the procedures required and the length of time involved. It is dangerous however to seek a drafting solution to what are problems of resources.¹⁹³

In this context the Court suggested that the State could have set up an administrative system to which points could be attached. It could also have set up an administrative

¹⁸⁹ *Patrick O’Sullivan and Cathal O’Sullivan v The Sea-Fisheries Protection Authority, The Minister for Agriculture, Food and the Marine, Ireland and the Attorney General* [2017] IESC 75, 35.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* 42-43.

¹⁹² *Ibid* 35.

¹⁹³ *Ibid* 36.

body to award points with an appeal mechanism to a court or appellate body.¹⁹⁴ This could be interpreted as an acknowledgment by the Supreme Court of the difficulties associated with criminal enforcement of fisheries legislation and seems to signal that an administrative system could be utilised instead as long as it upholds fair procedures.

While the main issues in relation to the point system were dealt with in *O'Sullivan*, *Crayden* clarified a few remaining issues.¹⁹⁵ In *Crayden*, the Court focused again on the fact that an “onus of disproof” rested with the licence holder.¹⁹⁶ The Court also found that the High Court had incorrectly stated that the economic circumstances of the offender had to be considered and that in fact such a consideration is not required by law to be considered in the determination of whether an infringement is serious.¹⁹⁷

Following on from the Supreme Court decisions, SI 89 of 2018¹⁹⁸ was introduced¹⁹⁹ which revoked the 2016 SI. However, the 2018 SI was annulled in the Dáil just two months later.²⁰⁰ This was the first time in the history of the State that the Dáil overturned an SI, which demonstrates how politically contentious the issue has become. The Sea-Fisheries and Maritime Jurisdiction (Amendment) Bill was placed as priority in the Autumn 2019 Legislation Programme. One of the stated purposes of the Bill was to provide for the EU point system. However, when this Act was introduced, it simply provided for the Voisinage agreement with Northern

¹⁹⁴ *Ibid* 37.

¹⁹⁵ Both judgments were delivered by O'Donnell J on 12 December 2017.

¹⁹⁶ *Crayden Fishing Company Ltd v Sea-Fisheries Protection Authority, The Minister for the Marine, Ireland and the Attorney General* [2017] IESC 74, 38.

¹⁹⁷ *Ibid* 42.

¹⁹⁸ European Union (Common Fisheries Policy)(Point System) Regulations 2018.

¹⁹⁹ On 20 March 2018.

²⁰⁰ On 29 May 2018.

Ireland²⁰¹ and did not introduce any point system for either licence holders or masters.

In August 2020, the Taoiseach, as the acting Minister, signed SI 318 of 2020²⁰² into law. Given the sustained opposition which the point system has encountered and the previous failed SIs, it might have been more appropriate to reintroduce the point system by statute. However, in July 2020, the EU Commission issued a reasoned opinion to Ireland for failure to implement the point system for masters and licence holders. Ireland has three months to respond to the reasoned opinion and if it remains non-compliant, proceedings may be instituted against Ireland. The Commission also suspended €13.5 million in funding to the fishing industry in Ireland due to its non-compliance, a figure which could potentially rise to €37.2 million if Ireland remains non-compliant.²⁰³ The Programme for Government²⁰⁴ stated the government's intention to recoup this funding by providing for the point system, which was the likely motivation for introducing another SI rather than engaging in the slower process of introducing an amendment to the 2006 Act or drafting a new act. However, as the most recent SI could still be challenged and no provision has been made for a point system for masters, infringement proceedings seem a foregone conclusion at this juncture.

²⁰¹ This agreement provides for reciprocal fishing between vessels registered in Northern Ireland and Irish registered vessels to fish within their respective territorial waters. The agreement was found to have no basis in law by the Supreme Court in *Barlow v Minister for Agriculture, Food and the Marine* [2016] IESC 62. The Sea-Fisheries (Amendment) Act 2019 was introduced to provide the agreement with a legal basis.

²⁰² European Union (Common Fisheries Policy)(Point System) Regulations 2020.

²⁰³ Dáil Deb 8 September 2020, vol 996, no 6.

²⁰⁴ *Programme for Government - Our Shared Future*, 82

<https://www.rte.ie/documents/news/2020/06/draft-programme-for-govt.pdf> accessed 1 May 2022.

A Possible Solution?

In 2016 a proposal was made to follow the UK system, where points are only applied after a finding of guilt in the criminal courts.²⁰⁵ The applicants in *O’Sullivan* also argued that Ireland should follow the UK system. The then Minister for Agriculture, Food and the Marine Michael Creed stated that he was “satisfied to move on the introduction of a system for the sequential application of EU points in conjunction with the prosecution process” but acknowledged that there were legal and administrative issues which would need to be resolved before this was possible.²⁰⁶ As previously discussed, the delays which would result from moving the application of points to after criminal prosecution would violate the purpose of the point system to impose an immediate sanction, which circumvents the delays associated with criminal prosecution.

Even if it were possible to solve the problem with delay in the criminal court system, there are other potent arguments against moving the application of points to after the conclusion of criminal proceedings, including the different burdens of proof and the criminal case being against the Master rather than the licence holder as previously discussed. The UK policy of imposing points after conviction is frequently cited as proof that it is permissible under the EU regulations to impose points after conviction. However, the UK prosecutes both the Master and the licence holder separately. Furthermore, the UK has implemented the point system for

²⁰⁵ See *Guidance for the Application of a Points System for Serious Infringements* (May, 2013) para 6 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314545/points.pdf accessed 24 May 2016.

²⁰⁶ Press release from Department of Agriculture, Food and the Marine available at <https://www.agriculture.gov.ie/media/migration/press/pressreleases/2016/june/PR552016010616.pdf> accessed 07 January 2020.

masters as well as licence holders. Conviction of the licence holder results in points on the fishing licence while conviction of the Master results in points on the Master's licence. The UK does not impose points on the fishing licence following conviction of the Master. Ireland has not implemented the point system for masters as masters do not possess a licence to fish in this jurisdiction. Furthermore, the licence holder is rarely prosecuted for a breach of fisheries legislation. It would represent a significant shift in policy if the DPP were to prosecute both the Master and licence holder for the same offence.

The proposal to move the application of points to after the criminal conviction of the Master received widespread support among industry and politicians. There was a major backlash from industry against the rushing in of the 2016 SI which they believed, somewhat justly, did not accurately reflect the High Court judgments.²⁰⁷ The government hastily introduced the 2016 SI in response to the High Court judgments rather than waiting for the Supreme Court decisions. Again, it rushed in the 2018 SI following on from the Supreme Court judgments rather than building a new system based on consultation with industry, resulting in the SI's annulment. The latest 2020 SI was signed a month after a reasoned opinion from the EU was issued, presumably in an attempt to comply with the three month response deadline. The combined result of these actions is that the point system has been near fatally undermined. There is now significant distrust of the point system both amongst politicians and industry which could have been avoided.

²⁰⁷ "Furious Industry Reaction Against Marine Minister" *Marine Times* (April, 2016). See also Dermot Conway, "The Penalty Points Controversy" *Marine Times* (April, 2016). See also Tom McSweeney, "Government Should Apologise to Fishermen" *Marine Times* (March, 2016).

A 2016 EU report on the social and economic impact of the point system found that there was a lack of transparency, accountability and participation across all Member States which had implemented the system.²⁰⁸ In particular there were concerns from industry on the system's workings and integrity and from civil society on the complete lack of transparency which does not allow for public scrutiny.²⁰⁹ Any new point system should have reflected these concerns and attempted to rebuild trust in, and support for the system. Further judicial challenges are likely due to the failure to engage with such concerns.

The point system was a powerful tool in fisheries enforcement. A decline in the number of cases can be observed between 2013 and 2014 when the point system was introduced.²¹⁰ One of the reasons for this could be that the point system provided more of a deterrent than criminal prosecution due to the potential for licence suspension and withdrawal, whereas criminal prosecution is subject to long delays and often results in low fines. Points for serious infringements, as a tool, have now been severely tainted due to the lack of consultation with stakeholders under successive SIs. Although the Supreme Court held that the system could be brought in by means of an SI, it remains to be seen whether the latest system will endure and if

²⁰⁸ Directorate General for Internal Policies, *Social and Economic Impact of the Penalty Point System* (February, 2016) 63 <https://op.europa.eu/o/opportal-service/download-handler?identifier=4ad8e694-d9fd-11e5-8fea-01aa75ed71a1&format=pdf&language=en&productionSystem=cellar&part=> accessed 1 May 2022.

²⁰⁹ *Ibid.*

²¹⁰ In 2013, 7 cases were heard in court, 24 vessels were detained and 32 files were sent to the DPP for direction on potential prosecution. Sea-Fisheries Protection Authority, *Annual Report 2013*, (SFPA, 2013) 12 https://www.sfpa.ie/LinkClick.aspx?fileticket=5_enth7xSes%3d&portalid=0&resourceView=1 accessed 4 April 2022. In 2014, 13 vessels were detained and 11 files were sent to the DPP. Sea-Fisheries Protection Authority, *Annual Report 2014*, (SFPA, 2014) 17 <https://www.sfpa.ie/LinkClick.aspx?fileticket=W5-fEqDv1CQ%3d&portalid=0&resourceView=1> accessed 4 April 2022.

primary legislation will be required. Certainly, it seems as though it will be required to implement a point system for masters.

The State should ensure that lessons learned from the implementation of the point system are applied to any future administrative sanctioning systems introduced in Ireland. Specifically, it is preferable that an administrative sanction system, which constitutes a fundamental policy shift, should be introduced by primary legislation. There must be meaningful consultation with industry as part of the legislative process. Although consultation takes a considerable amount of time, it is necessary for the system to be perceived as fair and trustworthy. Similarly, a greater level of transparency, accountability and participation in the decision-making process with more independent oversight in the form of access to the courts should be prioritised. Fair procedures must be reflected within the system, particularly in relation to appeal mechanisms to ensure it satisfies constitutional demands.

Conclusion

Sea-fisheries law is a highly complex,²¹¹ detailed area of law due to the need for comprehensive regulation of the fishing industry in order to implement the principles of the CFP. Criminal enforcement of the CFP is permitted by EU law as long as sanctions are effective, proportionate and dissuasive. Sanctions must also deprive the offender of the economic benefit derived from the infringement. In the opinion of the author, the fines and forfeitures imposed by the Irish courts do not satisfy these obligations and calls Ireland's enforcement of the CFP into question,

²¹¹ Lado cites the complexity of the legislation as one of the reasons why control is so difficult, stating that the legislation is "difficult to understand, let alone enforce". See Lado *supra* note 91, 287.

including the attainment of conservation and sustainability objectives.²¹² Given that Ireland could face three sets of infringement proceedings in the CJEU for its failure to implement the point system for both masters and also potentially for failures in relation to its control of the pelagic industry²¹³ and enforcement of the landing obligation, an effective enforcement regime should now be afforded greater priority than ever and is essential to ensure sustainable exploitation of the marine environment.

Not only do the deficiencies and gaps in the current national legislation require redress, but consideration must also be given to the reliance on criminal enforcement as the sole means of enforcement given the issues with delay and disproportionate penalties. Criminal prosecution may not be appropriate in all cases and administrative sanctions may provide a better alternative to fulfil Ireland's obligations under the CFP. An effective legislative framework is imperative to the successful introduction and implementation of any alternative administrative sanction system and must be prioritised.

²¹² Supported by Blomeyer & Sanz study *supra* note 127.

²¹³ Lorna Siggins, "EU critical of 'severe' weaknesses in Ireland's fisheries controls" *Irish Times* (5 November 2018).

Chapter 4

Regulatory Crime and Enforcement

Bridging the Gap between Theory and Reality

Introduction

“An important test of a regulatory theory is whether it offers assistance in addressing the challenges that regulators face in practice. In the area of enforcement, those challenges are numerous and severe”.¹

One of the principal functions of the SFPA as a regulatory enforcement agency is to secure efficient and effective enforcement of sea-fisheries law.² Although the SFPA operates within the criminal law sphere, traditional criminal enforcement methodologies may not be appropriate for enforcement of sea-fisheries law, or indeed to regulatory enforcement generally. This chapter examines various regulatory and enforcement theories to determine how enforcement of sea-fisheries law might be enhanced and improved³ and whether this may necessitate a break away from reliance on the criminal law towards administrative sanctions.

The Conception of “Crime” in the Criminal Law

The criminal law currently provides the only means of enforcement of sea-fisheries law in Ireland. Therefore, the nature of the criminal law itself warrants further consideration. According to Hart, the criminal law provides rules for how

¹ Baldwin R. and Black J., “Really Responsive Regulation”, (2008) 71(1) *Modern Law Review* 59, 59.

² S.49 of the 2006 Act.

³ The author has relied on the structure provided by Elder in examining the development of enforcement and sanction theories in Elder S., “Sanctions and Financial Regulation: A Meditation upon ‘Natural Necessity’” (2013) *Dublin University Law Journal* 217.

society in general, or special classes within it, should behave.⁴ Hart argues that punishment must be reserved for voluntary offences.⁵ The concept of voluntariness refers to the fact that the individual commits a crime voluntarily which harms others; and also to the fact that each individual must have fair opportunity to choose between complying with the law, or paying the penalty. Therefore, individuals either voluntarily comply with the law, or voluntarily commit a crime.⁶ In respect of punishment, he contends that sanctions guarantee that those who voluntarily obey shall not be sacrificed to those who do not.⁷ Therefore, individuals voluntarily cooperate in a coercive system.⁸

Norrie disagrees with the concept of voluntariness.⁹ He argues that the criminal law is based upon a process of social and moral exclusion constituting a denial and containment of the social and political nature of criminality.¹⁰ In his view, crime control is primarily about the social and political elite controlling the lowest social classes, who are not free and equal subjects, a classical “them and us” divide.¹¹ He contends that the essential focus of the law is on harms associated with the lower social classes, or “street crime” committed by individuals.¹²

⁴ *Ibid* 222.

⁵ Hart H.L.A., “The Presidential Address: I-Prolegomenon to the Principles of Punishment” (1960) 60(1) *Proceedings of the Aristotelian Society* 1, 21.

⁶ *Ibid*.

⁷ Hart H.L.A., *The Concept of Law* (Oxford: Clarendon Press, 1961) 193.

⁸ *Supra* note 3, 223. Oberdiek states that this argument is much too strong and that no legal system can offer this guarantee. He also disagrees that law is best understood as coercive. See Oberdiek H., “The Role of Sanction and Coercion in Understanding Law and Legal Systems” (1976) 21 *American Journal of Jurisprudence* 71, 90.

⁹ Norrie A., *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths, 2001) 143.

¹⁰ *Ibid*.

¹¹ *Ibid* 23.

¹² *Ibid* 372.

This theory is particularly appropriate in the context sea-fisheries law. Sea-fisheries law does not concern the social and political elite controlling the lowest social classes to the same extent as could be argued in the context of “street crime”. However, the “them and us” divide may exist between the EU, as the controlling elite, and fishers who would not consider themselves as free and equal subjects. Norrie’s argument that “street crime” dominates the harm focus may be, in the experience of the author of attending fisheries prosecutions in both the District and Circuit Courts around Ireland, one of the reasons why current criminal enforcement of sea-fisheries law is ineffective. Criminal law’s unique feature is its moral expressiveness and the traditional background of thinking about criminal law’s expressive meaning is street crime.¹³ The whole system which surrounds criminal prosecution is geared towards the traditional conception of harm. The fair procedures which must be upheld throughout an investigation, the format of the case file, the decision of the DPP, the prioritisation of work by State Solicitors, the court lists and the trial itself are all set up as if the system is dealing with a traditional type of harm. The court system and the infrastructure which surrounds it are ill-equipped to deal with other types of harm. However, many other types of harm have been categorised as regulatory criminal offences meaning they must proceed through a court system, which is not designed to effectively deal with such cases. For example, it is well documented that the courts have struggled to deal with breaches of environmental offences and how to effectively address environmental damage where fines do not remedy the damage.¹⁴

¹³ Brown D., “Street Crime, Corporate Crime and the Contingency of Criminal Liability” (2001) 149 *University of Pennsylvania Law Review* 1295, 1324.

¹⁴ See for example, Flynn T., “Alternative and Innovative Methods of Environmental Enforcement in Irish Law” (Law and Environment Conference, UCC, April 2018).

Most breaches of sea-fisheries law do not satisfy the harm element involved in conventional criminal cases. Many fisheries cases are dealt with in the Circuit Court because the majority of breaches of sea-fisheries law are defined as indictable offences under the legislation. The DPP may elect to prosecute summarily at the consent of the accused but, in principle, most offences are indictable. Fisheries cases are consistently adjourned in the court list in order for the court to deal expeditiously with serious crime which satisfies the harm focus.

It is more difficult to identify an immediate victim who has suffered harm in fisheries cases. A breach of sea-fisheries law is often not viewed as real crime by both judges and juries, particularly when fisheries cases are in the same court list as serious assaults, drugs cases etc. In the short term, the victim is the compliant fisher. If vessels consistently fish over quota then this means less fish is available for the compliant fisher and results in less quota being made available across the board for all vessels during the next quota period. This may have significantly negative financial implications for the industry as a whole. In the long term, the victims are the future generations of fishers and the economy and eco-system of the Irish State.¹⁵ In the case of serious breaches involving, for example, significant profit or irreparable damage to the marine environment, the harm focus may be more easily satisfied for the purposes of taking a prosecution.

¹⁵ Churchill points out that the use of the criminal law in fisheries enforcement is unusual because there is no potential victim to be protected nor is the law protecting property rights because fish are a common property resource. The purpose of the law is "in part at least, to promote the economic well-being of the potential criminals, the fishermen". See Churchill R.R. "Enforcement of the Common Fisheries Policy, with Special Reference to the UK" in Harding C. And Swart B. (eds.) *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth Publishing, 1996) 85.

One of the aims of sea-fisheries law is to conserve marine resources in order to ensure sustainable exploitation. If the sea-fisheries sector is to be sustainably exploited, conservation must be prioritised through effective enforcement. It is also incumbent on the State to ensure that Ireland is meeting its EU obligations in relation to enforcement of the CFP, as well as to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing in EU and international waters. In particular, sanctions imposed must be effective, proportionate and dissuasive and deprive the offender of the economic benefit derived from the infringement. If breaches of sea-fisheries law are not satisfying the “harm” focus of the criminal law, it is necessary to consider whether breaches of sea-fisheries law should be criminalised at all and whether alternative methods of enforcement should be pursued.

Punishment and Sanctions under the Criminal Law

“In deciding what behaviours are deserving of penal sanctions we decide what conduct we want to deter”.¹⁶

Designating certain conduct as a crime means that the conduct justifies punishment. Punishment must be justified and justified punishment must be deserved.¹⁷ Pound argues that law, as a mechanism of social control, is primarily the function of the State which operates “through the systematic and orderly application of force by the appointed agents” by means of the administrative and judicial process and its effectiveness depends on this application of force, or punishment.¹⁸ This is

¹⁶ Husak D., *The Philosophy of Criminal Law: Selected Essays* (Oxford: Oxford University Press, 2010) 3.

¹⁷ Husak D., “The Criminal Law As Last Resort” (2004) 24(2) *Oxford Journal of Legal Studies* 207, 222.

¹⁸ Pound R., *Social Control through Law* (Yale, Yale University Press, 1942) 25.

similar to Hart's view that coercive sanctions are a "natural necessity" of legal systems.¹⁹ Hart defines punishment as having five essential elements:

1. it must involve pain or other consequences normally considered unpleasant;
2. it must be for an offence against legal rules;
3. it must apply to an actual or supposed offender for his offence;
4. it must be intentionally administered by human beings other than the offender;
5. it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.²⁰

According to Hart, punishment is justified where there is a breach of criminal legislation, even where the breach may not be thought of as immoral.²¹ Again referencing the concept of "voluntariness", punishment of a criminal appears not merely as something useful to society but as justly extracted from the criminal who has voluntarily done harm because the criminal had a fair opportunity beforehand to comply.²² Hart explains that "[i]n the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it".²³

Ashworth and Zedner assert that punishment is both the consequence and the *raison d'être* of the criminal law and that it operates in the modern system through carefully calibrated and time-limited curtailment and withdrawal of the

¹⁹ Hart *supra* note 7, 193.

²⁰ Hart *supra* note 5.

²¹ *Ibid.*

²² *Ibid.*

²³ Hart *supra* note 7, 34.

subject's rights.²⁴ They propose a liberal model of criminal law.²⁵ A liberal conception of criminal justice emphasises that the purpose of the criminal law is to provide censure and punishment and also the need to respect the autonomy and dignity of individuals in the criminal process.²⁶ In Ireland, "just deserts", or retributivism, which provides that sanctions should be commensurate with the blameworthiness of the offending behaviour, is the key concept in sanction practice,²⁷ particularly in terms of sentencing, although the need for rehabilitation is also taken into account. Sanction and sentencing systems based on the "just deserts" principle have become popular in many jurisdictions.²⁸

Lord Lane describes sentencing in a criminal case as "trying to reconcile a number of totally irreconcilable facts".²⁹ Judges have historically considered sentencing as art rather than science, thus requiring substantial judicial discretion.³⁰ However, legislatures have increasingly attempted to limit discretion in sentencing by providing for mandatory sentences in legislation and also issuing sentencing guidelines to judges. Despite this, Ashworth notes that sentencing guidelines are sometimes ignored by trial judges.³¹ Imprisonment is not provided for for violations

²⁴ Ashworth A. and Zedner L., "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions" (2008) 2 *Criminal Law and Philosophy* 21, 43.

²⁵ *Ibid* 22.

²⁶ Cruft is critical of the contemporary liberal assumption that the enforcement of justice should be state-centred and algorithmic. See Cruft. R. "Liberalism and the Changing Character of the Criminal Law: Response to Ashworth and Zedner" (2008) 2 *Criminal Law and Philosophy* 59, 61.

²⁷ See further Von Hirsch A., *Past or Future Crimes* (Manchester: Manchester University Press, 1986) 59.

²⁸ Law Reform Commission, *Consultation Paper on Sentencing* (1993) 4.73

https://www.lawreform.ie/_fileupload/consultation%20papers/cpSentencing.htm accessed 4 April 2022.

²⁹ *HI. Deb*, vol 486, col 1295.

³⁰ Norrie *supra* note 9, 334.

³¹ Ashworth A. *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2010) 30.

of sea-fisheries law.³² Lacey observes that for many regulatory offences the argument was that they were not real crimes to which stigma should attach, but were rather in the nature of administrative regulations with non-stigmatising penalties such as fines.³³ Financial penalties are provided for under the 2006 Act. However, maximum fines are rarely imposed by judges who retain a great deal of discretion in sentencing in the absence of sentencing guidelines in the context of environmental and fisheries offences. It is likely the low penalties imposed are also related to fisheries cases not fitting in to the concept of real crime as previously discussed.³⁴

The Oireachtas has been reluctant to issue sentencing guidelines due to the constitutional protection of the exclusive role of the judiciary in the exercise of justice³⁵. The courts themselves have resisted imposing sentencing guidelines on lower courts due to the need for the trial judge to be able to take all circumstances into account in coming to a sentencing decision. However, this is changing slowly. In *DPP v Z*³⁶ the Court of Appeal stated that there is an obligation on the prosecution to draw the attention of the judge to any guidance on the ranges or bands of sentences that might be considered appropriate. The judge would not be bound by

³² Art. 73(2) of UNCLOS provides that “Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment”. However, some Member States do impose prison sentences for a breach of fisheries law. See Blomeyer & Sanz: Beke M., Ackermann R. and Blomeyer R. *The CFP-Infringement Procedures and Sanctions Imposed Throughout the EU 2014* (European Union, 2014) pp. 46-48 <https://op.europa.eu/o/opportal-service/download-handler?identifier=2f47e0b9-b69f-43b0-8688-57773bd330a8&format=pdf&language=en&productionSystem=cellar&part=> accessed 1 April 2022.

³³ Lacey N. “Criminalization and Regulation: the Role of Criminal Law in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 161.

³⁴ Kuperan *et al.* note that penalties in fisheries cases are generally not large relative to illegal gains and observe that the courts are not willing to apply sanctions perceived as excessively severe. See Kuperan K. and Sutinen J. G. “Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries” (1998) 32(2) *Law & Society Review* 309, 311.

³⁵ See O’Malley T. “Sentencing Guidelines, Legal Transplants and an Uncertain Future” (2019) 29(4) *Irish Criminal Law Journal* 94, 94.

³⁶ *The People (D.P.P.) v. Z* [2014] 1 I.R. 613.

this guidance but could take it into account. In *DPP v Fitzgibbon*³⁷ the Court of Appeal stated that the prosecution should make the judge aware of the range of sentences which have been imposed by judges for the particular offence in question. Again, the judge would not be bound by such guidance, but it would assist in improving consistency while still taking the individual circumstances of the case into account. In the context of fines in particular, the Court of Appeal in *DPP v Roseberry Construction*³⁸ noted that a fine may only be viewed as lenient or harsh in light of the economic circumstances of the offender. In *DPP v Oran Pre-Cast*³⁹ the Court of Appeal held that the degree of fault, the behaviour of the company since the offence and the ability to pay were all relevant factors to be considered in setting the fine. Therefore, the fine must be proportionate to the harm done but also to the means of the company. In *DPP v South East Recycling*⁴⁰ the Court of Appeal held that where the offender has deliberately broken the law to benefit economically, the fine may be set at a level to not only deprive the offender of the profit made but also to have a dissuasive effect. However, it was for the prosecution to adduce evidence of such conduct. Despite the guidance provided for in such cases, there continues to be inconsistency in fines issued by the lower courts for similar offences across both the criminal and regulatory spheres.

Sanctions for Regulatory Crime

According to Elder, sanctions are of the very essence of a criminal justice/regulatory system and bear a relationship to offences or prescribed

³⁷ *The People (D.P.P.) v. Fitzgibbon* [2014] 2 I.L.R.M. 116.

³⁸ *The People (DPP) v Roseberry Construction Limited* [2003] 4 IR 338.

³⁹ *The People (DPP) v Oran Pre-Cast Limited* Unreported, Court of Criminal Appeal, Hardiman J. (ex tempore) December 16, 2003.

⁴⁰ *The People (DPP) v South East Recycling* [2011] 3 IR 35.

contraventions themselves, the breach of which provokes the sanction. They are distinguished on the real crime side as inherently wrong or *mala in se*, and on the regulatory side as *mala prohibita* or, ‘technically’ illegal.⁴¹ Similar to the criminal law, sanctions are used by the State to control regulatees’ behaviour. Regulatees should be motivated by the threat of sanction to comply with the regulatory regime.⁴² Where a regulatee breaches an element of the statutory regime, the enforcement body should have a variety of enforcement tools available to them, of which sanctions will usually form a large part. Sanctions should be provided for by law but in some cases regulators are forced to improvise where no formal sanctions are provided for by statute.⁴³ For example, they may offer education, advice, or warnings and may name and shame offenders.⁴⁴ However, it is preferable that a range of sanctions of varying severity are provided for by law.

Sanctions differ depending on whether the regulatory regime relies on the criminal law or administrative/civil sanctions or a combination of both. Criminal sanctions are punitive in nature and must be applied by a judge. They usually take the form of fines or imprisonment. Administrative/civil sanctions can be applied by the regulator itself, or by an independent administrative body or tribunal. There are a vast range of administrative/civil sanctions available from warnings to negotiated compliance agreements to traditional monetary penalties and licence revocation. Whether the system relies on criminal or administrative sanctions, the maximum

⁴¹ Elder *supra* note 3, 226. This difference emerged from industrialisation in the 19th and 20th centuries, see further Hildebrandt M., “Justice and Police: Regulatory Offenses and the Criminal Law” 12 *New Criminal Law Review: An International and Interdisciplinary Journal* 43, 51.

⁴² Hawkins K., “Bargain and Bluff – Compliance Strategy and Deterrence in the Enforcement of Regulation” (1983) 5(1) *Law and Policy Quarterly* 35, 48, 66, 68.

⁴³ See Scott C., “The Regulatory State and Beyond” in Drahos P. (eds.) *Regulation, Institutions and Networks* (Australia: Australian University Press, 2017) 272.

⁴⁴ See generally Hood, C., Scott, C., James, O., Jones, G. and Travers, T., *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters* (Oxford: Oxford University Press, 1999).

penalty aims to incapacitate the offender, on the criminal side, by imprisonment and administratively by means of licence revocation.⁴⁵ In the case of sea-fisheries, although the regulatory regime relies on the criminal law, imprisonment is never utilised as a sanction.⁴⁶ Licence revocation is available to the Licensing Authority where a person breaches a condition of a licence but, to the author's knowledge, this has never occurred.

In the context of consumer protection legislation, Faure *et al.* identify five different national models of enforcement policy:

1. Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and, for the purposes of punishment and deterrence, there is reliance on the possibility of penalties being imposed as a result of criminal justice proceedings.
2. Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies but efforts to secure compliance are focused on agencies taking proceedings in the civil courts, although this does not preclude the possibility of criminal prosecutions.
3. Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and they themselves have the power to impose (generally modest) financial penalties. This does not preclude the possibility of criminal prosecutions or civil proceedings.
4. Jurisdictions in which a public institution (such as an Ombudsman) exists to receive complaints from consumers and third parties, and that

⁴⁵ Elder *supra* note 3, 226.

⁴⁶ Art. 73(2) UNCLOS as discussed above *supra* note 32.

agency may be instrumental in initiating proceedings in a civil court or referring the case for prosecution in the criminal courts.

5. Jurisdictions in which there is little or no monitoring by an administrative agency, and it is mainly left to the consumers aided by voluntary or publicly funded consumer associations to enforce private rights against defaulting traders, or else to resort to self-regulatory dispute settlement processes. Administrative and/or criminal proceedings by a residual, public enforcement agency are taken only in exceptional cases.⁴⁷

Although the models refer to traders and consumers, they are also applicable to regulatory enforcement in general. The choice between these five models is impacted by national culture and legal tradition. Common law jurisdictions usually favour models one and two. In terms of regulation of the sea-fisheries industry, Ireland falls under the first category. Faure *et al.* selected the UK as an example of a category one model. It was found that enforcement procedures were considered in general to be effective. However, there was perceived to be inadequate deterrence for serious cases because the penalties imposed by the criminal courts were too low. It was felt that the introduction of a suitable system of administrative financial penalties would enhance compliance.⁴⁸

These findings in the UK context are directly applicable to enforcement of sea-fisheries law in Ireland. In general, the District Court operates relatively efficiently and sea-fisheries cases, which are mostly dealt with on a plea, are heard

⁴⁷ Faure M., Ogun A., and Philipsen N., "Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement" (2009) 31(2) *Law & Policy* 161, 164.

⁴⁸ *Ibid.*

quite quickly and for the most part fines imposed are proportionate to the minor nature of the offences, taking the plea into account. However, penalties imposed by the Circuit Court in cases which are more serious in nature are often too low to constitute an effective, proportionate and dissuasive sanction and do not deprive the offender of the economic benefit derived from the infringement.⁴⁹

According to McGrath, Irish jurisprudence has failed to fully recognise that there are two interwoven strands to the criminal law.⁵⁰ The first, which is recognised by Irish courts, is the “expressive, symbolic, moral judgement that reflects community values and which inflicts punishment and just deserts on offenders”.⁵¹ The second, and the one neglected, is “regulatory, instrumental and utilitarian”.⁵² He argues that this second strand is often compliance-oriented, aimed at deterring offenders regarding their future behaviour and places reliance on fines as a compensator for wrongdoing, both generally regarded as features of the civil law.⁵³ He states that “regulatory crime as a concept has no fixed meaning in Irish law, nor is there a rich common law history in the area”.⁵⁴ He contends that not all regulatory offences address minor matters or punish them with small penalties. In McGrath's view, the Irish courts in defining crime have only juxtaposed conventional criminal law and civil law, whereas there is a need to contrast regulatory crime with

⁴⁹ See Blomeyer & Sanz criticism of level of fines in Ireland, Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. Implementation of the Current EU Fisheries Control System by Member States (2014-19) (European Union, 2020) 50 and 128 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022.

⁵⁰ McGrath J., “The Colonisation of Real Crime in the Name of All Crime: The Traditional Court Approach to the Definition of Crime” in Kilcommins S. and Kilkelly U. (eds.) *Regulatory Crime in Ireland* (Dublin: First Law, 2010) 48.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

conventional crime, and also regulatory crime with civil sanctions.⁵⁵ Unless a proper distinction is recognised and drawn, misbehaviour may not receive its proper status, and thus appropriate punishment.⁵⁶ McGrath's observations are particularly applicable to criminal enforcement of sea-fisheries law, where, as previously discussed, it could be argued that the Irish courts have not contrasted breaches of fisheries regulations with traditional notions of crime.

Issues with the Criminal Law

Despite the long-held assumptions of law and policymakers, the criminal law rarely operates as a deterrent and does not prevent crime.⁵⁷ Bringing a defendant to court, with a view to conviction and sentence, may not have preventive effects and may even be counter-productive.⁵⁸ In terms of sea-fisheries law, criminal conviction does not prevent repeated, almost identical breaches of the law. The criminal trial is not well suited to dealing with repeat offending because it focuses on specific charges without examining broader issues and continuing patterns of misconduct.⁵⁹ It is often the same operators who are consistently prosecuted by the DPP for breaches of sea-fisheries law.⁶⁰ However, this may not be apparent where different masters are prosecuted.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Robinson P.H., *Distributive Principles of Criminal Law: Who Should Be Punished How Much* (Oxford: Oxford University Press, 2009) 21-22. Robinson states that it is possible for the criminal law to provide a deterrent if certain prerequisites are present, namely legal knowledge, rational choice and perceived net cost. However, he argues that such prerequisites will rarely be present.

⁵⁸ Ashworth and Zedner *supra* note 24, 23.

⁵⁹ *Ibid.*

⁶⁰ In the context of Irish operators. Statistics on prosecutions by country are available in the SFPA Annual Reports. See for example SFPA Annual Report 2020, pp. 64-65 https://www.sfpa.ie/LinkClick.aspx?fileticket=nQuYG_ILhvs%3d&portalid=0&resourceView=1 accessed 4 April 2022.

A further criticism of the criminal law is that it is not cost-effective.⁶¹ In the US, one Supreme Court Justice described the ordinary criminal process as “too long, too expensive and unpredictable”.⁶² This also rings true in Ireland and the UK where legal costs are extremely high.⁶³ Therefore, Ashworth and Zedner propose that jury trials should be reserved for the most serious charges where the defendant pleads not guilty.⁶⁴ Even summary trials should be reserved for cases in which a court hearing really is necessary.⁶⁵ They argue that court proceedings are unnecessary where the defendant is willing to plead guilty, and that for some lesser forms of offending a court hearing may not need to examine the defendant’s fault or may not be necessary at all for minor offences, since almost all defendants are willing to accept some lesser, swifter resolution of the case.⁶⁶ Although criminal prosecution may be costly, it is dangerous to suggest the erosion of the rights of the accused which are enshrined in the common law system. Cruft points to the fact that such proposals are not sufficiently communitarian and fail to take account of the fact that the accused is part of the community, deserving of fair procedures.⁶⁷

Defendants often plead guilty to fisheries offences. A plea should expedite the process significantly. However, cases are still often delayed, albeit not to the extent as when a full trial is required where an accused pleads not guilty. Elder

⁶¹ *Ibid.*

⁶² *Lafler v Cooper* 132 S. Ct. 1376, 1391-98 (2012) (Scalia J) at 1391. See further Green B.A., “The Right to Plea Bargain with Competent Counsel after Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process Too Long, Too Expensive, and Unpredictable in Pursuit of Perfect Justice” (2013) 51 *Duquesne Law Review* 735.

⁶³ In the UK in many cases the costs associated with bringing the prosecution are higher than the fine imposed see Clientearth, *The Control and Enforcement of Fisheries in England* (2017) <https://www.clientearth.org/media/itpfxqh/the-control-and-enforcement-of-fisheries-in-england-ce-en.pdf> accessed 1 May 2022.

⁶⁴ Ashworth and Zedner *supra* note 24, 23.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Cruft *supra* note 26, 60.

identifies other issues which also potentially arise around, *inter alia* the subjective nature of some criminal proofs, the imposition of strict liability offences where “moral culpability” is absent and the use of reverse burdens of proof.⁶⁸

Criminal proofs in fisheries cases are mainly documentary, therefore, the issue of subjectivity does not arise. However, subjectivity in proving a misrecording of catch charge in a criminal case has thus far provided an insurmountable challenge for both the regulator and the State. A vessel may record that a certain species has been caught in a particular area with a high available quota when it has in fact been caught in an area with lower quota. This is known as “quota hopping”.⁶⁹ Although it is possible to produce positional data for the vessel, this does not prove where fish was caught. Therefore, such a charge relies on opinion evidence given by SFPOs that fish was caught in a certain area based on their analysis. Many of these types of cases are directed no prosecution by the DPP due to the subjective nature of the evidence, although at the time of writing, there are a number of test cases awaiting hearing dates in court. It is questionable whether these cases can satisfy the criminal burden of proof. In the absence of any alternatives to criminal prosecution, it leaves a significant gap in enforcement that these types of cases cannot be pursued successfully.⁷⁰ It can also have devastating effects on the marine environment in terms of biodiversity when areas which have been designated with low quota in order to protect stocks are overfished. This can result in inaccurate scientific

⁶⁸ Elder *supra* note 3, 244-245.

⁶⁹ It is important to note that this phrase may also refer to the practice where a fisher or fishing company having the nationality of one Member State takes advantage of the liberal conditions applying to the granting of nationality to fishing vessels in another Member State and re-registers their vessel(s) in order to benefit from conditions for fishing which are more liberal or economically advantageous in the new flag State than in the original flag State. This is discussed in Churchill R. and Owen D., *The EC Common Fisheries Policy* (Oxford: OUP, 2010) 2.6.

⁷⁰ S.31 of the 2006 Act may provide one alternative as previously discussed.

assessments of the stocks in the area because the catch has not been recorded correctly. This in turn means that quotas are based on inaccurate information which can be detrimental to sustainability of stocks.

Moral culpability has also presented significant problems in fisheries cases. Although the maxim that ignorance of the law is no excuse is a cornerstone of legal systems, sea-fisheries law, and in particular European Regulations, are so detailed and complex that a good deal of latitude is given to the accused. For example, in *AG v John Conneely*,⁷¹ the defendant admitted to the offence in question but argued that he did not understand his legal obligations and did not believe he had done anything wrong. He was acquitted on the basis that he did not understand the law, despite the considerable economic benefit derived from the offences in question.

It is relatively commonplace for the State to enter a *nolle prosequi* in fisheries cases.⁷² This is mostly related to significant delay which leads to difficulty with witness availability, misplaced evidence and gaps in the case file which it is too late to address. Therefore, for the reasons outlined above, the criminal law as it is currently applied to sanction breaches of sea-fisheries law, may be considered ineffective. However, this is not to say that the criminal law itself is ineffective. The demands placed on the prosecution as regards proving the case beyond a reasonable doubt exist to protect the presumption of innocence of the accused. Therefore, the evidence in a prosecution case must be held to a high standard. As all fisheries offences are currently categorised as criminal offences, it is incumbent on the State to meet these demands if it is to prove a criminal case. It may be more appropriate

⁷¹ *AG v John Conneely* (Galway Circuit Court, 04 February 2015).

⁷² See for example SFPA Annual Report 2020 *supra* note 60.

only to pursue criminal prosecution in cases of serious breaches of sea-fisheries law where the burden of proof is justified.

Ashworth and Zedner note a gradual move away from the criminal law as a means of censure due to a growing scepticism about the fitness of the criminal trial itself to fulfil its purpose.⁷³ They identify the greater use of seven alternatives to criminal prosecution in the UK:

1. Diversion
2. Fixed penalties
3. Summary trials
4. Hybrid civil-criminal processes
5. Strict criminal liability
6. Incentives to plead guilty
7. Preventive orders⁷⁴

For example, in the UK, the introduction of the controversial anti-social behaviour order, known as ASBOs, were viewed by some as an assault on traditional conceptions of criminal justice and conversely resulted in an extension of the reach of the criminal justice system rather than circumvention of it as had been the aim.⁷⁵

Some commentators argue that the criminal law and the criminal trial is being eroded by the State as it pursues other agendas such as greater regulation, an emphasis on

⁷³ Ashworth and Zedner *supra* note 24, 22.

⁷⁴ *Ibid.*

⁷⁵ Crawford A., "Governing through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice" (2009) 49(6) *British Journal of Criminology* 810, 810-811.

prevention, and an authoritarianism linked closely with penal populism and the demand for public protection.⁷⁶ However, there is a danger that such “alternatives” may easily become supplements to traditional criminal law.⁷⁷ Cruft contends that a full understanding of the appropriate role of the criminal law also requires a complementary normative understanding of non-criminal and non-governmental sanctions.⁷⁸ He argues that in addition to the seven changes highlighted by Ashworth and Zedner, we must also step outside considerations of both criminal and civil law, and consider when and how non-state sanctions are justified or required.⁷⁹ Often terms like “better regulation” and “responsive regulation” operate as cloaks to circumvent and undermine established criminal justice principles.⁸⁰ Elder notes that the development of these alternative channels of control, and negative challenges affecting the traditional trial process effect the movement towards greater administrative sanctioning.⁸¹

Under some Australian legislation, enforcement agencies are empowered to take simultaneous or sequential, administrative, civil or criminal action in respect of the same conduct.⁸² Four models of penalty enforcement have been identified by the Australian Law Commission:

1. Parallel criminal liability and civil penalties for the same conduct;
2. Separate schemes of civil and criminal penalties;

⁷⁶ Ashworth and Zedner *supra* note 24, 44.

⁷⁷ Cohen S., *Visions of Social Control* (Cambridge: Polity, 1985) 3.

⁷⁸ Cruft *supra* note 26, 64.

⁷⁹ *Ibid.*

⁸⁰ Crawford *supra* note 75, 811.

⁸¹ Elder *supra* note 3, 228-229.

⁸² Freiberg A., *The Tools of Regulation* (The Federation Press 2010) in Elder *ibid* 243-244.

3. Administrative penalties that arise automatically by operation of legislation;
4. Parallel criminal liability and quasi-penalties (e.g. licence suspension or removal).⁸³

Similarly, in the UK, the Environment Agency is empowered to combine sanctions in certain circumstances.⁸⁴ This is quite unusual as it is not normally possible to combine criminal and civil sanctions for the same offence. The principle is usually that an administrative/civil monetary penalty cannot be imposed if a criminal conviction or acquittal upon substantially the same facts has occurred, that civil proceedings are stayed where contemporaneous criminal proceedings are instituted, and sometimes if an administrative/civil monetary penalty is imposed that no criminal proceedings can then be instituted.⁸⁵ Even in the context of enforcement undertakings or compliance agreements, the agreement provides that the enforcement body will not issue an administrative sanction or initiate criminal proceedings for the conduct to which the agreement relates unless the agreement is breached.⁸⁶

⁸³ Australian Law Reform Commission, *Report on Principled Regulation: Federal Civil and Administrative Penalties in Australia* (December, 2002) 398 <https://www.alrc.gov.au/mwg-internal/de5fs23hu73ds/progress?id=cwGDHaYoN3NAKY1IfhkRaoJ8YTs5rn4NDi9IZGS4egc,&dl> accessed 30 March 2022.

⁸⁴ See Environment Agency, *Enforcement and Sanctions Policy* (20 December 2019) 8.2.9 <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy> accessed 30 March 2022.

⁸⁵ Elder *supra* note 3, 244.

⁸⁶ See for example, Environment Agency, *Policy Paper Annex 1: RES Act- The Environment Agency's Approach to Applying Civil Sanctions and Accepting Enforcement Undertakings* (20 December 2019) 3.5 <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings> accessed 30 March 2022.

In most common law jurisdictions, the principle of double jeopardy, expressed in the Latin maxim *nemo debet bis vexari pro eadem causa*, prevents both administrative and criminal penalties being imposed upon the same facts.⁸⁷ The principle developed in response to the draconian punishments traditionally imposed on defendants and the deficiencies in medieval criminal procedure to the advantage of the prosecution.⁸⁸ The common law immunity from re prosecution gradually developed in response to the injustice in permitting retrials for the same offence following an acquittal or conviction. The principle was also designed to prevent the imposition of multiple punishments for the same criminal transgression in separate proceedings.⁸⁹

Multiple penalties are provided for by legislation in order to provide flexibility in punishment and to allow punishment to be graded by severity.⁹⁰ However, there are also a number of disadvantages and risks to the availability of multiple penalties as they have the potential to be oppressive and unfair, involve costs injurious to the regulated, and can lead to protracted proceedings.⁹¹ Evidence gathered for one set of proceedings may potentially be precluded from use in another set of proceedings or may require safe-guards and procedures before being used.⁹²

⁸⁷ See Berg A. *Implementing and Enforcing European Fisheries Laws* (The Netherlands: Kluwer Law International, 1999) 235 and 241 .

⁸⁸ See generally Hunter J., "The Development of the Rule against Double Jeopardy" (1984) 5 *Journal of Legal History* 3 and Sigler J., "A History of Double Jeopardy" (1963) 7 *American Journal of Legal History* 283.

⁸⁹ Coffey G., "The Constitutional Status of the Double Jeopardy Principle" 30(2008) *Dublin University Law Journal* 138, 152.

⁹⁰ Tripkovic M., *Punishment and Citizenship: A Theory of Criminal Disenfranchisement* (Oxford: Oxford University Press, 2019) 59.

⁹¹ Elder *supra* note 3, 244.

⁹² *Ibid.*

The difference in speed of application, process, severity and purpose across the sanction spectrum may also present issues.⁹³

In the context of sea-fisheries law, simultaneous sanctions were available in the form of the point system, under which the licence holder received points on his/her licence in addition to the Master being prosecuted for the same offence. The Consultation Paper revealed that fishermen consider this to be oppressive and unfair.⁹⁴ Judicial review proceedings were instituted on the grounds that points should not be applied until after the criminal trial has taken place and the Master found guilty of the offence.⁹⁵ In particular, it was argued that the administrative appeal hearing in relation to the licence holder may be prejudicial to the Master at trial. The administrative appeal was held in private. However, this was merely the practice that evolved. The legislation was silent on whether it should have been a private or public hearing. It was also unclear whether a member of the press was entitled to attend. Evidence given was not on oath. However, there were no procedural safeguards to ensure that evidence given by the licence holder and Master was not used against the Master in a subsequent criminal trial. The same case file and evidence gathered by the SFPA for the points case was used in the criminal trial which could have presented problems. The defence could apply to have pieces of evidence excluded from the criminal trial against the Master which were used in the

⁹³ *Ibid.*

⁹⁴ Department of Agriculture, Food and the Marine, *Responses to the Consultation on Proposed Amendments to the Sea Fisheries and Maritime Jurisdiction Act 2006*, (February, 2015) <https://www.agriculture.gov.ie/seafood/sea-fisheriespolicymanagementdivision/completedpublicconsultations/> accessed 4 April 2022.

⁹⁵ *Patrick O'Sullivan and Cathal O'Sullivan v The Sea-Fisheries Protection Authority, The Minister for Agriculture, Food and the Marine, Ireland and the Attorney General* [2016] 1 JIC 1507.

administrative appeal of the licence holder. The court could also take the application of points into account in mitigation when setting a fine.

In two prosecutions against two different masters of the same vessel which had previously had points applied to the licence resulting in a two month suspension, the defence entered an application to have the case dismissed due to a penalty already having been applied to the licence holder, if not to the accused personally.⁹⁶ However, the judges in both cases elected to allow the jury to deliberate on the case rather than granting the defence application.

The Supreme Court held that it is permissible for the Master to be prosecuted and found not guilty and for the licence holder to retain the points.⁹⁷ The judgment did not address whether this would also be the case for the Master point system where the same person would be involved in both processes. The State may need to elect to pursue either administrative or criminal action in this situation. Similar to the point system for licence holders, it would certainly be argued by the defence in any criminal trial if the master had already received points on his/her licence, particularly if this resulted in a licence suspension. It is likely it would form the basis of an application to dismiss the case as well as arguments made in mitigation. Alternatively, if an administrative sanction regime were to apply instead of criminal prosecution, the administrative body would also need to consider the previous application of points before recommending any administrative sanction as it may not

⁹⁶ *DPP v Paul Keating* (Wexford Circuit Court, 02 October 2018) and *DPP v James Scallan* (Wexford Circuit Court, 12 March 2020).

⁹⁷ *Patrick O'Sullivan and Cathal O'Sullivan v The Sea-Fisheries Protection Authority, The Minister for Agriculture, Food and the Marine, Ireland and the Attorney General* [2017] IESC 75.

be able to initiate two sets of administrative proceedings based on the same set of facts. As the point system evolves over time, the position may become clearer.

Reconsidering Regulatory Crime

“Conviction of an individual for an offence is the strongest form of condemnation of conduct that the State can muster.”⁹⁸

If the criminal law is the body of law which decides on punishment, and if punishment requires justification, as nearly all theorists agree it does, then in deciding what conduct justifies punishment we are also deciding what conduct should be defined as a crime under the criminal law.⁹⁹ Therefore, punishment cannot be justified if the conduct should not have been criminalised in the first place.¹⁰⁰ McGrath argues that the Irish cases which have defined the indicia of a crime speak to “real crime”. Therefore, attempting to make conventional crime indicia fit into regulatory contexts is inappropriate.¹⁰¹ As Husak notes, criminal liability is different to other types of sanctions.¹⁰² Otherwise we would be at a loss to understand the special procedural safeguards which the State affords to an accused person.¹⁰³ One could view alternative sanctioning as the State moving away from criminal law to avoid the more onerous procedural requirements that now apply to the criminal process.¹⁰⁴ Indeed, in many cases, such as the ASBOs example, this is the motivation.

⁹⁸ Ashworth and Zedner *supra* note 24, 48.

⁹⁹ Husak D., “Limitations on Criminalization and the General Part of Criminal Law” in Shute S. And Simester A. (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2010) 26-44.

¹⁰⁰ *Ibid.*

¹⁰¹ *Supra* note 50.

¹⁰² Husak *supra* note 99.

¹⁰³ *Ibid.*

¹⁰⁴ Ashworth and Zedner *supra* note 24, 48.

However, one could also view the use of alternative sanctions as a more appropriate means of dealing with conduct which should never have been criminalised in the first instance. Where conduct satisfies the harm focus, then it should be dealt with through criminal sanctions, but where it does not, then it should not be dealt with by the criminal law but rather by alternative sanctions. Brown notes that in the context of white collar corporate offending, the criminal law is preserved for the most egregious instances of knowing and harmful conduct - those in which the retributive and expressive function of criminal law become clearly necessary.¹⁰⁵ Where conduct does not reach this threshold, then the criminal law is not necessary and administrative sanctions should apply. In the case of sea-fisheries, serious cases would more easily satisfy the harm element and could still be referred for criminal prosecution, leaving other breaches to be dealt with by an administrative sanction system.

Such a proposition differs entirely from applying alternative sanctions to conduct which should be considered criminal with the aim of avoiding the criminal justice system. Commentators are justifiably concerned about such moves which undermine the right of the accused to the protections offered by the principles of criminal justice. There is a profound difference between such attempts to side step the more onerous procedural requirements of the criminal law and acknowledging that certain types of conduct, and in particular breaches of sea-fisheries law, do not satisfy the threshold to be classified as crimes justifying punishment.¹⁰⁶ Therefore, it

¹⁰⁵ Brown *supra* note 13, 1330.

¹⁰⁶ INTERPOL classify IUU fishing as a risk indicator of fisheries crimes or other associated crimes committed within the fisheries sector rather than defining it as either a criminal or administrative offence. Treating it as a risk indicator rather than precisely defining IUU fishing enables the implementation of a multidisciplinary approach which allows for the prosecution of a greater number of cases related to illegal activities in the fisheries sector. See INTERPOL, *International Law Enforcement Cooperation in the Fisheries Sector: A Guide for Law Enforcement Practitioners*

is entirely proper that breaches of sea-fisheries law, and indeed perhaps many other regulatory offences, should be dealt with by alternative sanctions unless the conduct contains a harm element that justifies punishment as a crime.

Legislatures have a tendency to over-criminalise conduct, particularly for regulatory offences, to demonstrate that they take breaches of the law seriously.¹⁰⁷ As the criminal law is perhaps society's strongest possible means of censure, legislatures define conduct as a crime despite in many cases there being more effective means of discouraging and sanctioning non-compliant behaviour. Indeed, as Kilcommins *et al.* observe, "criminalisation is now more than ever viewed as a panacea for almost any social problem".¹⁰⁸ However, crime should be confined to conduct which truly warrants society's censure. Husak illustrates this point by suggesting that even if, for example, domestic violence could be punished more effectively by alternative sanctions outside of the criminal system, domestic violence would still have to be classified as a crime because of the societal condemnation it deserves by its nature.¹⁰⁹ Therefore, the nature of the conduct itself must be instructive of whether a breach is defined as a crime.

Mushal describes the criminal law as the "engine that drives enforcement".¹¹⁰ However, according to Husak, a criminal statute is not necessary if other means

(INTERPOL, 2018) 9

<https://www.interpol.int/content/download/5147/file/GuideInterLawEnforcementCoop-entier-WEB-2019-04.pdf> accessed 30 March 2022.

¹⁰⁷ Kadish S.H., "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30(3) *University of Chicago Law Review* 423, 438.

¹⁰⁸ Kilcommins S., Leahy S. And Spain E., "The Absence of Regulatory Crime from the Criminal Law Curriculum" in Gledhill K. and Livings B. (eds.) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Oxon: Routledge, 2017) 1.

¹⁰⁹ Husak *supra* note 16, 223.

¹¹⁰ Mushal R.W., "Reflections Upon American Environmental Enforcement Experience As It May Relate to Post-Hampton Developments in England and Wales" (2007) 19(2) *Journal of Environmental Law* 201.

could address the wrongdoing more easily.¹¹¹ Jareborg argues that “[p]unishment is society’s most intrusive and degrading sanction. Criminalisation should accordingly be used only as a last resort or for the most reprehensible types of wrongdoing”.¹¹² As previously discussed, in the opinion of this author, there is a role for the criminal law in dealing with serious regulatory crime. Confinement of the role of the criminal law to serious cases may assist the Irish courts in recognising regulatory crime as a different, albeit related category of wrongdoing to traditional crime. The criminal law is certainly valuable in terms of its moral weight in censuring wrongdoing and has a moral power in sentencing, which is achieved through its capacity to shape social reality.¹¹³

If criminal prosecution is confined to only egregious breaches of sea-fisheries law, the regulator must possess a range of enforcement options. As previously discussed, the SFPA is notably limited in terms of sanction choice. Oberdiek, echoing the views of Bobbio, argues that coercion and sanctions are overused techniques for influencing behaviour and ensuring compliance and that they may be largely replaced by promotional techniques.¹¹⁴ Bobbio argues that a promotional system should make action attractive where there is a duty on the individual to act and should make the action repugnant where such action is prohibited.¹¹⁵ Taking Bobbi and Oberdiek’s view, sanctions should not be the core of the criminal justice/regulatory system because sanctions do not effectively influence individuals’

¹¹¹ Husak *supra* note 16, 212. He also argues that severe constraints should be placed on the authority of the State to enact criminal offences see Husak *supra* note 87, 13.

¹¹² Jareborg N. “What Kind of Criminal Law Do We Want?” in Jareborg N. (ed.), *Scraps of Penal Theory* (Uppsala: Iustus Forlag, 2002) 89.

¹¹³ Findlay M. and Henham R., *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (New York: Routledge, 2011).

¹¹⁴ Oberdiek *supra* note 8, 94.

¹¹⁵ Bobbio N., “The Promotion of Action in the Modern State” in Hughes G. *Law, Reason and Justice* (New York: New York University Press, 1969) 199-200.

behaviour. Hart states that individuals voluntarily comply in a coercive system due to the guarantee provided by sanctions.¹¹⁶ However, Oberdiek argues that even the best legal systems cannot provide such a guarantee by means of sanctions and that compliance with the legal system can still be achieved by other means such as incentives.¹¹⁷

Certainly, in the context of sea-fisheries law, there is no guarantee of criminal sanction and, therefore, fishers are less likely to voluntarily comply.¹¹⁸ Both the Macrory Review¹¹⁹ and its predecessor, the Hampton Report,¹²⁰ accept that the most effective approach to preventing regulatory breach in many cases will be advice on how best to ensure compliance. However, Macrory cautions “[b]ut without the power to sanction, even a regulator’s advisory functions are likely to have little effect”¹²¹ Therefore, sanctions continue to form a major part of both criminal justice and regulatory systems, but there is scope for alternatives to criminal prosecution to achieve compliance. The overarching enforcement strategy in terms of how sanctions are to be assigned in practice must also be considered.

¹¹⁶ Hart *supra* note 7, 193.

¹¹⁷ Oberdiek *supra* note 8, 90. See further Eliassen S.Q., Papadopoulou K.N., Vassilopoulou V. and Catchpole T.L. “Socio-Economic and Institutional Incentives Influencing Fishers’ Behaviour in Relation to Fishing Practices and Discard” (2014) 71(5) *ICES Journal of Marine Science* 1298. Norway uses a system of sea closures as an incentive to use more selective gear to reduce discards see European Parliament, *Small-Scale Fisheries and the Zero Discard Target* (European Union, 2015) 28.

¹¹⁸ Sutinen *et al.* argue that the time between detection of a violation and conviction and sanction, the lower the perceived cost of the violation at the time of a person’s compliance decision. The less time there is to conviction and sanctioning, the higher the perceived cost. Therefore, they expect that an enforcement program that processes cases quickly will have a greater deterrent effect than one that processes cases slowly. See Sutinen J.G., Rieser A., and Gauvin J.R. “Measuring and Explaining Noncompliance in Federally Managed Fisheries” (1990) *Ocean Development and International Law* 21(3) 335, 339.

¹¹⁹ Macrory R., *Regulatory Justice: Making Sanctions Effective*, Final report (November, 2006).

¹²⁰ Hampton P., *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005).

¹²¹ Macrory R., “Reforming Regulatory Sanctions - Designing a Systematic Approach” in Oliver D, Prosser T. and Rawlings R. (eds), *The Regulatory State* (Oxford: Oxford University Press, 2010) 230.

Deterrence and Compliance Models¹²²

“The great object of penal law is to deter men from violating the law by holding out privation and suffering as the consequences of transgression”.¹²³

The central purpose of all enforcement activity may perhaps be to deter individuals from breaching the law in the first place.¹²⁴ Becker utilises economic theory to explain why people commit crimes despite the threat of punishment. His seminal theory predicts that the aggregate number of offences is negatively related to the probability and severity of punishment.¹²⁵ Individuals will be induced to comply with the law if the expected cost of the offence in terms of sanction or consequence (D) and probability of apprehension (p) exceed the benefit of committing the offence (U).¹²⁶ Therefore, the condition of compliance becomes $U < p.D$.¹²⁷ It should be noted that the cost of offending in terms of sanction is only one factor and other consequences such as shame, reputational damage and legal costs must also be considered.¹²⁸ In terms of sea-fisheries law, legal expenses may be extremely high

¹²² Several empirical studies of fishers have been conducted in order to explain compliance behaviour. See Kuperan and Sutinen *supra* note 34, Sutinen *et al. supra* note 114, Hatcher A., Jaffry S., Thebaud O. and Bennet E. “Normative and Social Influences Affecting Compliance with Fisheries Regulations” (2000) 76(3) *Land Economics* 448 and Hønneland G. “A Model of Compliance in Fisheries: Theoretical Foundations and Practical Application (1999) 42 *Ocean and Coastal Management* 699. The European Fisheries Control Agency have also developed several compliance indicators to assist control and detection see https://www.efca.europa.eu/sites/default/files/Guidelines%20on%20indicators%20to%20measure%20compliance%20in%20fisheries_1.pdf accessed 31 March 2022.

¹²³ Criminal Law Commissioners, 1843, 92 in Norrie *supra* note 9, 336.

¹²⁴ Chalfin A. and McCrary J., “Criminal Deterrence: A Review of the Literature” (2017) 55 *Journal of Economic Literature* 5.

¹²⁵ See Van Velthoven B. and Van Wijck P., “Becker’s Theory on Crime and Punishment: A Useful Guide for Law Enforcement Policy in The Netherlands?” (2016) *Recht der Werkelijkheid* 6.

¹²⁶ See further Becker G., “Crime and Punishment: An Economic Analysis” (1968) 78(2) *Journal of Political Economy* 169.

¹²⁷ Simplified by Faure *et al. supra* note 47, 166. Becker’s complete theory contains many other variables such as net social damage caused by offences, social costs of punishment and how to arrive at optimum law enforcement.

¹²⁸ See further Carr-Hill R.A. and Stern N.H., *Crime, the Police and Criminal Statistics: An Analysis of Official Statistics for England and Wales using Econometric Methods* (London: Academic Press, 1979).

for both the State and the accused where the case is repeatedly put back on the court list. However, in the author's experience, given the considerable sympathy which exists for fishers, and in particular Irish fishers, reputational damage is not particularly associated with a conviction for fisheries offences.¹²⁹

Taking this into account, Faure *et al.* have reformulated the equation for the condition of compliance.¹³⁰ $U < q.E + p.D$. $q.E$ represents the probability and the associated costs of the relevant act being detected.¹³¹ $p.D$ represents the expected costs of a formal sanction. The variable **q** depends in particular on the amount and quality of enforcement activities. The variable **p** is influenced by factors such as the requirements for proof of contravention. This includes satisfying the high burden of proof in criminal cases, the ability to obtain evidence to prove the offence to the standard required and proof of fault or knowledge.¹³² Fisheries offences are strict liability offences, therefore proof of knowledge or intent is not technically required. However, as previously discussed the courts still often take such factors into account. Therefore, it is useful for the prosecution to provide at least circumstantial evidence of knowledge. This simple model of deterrence assumes that likely offenders behave rationally and have full information on the values of the different variables.¹³³ However, Robinson argues that legal knowledge, rational choice and perceived net cost are prerequisites to effective deterrence which are rarely present in the context of criminal offences.¹³⁴ Therefore, it is debatable whether it is possible to assume rational behaviour in sea-fisheries cases despite the potentially large economic

¹²⁹ Sayre observes that when it "becomes respectable to be convicted, the vitality of the criminal law has been sapped". Sayre F. "Public Welfare Offences" (1933) 33 *Columbia Law Review* 55, 79-20.

¹³⁰ *Supra* note 47, 166.

¹³¹ *Ibid.*

¹³² *Ibid* 167.

¹³³ *Ibid.*

¹³⁴ Robinson *supra* note 57.

benefit to be derived from an infringement and the low risk of detection and punishment.

The deterrence approach assumes that all regulated entities are profit-maximisers who assess the risk of non-compliance. In implementing a deterrence approach, regulators must rigorously enforce the law and courts impose maximum penalties for violations.¹³⁵ The simple assumption is that where the potential penalty outweighs the benefits of non-compliance, the regulated entity will then be compliant.¹³⁶ Scholz argues that this basic model of deterrence is only valid when:

- (a) corporations are fully informed utility maximisers;
- (b) legal statutes unambiguously define misbehaviour;
- (c) legal punishment provides the primary incentive for corporate compliance;
- (d) enforcement agents optimally detect and punish misbehaviour given available resources.¹³⁷

Since these conditions are rarely fulfilled, a traditional conception of deterrence is generally not a helpful explanation of what motivates organisations to comply with the law.

A more nuanced view of the deterrence model is to acknowledge that prosecution may have to be selective due to resource constraints in order to

¹³⁵ Scholz J.T., "Co-operation, Deterrence and the Ecology of Regulatory Enforcement" (1984) 18 *Law and Society Review* 179, 183.

¹³⁶ Abbot C., *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Oxford: Hart Publishing, 2009) 41.

¹³⁷ Scholz *supra* note 135.

maximise the deterrent threat from limited resources.¹³⁸ Ogus points out that the deterrent effect of sanctions depends on their certainty, severity, celerity, and uniformity, but especially certainty.¹³⁹ If there is the potential for a high reward to be gained from non-compliance and a corresponding low potential penalty, then the threat posed by the sanction is not a severe enough threat to deter non-compliance.¹⁴⁰ In the context of sea-fisheries law, imposition of sanction is far from certain. Where a penalty is imposed, it is often so long after the occurrence of the breach that it cannot be said to have a deterrent effect. Penalties are generally considerably lower than the profit obtained from the breach and can vary greatly between judges. Therefore, it cannot be said that a model of deterrence applies to sea-fisheries enforcement, despite this being the stated purpose of criminalising all breaches of sea-fisheries law under the 2006 Act without provision for administrative sanctions.¹⁴¹

Compliance strategy seeks to prevent a harm rather than punish an evil.¹⁴² The compliance approach assumes that regulated entities normally act like good citizens and courts tend to give them the benefit of the doubt in relation to any wrongdoing. Trivial violations are overlooked and regulated entities are given advice and generous amounts of time in order to help them to correct more serious violations.¹⁴³ Its conception of enforcement centres upon the attainment of the broad aims of legislation, rather than sanctioning its breach. Recourse to the legal process is rare, a matter of last resort, since compliance strategy is concerned with repair and

¹³⁸ Abbot *supra* note 136.

¹³⁹ Ogus, A. *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994) 93.

¹⁴⁰ *Ibid.*

¹⁴¹ Dáil Deb 17 November 2005, vol 610, no 3.

¹⁴² Hawkins K. and Thomas J., *Enforcing Regulation*. (Boston: Kluwer-Nijhoff Publishing, 1984) 4.

¹⁴³ Scholz *supra* note 135.

results, not retribution.¹⁴⁴ Compliance strategy began to influence regulatory enforcement through the criminal law and through environmental protection measures.¹⁴⁵ More and more systems of social control are based around compliance theory as predicted by Reiss.¹⁴⁶ The compliance approach is more accurately divided into persuasive and insistent approaches.¹⁴⁷ The persuasive approach attempts to educate, persuade, coax and cajole offenders into compliance.¹⁴⁸ The insistent strategy utilises this persuasive strategy but also expects offenders to correct their behaviour. Where offenders do not do so, regulators will proceed to prosecution.¹⁴⁹

Taking a compliance approach without any recourse to deterrent measures may not be effective in dealing with regulatees who are unwilling to comply. Likewise, where regulators use an overly deterrence-based strategy, regulatees may view this as unfair and stigmatising¹⁵⁰ which can lead to a culture of resistance to regulation¹⁵¹ and non-compliance. Deterrence and compliance approaches may be considered as polar opposites which are unlikely to be implemented in their pure form. Most enforcement agencies implement a mixture of the two but lean more in the direction of one or the other.¹⁵² Ideally, regulators should aim to implement a

¹⁴⁴ Hawkins and Thomas *supra* note 142.

¹⁴⁵ See Reiss A.J., "Selecting Strategies of Social Control over Organisational Life" in Hawkins K. and Thomas J.M. *Enforcing Regulation*, 26. See also Reiss A.J. and Bordua D.J., "Environment and Organisation: A Perspective on the Police" in Bordua D.J. *The Police: Six Sociological Essays* (John Wiley, 1967).

¹⁴⁶ *Ibid* 35.

¹⁴⁷ Hutter B., "Variations in Regulatory Enforcement Styles" (1989) 11 *Law and Policy* 153, 155.

¹⁴⁸ Hutter B. *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997) 16.

¹⁴⁹ Abbot *supra* note 136, 42.

¹⁵⁰ See generally Sherman L.W., "Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction" (1993) 30(4) *Journal of Research in Crime and Delinquency* 445.

¹⁵¹ See generally Bardach E. and Kagan R.A., *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

¹⁵² Gunningham N., "Negotiated Non-Compliance: A Case Study of Regulatory Failure" (1987) 9 *Law & Policy* 69, 70.

mixed deterrence/compliance approach, or “hybrid” model.¹⁵³ Therefore, a mixed approach is deemed to be the most successful strategy by commentators.¹⁵⁴ The leading theory for explaining and prescribing this mix is responsive regulation.¹⁵⁵

Responsive Regulation

In 1992, Ayres and Braithwaite argued that there should be a move away from the “crude polarisation” of deterrence and compliance theories towards striking some sort of sophisticated balance between the two theories.¹⁵⁶ The central question of responsive regulation is: “when to punish; when to persuade?”¹⁵⁷ which is determined by implementing an enforcement pyramid. The quintessential enforcement pyramid contains persuasive enforcement strategies at its base, escalates upwards to monetary civil sanctions at its middle, with criminal prosecution and licence revocation at its apex. Regulators use this pyramid in a “tit-for-tat”¹⁵⁸ or responsive approach, beginning at the base with compliance, education-orientated action and ascending upwards to more serious deterrent punitive action where the regulatee continues to breach the applicable laws. Thus, the idea of a pyramid of support and sanctions lies at the heart of responsive regulation.¹⁵⁹ Implementation of

¹⁵³ Law Society of Ireland, *Enforcement of Environmental Law: The Case for Reform* (Dublin: Law Society of Ireland, 2006-2007) 30
<https://www.lawsociety.ie/globalassets/documents/committees/lawreform/envir-report.pdf>
accessed 1 April 2022.

¹⁵⁴ See for example, Gunningham N. and Johnstone R., *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999), Winter S. and May P., “Motivation for Compliance with Environmental Regulations” (2001) 20 *Journal of Policy Analysis and Management* 675 and May P. and Wood R., “At the Front Lines: Inspectors’ Enforcement Styles and Regulatory Compliance” (2003) 13 *Journal of Public Administration and Research Theory* 117.

¹⁵⁵ Parker C., “The ‘Compliance’ Trap: The Moral Message in Responsive Regulatory Enforcement” (2006) 40(3) *Law and Society Review* 591, 592.

¹⁵⁶ Ayres, I. and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) 35.

¹⁵⁷ *Ibid* 21.

¹⁵⁸ *Ibid* 35.

¹⁵⁹ Braithwaite J., “The Essence of Responsive Regulation” (2011) 44 *University of British Columbia Law Review* 475.

a responsive approach requires the regulator to be aware of and responsive to the characteristics of the regulatee in question. Macrory highlights the need to distinguish the enforcement requirements for different offending behaviour.¹⁶⁰ The enforcement approach should differ depending on the type of offender, their compliance record and willingness to comply with the regulatory regime as well as the size or scale of the company.

It should be noted that the concept of responsive regulation is designed as a pyramidal structure to maintain as much enforcement activity as possible at the educational base. Regulators should be contingently forgiving and move back down the pyramid where regulatees fall into line.¹⁶¹ Such practices were advocated on the basis that the perception of fairness and responsiveness would build commitment amongst regulatees, while at the same time ensuring that regulators escalate sanctions where necessary.¹⁶² By resorting to punitive sanctions only after more persuasive action has already been tried, the former comes to be seen as more legitimate.¹⁶³ Legitimacy increases voluntary compliance and cooperation with enforcement.¹⁶⁴ However, Crawford is critical of the UK government's application of responsive regulation as a ladder or even an escalator rather than a pyramid, in that each intervention is always more serious than the last.¹⁶⁵ In other words, movement is always upward and does not conform to the principle that most activity

¹⁶⁰ *Supra* note 119, 29-30. See further Braithwaite J., *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008) 88.

¹⁶¹ Ayres and Braithwaite *supra* note 156, 62-63.

¹⁶² Scott *supra* note 43, 283.

¹⁶³ Braithwaite *supra* note 159, 486.

¹⁶⁴ Brown *supra* note 13, 1301.

¹⁶⁵ Crawford *supra* note 75, 825.

should be at the bottom and that regulators should move back down the pyramid where possible.

Responsive regulation remains unrivalled in its applicability to multiple regulatory contexts¹⁶⁶ and has been adopted worldwide by governments and regulators.¹⁶⁷ This is part due to the intuitive nature of its design in that regulators often already follow a pyramid approach without knowing it.¹⁶⁸ This reaffirms Braithwaite's view that responsive regulation is "a natural social process".¹⁶⁹ However, in reality, the SFPA often has no option but to proceed immediately to criminal prosecution since it has no legislative power to give warnings, fixed penalty notices (FPNs) or other less severe penalties, thereby limiting its capacity to engage in compliance-orientated action, other than informal advice and warnings.¹⁷⁰

Despite its popularity, studies have exposed difficulties with the practical implementation of responsive regulation.¹⁷¹ Complications arise in inspectors applying the appropriate level of sanction which may lead to inconsistency and unpredictability in enforcement. As in the case of sea-fisheries law, the availability of a range of sanctions to be able to escalate and de-escalate up and down the pyramid may often be lacking. Baldwin and Black are critical of responsive

¹⁶⁶ Kolieb J., "When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond" (2015) *Monash University Law Review* 136, 136.

¹⁶⁷ See further Parker C., "Twenty Years of Responsive Regulation: An Appreciation and Appraisal" (2013) 7 *Regulation and Governance* 2.

¹⁶⁸ Gunningham N., "Strategizing Compliance and Enforcement: Responsive Regulation and Beyond" in Parker C, Nielsen V.L. (eds.) *Explaining Compliance: Business Responses to Regulation*, 199–221 (Edward Elgar: Cheltenham, 2011).

¹⁶⁹ Braithwaite *supra* note 159, 519.

¹⁷⁰ See for example SFPA Annual Report 2020 where the only enforcement and sanctions options listed in the context of fisheries are in relation to prosecutions
https://www.sfpa.ie/LinkClick.aspx?fileticket=nQuYG_ILhvs%3d&portalid=0&resourceView=1
accessed 4 April 2022.

¹⁷¹ Job J, Stout A, Smith R., "Culture Change in Regulatory Institutions: From Command-and-Control to Responsive Regulation in Taxation Administration" in Elffers H, Verboon P, Huisman W. (eds) *Managing and Maintaining Compliance* (Boom Legal Publishers: The Hague, 2006) 147-169.

regulation for policy, practical and constitutional reasons. On a policy level, they argue that step-by-step escalation up the pyramid may not be appropriate for catastrophic risk.¹⁷² Some regulators require that lesser measures have first been attempted before escalating up the pyramid which may not always be appropriate.¹⁷³ For example, the regulator may be aware that a vessel is fishing large quantities of a species which is endangered and for which targeted fishing is prohibited. In such a case, a catastrophic risk may exist that a species could be wiped out and therefore, the regulator must proceed immediately to the top of the pyramid. Theoretically, it should be possible for the regulator to move up and down the pyramid. However, it may be very difficult to move down the pyramid following use of a deterrent, punitive sanction, since the relationship between regulator and regulatee may have suffered. The threat of punitive sanctions may make base-level “voluntary” compliance impossible.¹⁷⁴

From a practical viewpoint, there may be a lack of repeat interactions or significant lapses in time between meetings of the regulator and the regulatee.¹⁷⁵ Regulators may also be confined to either compliance-orientated or punitive measures. In the context of sea-fisheries, the SFPA finds itself in a Catch-22 situation. While there may be a lack of judicial, political and public support for punitive measures against fishers, the SFPA is nevertheless tied to punitive measures

¹⁷² *Supra* note 1, 62. See also Gunningham N., “Enforcement and Compliance Strategies” in Baldwin R., Cave M. and Lodge M. (eds.) *The Oxford Handbook of Regulation* (Oxford: OUP, 2010).

¹⁷³ See Chapter 6 Case Study. In Scottish fisheries enforcement, an FPN must be offered before a prosecution is instituted.

¹⁷⁴ Baldwin and Black *supra* note 1, 63.

¹⁷⁵ *Ibid* 64. See also Gunningham *supra* note 152, 205 and Kingsford-Smith D., “A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector” (2011) 44(3) *UBC Law Review* 695.

having no other enforcement options available and so lacks the tools to apply alternative strategies.

From a constitutional perspective, Baldwin and Black contend that responsive regulation lacks formalism and undermines the rule of law as well as broader constitutional values,¹⁷⁶ while Yeung argues that responsive regulation prioritises ensuring effective regulation and compliance over constitutional values of proportionality and consistency.¹⁷⁷ Scott is critical of the central emphasis placed on the State¹⁷⁸ and further contends that responsive regulation generally is selective, responsive, oriented towards the regulator's instrumental objectives and in conflict with "real" crime universal application principles.¹⁷⁹ However, Scott has since revised this critique and taken a more nuanced view of responsive regulation with the focus being on building capacity amongst the regulated community to comply with a regulatory regime with state oversight. Braithwaite maintains that he has always advocated flexibility and characterised responsive regulation as a principles-based, dynamic and "cumulative creation".¹⁸⁰ He emphasises that in designing the regulatory pyramid a partnership approach between regulator and regulated is possible, and concludes:

The paradox of responsive regulation is that by having a capability to escalate to tough enforcement, most regulation can be about collaborative capacity

¹⁷⁶ *Supra* note 1. See also Grabosky P., "Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process" (2013) 7(1) *Regulation & Governance* 114.

¹⁷⁷ Yeung K., *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing, 2004) 168-170.

¹⁷⁸ Scott C., "Regulation in the Age of Governance: The Rise of the Post Regulatory State" in Jordana J. and Levi-Faur D. (eds.) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* 145-176 (Edward Elgar: Cheltenham, 2004) 24-26.

¹⁷⁹ Scott C., "Regulatory Crime: History, Functions, Problems, Solutions" (July 2009) UCD Working Papers in Law, Criminology and Socio-Legal Studies Research Paper No 13, 8 and 12.

¹⁸⁰ Braithwaite *supra* note 159, 1.

building. Most of the action can fall within a strengths-based pyramid, a pyramid of supports for business compliance and continuous improvement.¹⁸¹

Braithwaite advocates that the key to progress is to keep constructing new paradigms that sweep across disciplines, which are responsive to new realities of the world.¹⁸² However, where the regulator is dependant on policy-makers, as in the case of the SFPA, it is challenging for the regulator to respond to the changing regulatory landscape and successfully implement a responsive strategy.

The ability to impose stringent sanctions if required is essential to the successful implementation of a responsive strategy. The apex of the pyramid is conceived as the “benign big gun”, which is similar to the “big stick” metaphor, in that it allows regulators to successfully concentrate their efforts at the bottom of the pyramid because they hold a powerful tool in reserve to be deployed if needed.¹⁸³ In the original conception of the pyramid in the context of financial regulation, licence revocation sat at the apex. However, during the financial crash, since the larger financial institutions were deemed too big to fail, their licences were never revoked, leading to the criticism that there was no benign big gun and no credible regulatory presence at all.¹⁸⁴ Criminal prosecution in conjunction with licence revocation now sits at the apex of most regulatory pyramids, including in the context of the financial sector.¹⁸⁵

¹⁸¹ *Ibid.*

¹⁸² Braithwaite J., “The New Regulatory State and the Transformation of Criminology” (2000) 40(2) *British Journal of Criminology* 222, 235.

¹⁸³ See further Braithwaite J., “Limits on Violence; Limits on Responsive Regulatory Theory” (2014) 36(4) *Law and Policy* 432.

¹⁸⁴ Ford C., “Prospects for Scalability: Relationships and Uncertainty in Responsive Regulation” (2012) *Regulation and Governance* 1, 15.

¹⁸⁵ Wood et al. examine a range of enforcement pyramids from diverse areas of regulation in Wood et al., “Applications of Responsive Regulatory Theory” (2010) Occasional Paper RegNet ANU Canberra.

In Ireland, the financial crash coupled with several high profile prosecutions against high ranking management of financial institutions resulted in the creation of an administrative sanction system to be administered by the Central Bank. The prosecution of Mr. Fitzpatrick, the former chair of Anglo-Irish Bank, became the longest running criminal trial in Irish history, lasting 126 days and resulting in his acquittal.¹⁸⁶ The trial was the culmination of a nine-year investigation costing millions and was the second attempt to prosecute Mr. Fitzpatrick. As Mr. Fitzpatrick was declared bankrupt prior to the commencement of the trial, the State bore the cost of both prosecution and defence legal fees. The costs associated with the prosecution and the resulting acquittal were extremely controversial in the media and is an example of the reasoning behind the introduction of an administrative sanction system for financial institutions and their directors as an alternative to criminal prosecution which came to be seen as ineffective in such cases.

Sea-fisheries enforcement could be described as operating in an analogous context. Licence suspension or revocation has never been used as a sanction by the Licensing Authority to the author's knowledge, except in the context of the point system. The SFPA itself does not have the legislative power to suspend or revoke licences for non-compliance as the Licensing Authority is the competent authority in this regard. Therefore, the SFPA can recommend that a licence be revoked, but the decision ultimately lies with the Licensing Authority. Since the SFPA is responsible for enforcement, it seems inefficient that it can only revoke a licence with the agreement of an entirely separate public body. This separation of powers may be intentional on the part of the legislature, so that one body does not wield too much

¹⁸⁶ *DPP v Fitzpatrick* (Dublin Circuit Court, 23 May 2017).

power. The SFPA may be seen as judge, jury and executioner if it had the power to revoke licences without the oversight of another body. However, it is submitted that the courts could provide such oversight. Licence suspension and revocation could be a very effective tool if placed at the apex of the pyramid with the option of recourse to the courts. However, it is essential that the power would actually be capable of being utilised so that it operates as a credible threat. Similarly, if criminal prosecution is to remain at the apex then it must function as an effective, proportionate and dissuasive sanction.

The role of criminal law is viewed by some regulatory experts as peripheral and effectively non-apex in effectiveness.¹⁸⁷ Nonetheless, Braithwaite has always argued that there must be a role for both civil penalty and criminal sanction.¹⁸⁸ The key issue is the interplay between both, in a collaborative, dynamic design that will garner legitimacy and industry buy-in, change with circumstances and involve both a tough top, where criminal law lurks and a balanced middle.¹⁸⁹ As the SFPA does not currently possess any mid-pyramid sanctions, this gap must be filled in order to create a more appropriate role for the criminal law.

Luban argues that criminal law is a useful tool in enforcing regulation due to the threat of imprisonment.¹⁹⁰ In a study of alternative sanctions, Kahan found that sanctions other than imprisonment for serious crimes tend to be resisted by the

¹⁸⁷ See Grabosky P., "On the Interface of Criminal Justice and Regulation", Ogus A., "Regulation and its Relationship with the Criminal Justice Process", and Smith G., Seddon T. and Quirk H., "Regulation and Criminal Justice: Exploring the Connections and Disconnections" in Smith G., Seddon T. and Quirk H., *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge: Cambridge University Press, 2010).

¹⁸⁸ Braithwaite J., *Punish or Persuade: Enforcement of Coal Mine Safety* (New York: State University of New York Press, 1985) 181-184.

¹⁸⁹ Elder *supra* note 3, 239.

¹⁹⁰ Luban D., "The Publicity of Law and the Regulatory State" (2002) 10(3) *Journal of Political Philosophy* 296, 312.

public because they fail to stigmatise.¹⁹¹ When white collar offenders are fined rather than imprisoned, for example, citizens suppose that the State does not regard their offences as serious.¹⁹² However, Ashworth argues:

custody should not simply be seen as the top rung of a ladder which starts with discharges and runs upwards through fines and community penalties. The imposition of a custodial sentence restricts liberty to a far greater degree than any other sentence, and for that reason should require special justification.¹⁹³

Although imprisonment is technically available under the 2006 Act for certain offences relating to obstruction and assault of an SFPO, a judge has, to the author's knowledge, never imposed a custodial sentence under the Act. A fine and forfeiture is the most serious penalty which is currently imposed for a breach of fisheries legislation.

Since imprisonment is not imposed for breaches of sea-fisheries law, arguments on the effectiveness of the imprisonment element of criminal prosecution do not support the use of the criminal law as an apex sanction in any enforcement pyramid. However, use of the criminal law may be effective for other reasons as previously discussed. The moral influence of the criminal law is extremely powerful, with sentencing having the potential to shape and reflect social values.¹⁹⁴ Coupled with licence revocation, which would represent the ultimate penalty for fishers, namely loss of livelihood, the public condemnation and moral weight associated with criminal prosecution should remain at the apex of the pyramid. Where the

¹⁹¹ Kahan D. "What Do Alternative Sanctions Mean?" (1996) 63 *University of Chicago Law Review* 591.

¹⁹² Brown *supra* note 13, 1335.

¹⁹³ Ashworth *supra* note 31, 269.

¹⁹⁴ Robinson *supra* note 57, 183.

criminal law is reserved for conduct which is serious and deserving of moral condemnation, the criminal law remains appropriate. However, it should not be the default position where moral censure is not required and the conduct could be more appropriately dealt with by means of administrative sanctions.

In the UK, the Macrory Review examined some of the issues connected with a responsive approach, and in particular, the role of the criminal law in regulatory enforcement.¹⁹⁵ The review builds upon the enforcement pyramid approach but moves away from the type of graduated response inherent in the pyramid structure to one that allows for different responses to different types of businesses and the different circumstances of the breach.¹⁹⁶ According to Macrory, the review is grounded within a set of more coherent principles of regulatory governance, emphasising transparency and accountability.¹⁹⁷

The review found that traditional approaches to enforcement left the criminal law with a great deal to do.¹⁹⁸ He found that in nearly every regulatory field the core sanction was a criminal offence, and usually one expressed in strict liability terms.¹⁹⁹ Thus, the review advocated broader monetary penalty categories to round out the arsenal of regulatory sanctions, as well as recommendations for change/improvement of the criminal system including improved training for court officials in regulatory offences, specialising criminal courts to specific areas, the provision of a richer range of sentencing options, including publicity orders, corporate rehabilitation orders, enforcement undertakings that allow the offender to propose their own sanction, (e.g.

¹⁹⁵ *Supra* note 119.

¹⁹⁶ *Supra* note 121, 241.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid* 234.

¹⁹⁹ *Ibid* 232.

staff retraining or compensation for victims), the application of proof beyond reasonable doubt in all regulatory enforcement, and the introduction of forms of restorative justice. The proceeding chapters examine whether some of these options could be applied in the Irish context, both in relation to broader monetary penalties and changes in the criminal system.

Risk-Based Regulation

Previous reviews in the UK recommended that all regulators should adopt a risk-based approach.²⁰⁰ Therefore, any discussion of regulatory strategy would not be complete without examining risk-based regulation. At its simplest, risk-based regulation can be conceived as allocating resources in proportion to risk, considering both the impacts themselves and the likelihood that they happen, in order to establish appropriate levels of control.²⁰¹ The approach explicitly acknowledges that the government cannot regulate to remove all risks and that regulatory action, when taken, should be proportionate, targeted and based on an assessment of the nature and magnitude of the risk and the likelihood that the regulation will be successful in achieving its aims.²⁰² The targeting of inspection and enforcement may improve regulatory efficiency and maximise the benefits of regulation whilst ensuring that the burden posed on the regulated community is commensurate to the risk posed.²⁰³ Risk-based regulation has become quite popular across many regulatory settings and may have some advantages over responsive regulation as it allows the regulator to

²⁰⁰ Hampton Report *supra* note 120.

²⁰¹ Rothstein H., Irving P., Walden T. and Yearsley R., "The Risks of Risk-Based Regulation: Insights from the Environmental Policy Domain" (2006) 32 *Environment International* 1056, 1057.

²⁰² Black J. *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Reviews of Regulatory Reform, 2010) 16.

²⁰³ Rothstein *et al. supra* note 201.

relate enforcement activity to achievement of enforcement objectives while using resources more efficiently by targeting high-risk entities.²⁰⁴

Hutter notes that many regulators only adopt risk-based tools as opposed to utilising an entirely risk-based approach to regulation and enforcement.²⁰⁵ For example, the SFPA operates a risk-based approach to inspections. A vessel risk list is circulated among all officers on a monthly basis. Each port can then allocate limited staff and resources to the vessels on this list. Officers also cross-check logbook and positioning data in order to determine which vessels should be inspected. The date of last inspection is also taken into account. The higher the risk, the more inspections required.

There are also inevitable disadvantages to risk-based regulation. It must be accepted that certain risks will not be prioritised, meaning there is a danger that low-level risks may have a cumulative effect.²⁰⁶ Therefore, the Hampton Report still advocated some level of random inspection in order to avoid lower risk offenders escaping prioritisation.²⁰⁷ Risk-based regulation is also weak in terms of identifying new risks and focuses on individuals rather than on the broader regulated community.²⁰⁸ It may be more appropriate to focus on the broader regulated community in the sea-fisheries sector given that one of the aims of the CFP is to create a culture of compliance among the industry as a whole. Risk-based inspections may narrow the focus too greatly to achieve this level of widespread compliance. A further issue is that risk-based regulation depends on the regulator

²⁰⁴ Baldwin and Black *supra* note 1, 66.

²⁰⁵ Hutter B. *The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation* (ESRC Centre for Analysis of Risk and Regulation, 2005) 3.

²⁰⁶ Baldwin and Black *supra* note 1, 66.

²⁰⁷ *Supra* note 120.

²⁰⁸ Baldwin and Black *supra* note 1, 67 & 74.

having the resources to analyse often vast amounts of information.²⁰⁹ The SFPA may not have the resources to allocate sufficient staff numbers to analyse all of the data provided to it by vessels. Therefore, risk analysis may not be entirely accurate and may not provide a full picture.

Sparrow's theory of regulatory craft is tied to the idea of risk-based regulation.²¹⁰ Sparrow advocates the "expert" model of regulation rather than the traditional "legal" model.²¹¹ In doing so, regulators can identify risks and problems and fix them rather than focusing on a programme for risk reduction.²¹² Therefore, it places problem-solving at the centre of the regulator's approach. The problem should be precisely defined, which assumes that the problem is capable of precise definition. In fact, Sparrow acknowledges that his theory is predicated on the hypothesis that a significant proportion of day-to-day incidents, violations and crimes fall into patterns that can be discerned.²¹³

According to Sparrow, regulators should separate the stages of problem-solving by targeting key problems and solving these by developing solutions and implementing these solutions.²¹⁴ Regulators should utilise a broad range of versatile tools to deal with problems which suit the particular risk. However, a broad range of tools is not available to the SFPA. Similar to really responsive regulation discussed below, regulators should regularly assess their own performance and adjust strategy accordingly on this basis. Baldwin and Black are critical of Sparrow's approach for

²⁰⁹ *Ibid.*

²¹⁰ See Sparrow M., *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (Washington: Brookings Institution Press, 2000).

²¹¹ *Ibid* 28.

²¹² Sparrow M., *The Character of Harms: Operational Challenges in Control* (Cambridge: Cambridge University Press, 2008) 149.

²¹³ *Ibid* 232.

²¹⁴ The author attended a workshop conducted by Sparrow entitled "How to be an effective risk-based regulator" from 11-14 November 2017.

not elaborating on whether the solution to a given problem lies through a responsive, deterrent or some other approach.²¹⁵ Nor does it address the potential interactions between different regulatory logics and strategies for coming to grips with the stages of the problem-solving process.²¹⁶ Although the same set of offences are repeated by fishers, thereby making it possible to identify problems, really responsive regulation may deal more thoroughly with the reasons for non-compliance. Really responsive regulation also does not demand that problems be distilled down to the level demanded by Sparrow, which may not be possible to do in the context of the broad categories of sea-fisheries offences.

Really Responsive Regulation

Baldwin and Black have expanded on responsive regulation and propose a theory of really responsive regulation.²¹⁷ To implement a system of really responsive regulation, the regulator must detect non-compliant behaviour, develop tools and strategies for responding to such behaviour, enforce these tools and strategies and assess their success or failure, modifying approaches accordingly. The theory provides a basis for assessing how best to apply a pyramid approach to enforcement, for judging how responsive and other approaches can be combined, and for evaluating whether it is necessary to change rationale.²¹⁸ Many regulators have struggled to apply a responsive approach.²¹⁹ Really responsive regulation provides a greater level of guidance to regulators and acknowledges many of the challenges faced by regulators in practice, such as detection and lack of tools.

²¹⁵ *Supra* note 1, 68.

²¹⁶ *Ibid.*

²¹⁷ *Supra* note 1.

²¹⁸ Baldwin R., Cave M. and Lodge M., *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 2012) 275.

²¹⁹ Job *et al.* *supra* note 171.

In applying a really responsive approach, regulators should respond to the regulatee's attitudinal setting, meaning its response to the regulatory regime broadly. To do this, the regulator must be aware of the regulatee's motivational posture which contains five elements: commitment to or accommodation of the regulatory regime, capitulation to the regulator, resistance, game playing and disengagement.²²⁰ Motivational posture may also be affected by the relationship between the regulator and the regulatee, pursuit of profitability or reputation, market position, congruence of external regulatory demands and internal goals, the means by which regulatory norms are imposed, the perceived fairness of the regulatory regime and the nature of the external environment.²²¹ Selznick argues that regulation which appears to be effective but which is not responsive to non-legal normative orderings will ultimately fail to accomplish the goals of justice because of its failure to connect with social reality.²²² More responsive regulation helps to combat the assertion that regulation is too generalised, absolutist, inflexible, impressionistic, and democratically weak.²²³ Non-responsive regulation will not only fail to be just, but will also be ineffective as people refuse to comply with legal regulation that does not seriously engage with their concerns, values, and social milieu.²²⁴ Therefore, the regulator must respond to all of these combined factors while also being cognisant of its own institutional context and that of the regulatee,²²⁵ which affects approaches and responses to both regulation and enforcement. The approach further demands

²²⁰ *Supra* note 1, 69.

²²¹ *Ibid* 69-70.

²²² Selznick P., *The Moral Commonwealth* (Berkeley: University of California Press, 1992) 463.

²²³ Cotterrell R., *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1995) 304-5. See for example the issues of Danish fishers in relation to regulations in Raakjær Nielsen J. and Mathiesen C. "Important factors influencing rule compliance in fisheries lessons from Denmark" (2003) 27(5) *Marine Policy* 409.

²²⁴ Parker C. and Braithwaite J., "Regulating Law" in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 128.

²²⁵ *Ibid* 70-71.

that regulators are aware of and responsive to sometimes conflicting approaches and how they interact, for example, education versus punitive sanction, and in doing so, seeks to limit potential tensions between tools and strategies.²²⁶

Really responsive regulation is more attuned to problems with detection than responsive or risk-based regulation. Detection can prove very difficult for regulators. In the context of sea-fisheries generally, only a percentage of vessels can be inspected and consequently, only a small proportion of the overall data provided by vessels can be checked to ensure accuracy and detect any non-compliance.²²⁷ Detection of offences committed at sea relies for the most part on the Naval Service, whose resources for inspections at sea may be limited and compete with other demands. Certain offences, such as quota hopping, are almost impossible to detect and prove. The Naval Service may board a vessel and note that the Master has recorded significantly more catch than is present on board with the intention of attributing this catch to a different area. However, such an intention is difficult to prove and presents merely as an accidental over-estimation of catch.

Similarly, the requirements of the landing obligation make it virtually impossible to detect and prove non-compliance under the current quota system.²²⁸

²²⁶ *Ibid* 72.

²²⁷ The European Court of Auditors noted weaknesses in Member State data validation systems and processes which exacerbates the issues with detection, as even where comprehensive data is available, infringements may not be detected. See European Court of Auditors, *EU Fisheries Controls: More Efforts Needed* (2017) 38-40 https://www.eca.europa.eu/Lists/ECADocuments/SR17_8/SR_FISHERIES_CONTROL_EN.pdf accessed 1 April 2022.

²²⁸ Remote Electronic Monitoring (REM) will likely become the method for monitoring and enforcement of the landing obligation but is in its early stages of implementation. It may operate in conjunction with an observer programme. See European Parliament, *The Landing Obligation and its Implications on the Control of Fisheries* (2015) [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563381/IPOL_STU\(2015\)563381_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563381/IPOL_STU(2015)563381_EN.pdf) accessed 1 April 2022. No prosecution for breach of the landing obligation has been taken in Ireland on the basis of an observer programme.

Vessels can also easily land at unmanned ports to evade detection, or at times when the SFPA do not have staff on duty. There have also been a number of incidences of factories allegedly manipulating weighing records, which can be ongoing for an extended period before detection and consequently, it is difficult to prove when the manipulation commenced. The challenges posed by detection and proving an offence present a serious threat to conservation objectives, where the status of stocks is then based on incorrect information.

In responding to such challenges to detection, regulators should develop clear conceptions of their aims and an appropriate disaggregation of those objectives into subsidiary aims so that achievable targets can be set and problems identified in a manageable way.²²⁹ Regulators should be able to detect invisible non-compliance which may interfere with the achievement of objectives,²³⁰ which may themselves shift over time. As the SFPA cannot verify all data, it must be cognisant of the dangers posed by invisible non-compliance and its cumulative effect. Regulators should also assess whether compliance with the legal rules is enough to attain its objectives.²³¹ In the case of the landing obligation, fishers may be compliant with the rules, but this may interfere with the overall objective of conservation. In this way, really responsive regulation has the potential to provide a better picture of the regulatory environment than responsive or risk-based regulation alone.

The regulator must develop tools and strategies to deal with non-compliant behaviour following detection. Responsive regulation assumes that the regulator has a full pyramid of options. However, as Baldwin and Black note, a regulator rarely

²²⁹ Sparrow *supra* note 212, 146-149.

²³⁰ *Ibid* 272-273.

²³¹ *Supra* note 1, 29.

has a full toolbox.²³² The Macrory Review also recommended the expansion of the regulatory toolbox.²³³ The SFPA has no middle ground options between the base and the apex of the regulatory pyramid. Although enforcement of the landing obligation requires a complete adjustment to the SFPA enforcement strategy, the SFPA does not have the legal capacity to create more tools. The burden of proof for criminal prosecution is, in most cases, incompatible with proving a breach of the landing obligation. Fishers must now land all catch and must not discard unintended catches, making it almost impossible to prove that the Master fished over quota. Although there is an obligation on masters to move fishing grounds or stop fishing if they are approaching the quota, where a master lands fish over quota, he/she can simply claim they are obliged to land the fish under the landing obligation. Without alternatives to criminal prosecution, the landing obligation risks becoming a mask for overfishing which does not fulfil conservation objectives. However, the SFPA's role is to enforce the law. It has no role in policy-making. Therefore, it is not within the Authority's control to implement new policy at national level which reflects the change in policy at European level. This significantly weakens the SFPA's ability to adapt to change. Individual Transferable Quotas or Days at Sea may provide solutions to the problems with achievement of conservation objectives in light of the new landing obligation.²³⁴ However, this is a policy matter which would have to be introduced by DAFM. It appears unlikely that such a policy change will be instituted

²³² *Ibid* 83.

²³³ *Supra* note 119.

²³⁴ Regulations based on input control, like "days at sea" which allow landing of all catches, were perceived as more efficient by Danish fishers in terms of stock conservation by protecting stocks from overfishing. See Raakjær Nielsen and Mathiesen *supra* note 223.

given the view of DAFM that quotas constitute a public good and are treated as a national asset.²³⁵

The SFPA has previously devised an alternative strategy, even where it lacked enforcement powers. In 2017, it informed the EU that it believed widespread misreporting of area had occurred in the FU16²³⁶ prawn fishery. The SFPA sent revised calculations to the EU of what it believed was the actual amount of catch taken from the area based on time spent in the area by each vessel. This resulted in an EU closure of the area for fishing for the remainder of the year. Members of the industry challenged the basis of the SFPA calculations by means of judicial review. The High Court upheld the actions of the SFPA,²³⁷ which was then appealed to the Supreme Court²³⁸ and subsequently sent as a preliminary reference to the CJEU. Although criminal prosecutions against the masters are also being pursued, the delay involved in waiting for the cases to come to court would have left the SFPA powerless to address the non-compliance in the interim, which could have resulted in significant damage to the marine environment. The FU16 scenario is an example of the judicial challenges which often follow new approaches to enforcement. Therefore, it is crucial that any new enforcement strategy or tools satisfy fair procedures to withstand judicial scrutiny.

²³⁵ Department of Agriculture, Food and the Marine, “Screening Regulatory Impact Analysis of the Proposal for a Bill to amend the Sea Fisheries and Maritime Jurisdiction Act 2006 to provide for Fixed Penalties for minor offences, a Points System for Masters of Fishing Vessels for serious offences and Quota Management Policy” (19 November 2014) 12 <https://assets.gov.ie/132663/4d766256-fce2-44af-85b9-2517ba65efba.pdf> accessed 1 April 2022.

²³⁶ Functional Unit 16 is an area of the sea. It has a much lower quota for prawns than the adjacent area in order to conserve the stock.

²³⁷ *Pat Fitzpatrick and Michael Flannery v The Minister for Agriculture, Food and the Marine and the Sea-Fisheries Protection Authority* [2018] IEHC 772.

²³⁸ *Pat Fitzpatrick and Michael Flannery v The Minister for Agriculture, Food and the Marine and the Sea-Fisheries Protection Authority*, Supreme Court 25 February 2020.

Although the action taken by the SFPA is an example of how it may adopt new strategies to tackle a problem, the SFPA was still reliant on ministerial and EU support to close the area as it does not have the power to take such action itself. Therefore, the SFPA is not free to expand its own enforcement tools. It is submitted that the fact that the SFPA is not free to do so and the fact that it has no role in policy-making, which directly affects its enforcement work, calls its independence into question. The SFPA is bound by policy decisions made by its parent department, DAFM and the Minister, who may make policy directions to the SFPA under s.46 of the 2006 Act. Therefore, it cannot be considered a completely independent regulatory agency capable of shaping its own regulatory tools and strategies.

One of the key strengths of really responsive regulation is its assessment and response to its own performance and effects. The regulator should constantly evaluate whether its enforcement tools and strategies are successful in achieving enforcement objectives and should change and adapt accordingly.²³⁹ Publication of this assessment is essential to accountability and transparency. However, it may be difficult to measure outcomes and demonstrate the achievement of objectives.²⁴⁰ The SFPA is subject to a ministerial review every few years. The various sections of the SFPA are also consistently audited, both internally and externally. It is essential that reviews are not merely a box ticking exercise, but that they operate as a mechanism to identify areas which could be improved and implement strategies to further the goals of the organisation. Baldwin and Black acknowledge the difficulties inherent to performance review but state that, by making review an integral part of really

²³⁹ *Ibid* 72. Also advocated by Sparrow.

²⁴⁰ For example, EU Commission audits and studies usually examine the number of infringements against the number of convictions in the Irish context. However, as Churchill points out “without having some idea of the number of infringements which go undetected, the number of convictions tells one very little”. See Churchill *supra* note 15, 95,

responsive regulation, this may encourage regulators to review performance on a more frequent basis.²⁴¹

Conclusion²⁴²

The SFPA is currently operating a somewhat mixed approach to regulation and enforcement. It operates a risk-based approach to inspection but does not operate a fully risk-based strategy as it does not have the required resources to get a full picture of risk. Even if it did, risk-based regulation does not detect invisible non-compliance and does not identify new risks. This is essential to the SFPA given that the landing obligation has changed the regulatory and enforcement landscape. Similarly, it lacks sufficient tools to implement a responsive approach.

It is submitted that the SFPA should move towards a really responsive approach, which acknowledges the challenges posed by detection, and also that the regulator may not be free to expand on its own tools, as in the case of the SFPA. The assessment limb of really responsive regulation may prove the most useful to the SFPA. The SFPA is constantly reviewing how its various sections operate. However, review has not led to meaningful change in how enforcement operates since the inception of the organisation.

The independence of the SFPA may present an obstacle to change, as while it may implement some changes itself, often it is entirely dependent on DAFM and also on the legislature itself to provide it with more enforcement options. If the

²⁴¹ *Ibid* 73.

²⁴² It has previously been acknowledged in England that a change in approach to control and enforcement is necessary see House of Commons Public Accounts Committee, *Fisheries Enforcement in England Forty Third Report of Session 2002-03* (House of Commons, 2003) <https://publications.parliament.uk/pa/cm200203/cmselect/cmpubacc/752/752.pdf> accessed 1 April 2022.

SFPA does not expand its enforcement options and strategies, it will operate blindly in a manner that is locked into a static conception of the regulatory challenges it faces and will fail to overcome new enforcement hurdles that it will inevitably confront, such as the landing obligation.

As part of the assessment limb of a really responsive approach, the reliance on criminal enforcement must be considered. Even more broadly, from a conceptual point of view, the definition of regulatory breaches as crimes must be re-evaluated. The criminal law is not an appropriate enforcement tool for the majority of regulatory breaches, including sea-fisheries law which do not satisfy the indicia of a crime. Therefore, the criminal law cannot sanction regulatory breaches effectively where they are not criminal in nature. The procedural safeguards which must apply to the criminal trial are also unnecessary in this context. In its current form, blanket use of criminal prosecution as the sole means of enforcement is neither cost-effective²⁴³ nor efficient, does not provide a deterrent given the level of repeat offences, often does not result in sanctions which are effective, proportionate and dissuasive, or deprive the offender of the economic benefit derived from the infringement as required by EU law.

However, criminal law has a moral value which should not be casually dismissed. Indeed, it has been said that “what judges treat as important, a society comes to judge as important”.²⁴⁴ It is submitted that the criminal law should continue

²⁴³ In New Zealand the complexity of regulations tend to lead to costly court cases so only the most serious offences tend to be prosecuted see Comptroller and Auditor General, *Fisheries Enforcement in England* (2003) 46

<https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2003/04/0203563.pdf> accessed 1 April 2022.

²⁴⁴ Markowitz K.J. and Gerardu J.J. “The Importance of the Judiciary in Environmental Compliance and Enforcement” (2012) 29(2) *Environmental Law Review* 538, 554.

to play a role in enforcement of sea-fisheries law. However, it should be reserved as an apex sanction for serious offences which more easily satisfy the harm focus and deserve the moral censure which the criminal law provides, thus requiring procedural safeguards. An effective criminal system is essential to the proper functioning of lower tier sanctions, operating as the “gorilla in the closet”,²⁴⁵ but this is contingent on lower tier sanctions being available. Where criminal prosecution is the only option, this reduces its deterrent and moral value. Therefore, in the opinion of the author, a more appropriate role for the criminal law must be found which operates in conjunction with an administrative sanction system in line with a really responsive approach.

²⁴⁵ Mushal *supra* note 110.

Chapter 5

The Scales of Justice

Fisheries and the Courts

Introduction

In order to support sustainability and conservation of fish stocks, it is vital that sea-fisheries law is enforced in a manner which secures compliance and provides a deterrent to offending behaviour.¹ Treating all breaches of sea-fisheries law as criminal offences is costly and time-consuming due to the onerous burden of proof and lengthy time delays associated with the criminal system. Sea-fisheries cases are often delayed indefinitely due not only to the delays inherent in the Irish criminal system, but also the lack of priority assigned to sea-fisheries cases. When cases finally make it to court, penalties imposed are often not proportionate to the seriousness of the harm caused or to the value of the infringement,² which has a detrimental effect on the deterrence value of criminal prosecution, as well as its moral influence.³ Penalties imposed often do not satisfy the EU obligation for sanctions to be effective, proportionate and dissuasive.⁴ The reliance on criminal prosecution, which is in most cases not a suitable vehicle for enforcement of sea-

¹ Sutinen and Kuperan note that noncompliant behavior influences others not to comply with the regulations, and ultimately compliance breaks down. Only effective enforcement can reverse and prevent this undesirable outcome. See Sutinen J.G. and Kuperan K. "A Socio-Economic Theory of Regulatory Compliance" 26 (1999) *International Journal of Social Economics* 174, 188.

² See Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. *Implementation of the Current EU Fisheries Control System by Member States (2014-19)* (European Union, 2020) 128 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022.

³ Ehrlich I. "The Deterrent Effect of Criminal Law Enforcement" (1972) 1(2) *Journal of Legal Studies* 259, 266.

⁴ European Court of Auditors, *EU Fisheries Controls: More Efforts Needed* (2017) 48 https://www.eca.europa.eu/Lists/ECADocuments/SR17_8/SR_FISHERIES_CONTROL_EN.pdf accessed 1 April 2022.

fisheries law, raises serious doubts over whether Ireland is fulfilling its obligations in terms of enforcement of the CFP.

An assessment of both the benefits and limitations of the current system of criminal enforcement is necessary, in order to determine if and how alternative means of enforcement could supplement the current system. Two case studies are highlighted and analysed in detail as illustrating the difficulties associated with criminal enforcement. The preceding chapters have concluded that criminal prosecution should be confined to serious regulatory breaches which satisfy the harm focus of the criminal law, justifying the high burden of proof as well as the procedural safeguards associated with criminal prosecution. The case studies inform how criminal prosecution might be better utilised when it is pursued as a top tier sanction for serious breaches of sea-fisheries law.

Enforcement Model

“Criminal lawyers focus on the traditional sphere of ‘real crime’ – roughly equating to those offences requiring proof of mens rea or fault – whilst treating regulatory offences of strict liability, often enforced by specialist agencies rather than the public police, as a marginal and, perhaps, embarrassing exception to the general methods and principles of criminal law”.⁵

Enforcement of sea-fisheries law is completely reliant on the criminal system.

Criminal enforcement is a traditional regulatory command-and-control model as

⁵ Lacey N., “Criminalization and Regulation: The Role of Criminal Law in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 144.

applies in many other areas of law.⁶ Under this type of model, legislation is enacted with provision for enforcement by a prescribed authority, in this case the SFPA. Where a breach of this legislation occurs, the ordinary criminal court system and procedures apply, including traditional legal principles e.g. burden of proof, rules of evidence and application of traditional sentencing principles. This paradigm is ill-suited to address all but the most serious contraventions of sea-fisheries law, as the majority of breaches do not fit into the indicia of a crime. The onerous criminal burden of proof, in which every element of the offence and every piece of evidence must be proved in court, along with the technical nature of offences and, frequently, an extended chain of circumstantial evidence, renders successful prosecution difficult and resource-intensive. For example, in a recent UK case lasting three weeks, evidence that a vessel was in a prohibited area was not enough to secure a conviction due to the absence of hard evidence that the vessel was fishing.⁷

Where there is a successful prosecution, traditional sentencing principles, in the shape of fines and forfeiture, are arguably inadequate to address the environmental damage and, in many cases, are not in proportion to the harm caused, thereby reducing the deterrent effect and moral value of criminal prosecution. Defence lawyers, and even the courts sometimes describe regulatory offences as not criminal “in the real sense”.⁸ As discussed in Chapter 4, many regulatory breaches are prosecuted as criminal offences where the conduct is not criminal in nature. Therefore, the criminal law cannot provide a satisfactory sanction response.

⁶ See generally O’Sullivan K.P.V. and Flannery D. “A Discussion of the Resilience of Command and Control Regulation within Regulatory Behaviour Theories” (2012) *Journal of Governance and Regulation* 15.

⁷ *Devon and Severn Inshore Conservation Authority v Laura D Fishing Ltd and Others* (2018).

⁸ Macrory R., “New Approaches to Regulatory Sanctions” (2008) 20 *Environmental Law and Management* 210, 211.

The legislation itself is not materially deficient in terms of the investigative powers and penalties which apply to sea-fisheries law. The 2006 Act provides for far-reaching powers of SFPOs, detention of the vessel and potentially large fines, including forfeiture of catch and gear. It is in the application of the legislation in practice that problems begin to emerge. There are significant gaps between the terms of the legislation and how it operates in the court system. Detention of the vessel, as discussed in Chapter 3, is one such example. The application of the provisions in relation to fines and forfeitures by the courts also continues to present issues.

It has been well-documented that the existing enforcement model imposes a significant cost burden on all actors in the system. In the context of environmental law, under the United Nations Economic Commission for Europe (UNECE) Aarhus Convention, access to justice requires that the cost of bringing court proceedings is not prohibitively expensive.⁹ Ireland introduced a special costs rule for certain categories of environmental litigation but this has not solved the problem of high costs in environmental litigation.¹⁰ The Aarhus Convention also demands that access to justice be timely. Delay in the Irish courts is significant and applies across the board, although sea-fisheries cases fare all the worse for lack of priority. Ireland has the lowest number of judges per head of population in the EU, which clearly contributes to delay. The length of time from lodgement of legal papers, to the handing down of a judgment is around 650 days, which is inclusive of both criminal

⁹ Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.

¹⁰ Planning and Development Act 2000 s.50B, as amended, and Environment (Miscellaneous Provisions) Act 2011 Pt 2.

and civil cases. This compares to 437 days in the UK.¹¹ Delays in the system of course exacerbate the issue of high costs.

The Court of Appeal was established in 2014 to alleviate the case load of the Supreme Court. Now, the Court of Appeal is itself overloaded with cases. In a recent judgment on delay, the Court stated that:

the courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time...[t]here is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).¹²

The court went on to acknowledge the link between delay and costs, stating “the courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action”.¹³

The limitations of the existing enforcement model are reflected in EU law and policy. The EU sought to introduce a common enforcement system for fisheries offences across all Member States in the form of the point system, which could be viewed as recognition that the level playing field envisioned by the CFP was not being realised due to the variance between Member States in their approach to enforcement. The difference between the Irish common law tradition and the civil law tradition of all other Member States is noticeably pronounced in the context of

¹¹ Kyran Fitzgerald, “Cracks starting to show in judicial system”, *Irish Examiner* (13 November 2017).

¹² *Farrell v Arborlane Ltd* [2015] IEHC 535, 30.

¹³ *Ibid.*

criminal enforcement, in which the accused is entitled to be tried by judge and jury to the criminal standard, requiring establishment of guilt beyond reasonable doubt. The method of implementation of the point system in Ireland represents an attempt to move away from this traditional model by operating an administrative system. However, at the time of writing, the precise status of the point system, which has come under sustained criticism and opposition, remains unknown.

Enforcement in Practice¹⁴

The procedures which must be followed from detection of an offence to preparation and submission of a case file to the DPP, possibly resulting in a criminal trial, demonstrate the demands of meeting the criminal standard of proof including all rules of evidence. The criminal standard of proof and accompanying procedural safeguards exist to protect the individual against the comparative might of the State in criminal cases. However, the demands of meeting these standards are, in the opinion of the author, excessive in the context of all but the most serious regulatory offences. Most regulatory offences could more appropriately be dealt with outside of the criminal law through other means of enforcement, in particular by administrative sanctions, which would be decided at the lower burden of proof.¹⁵

The actual process of investigation and case file preparation is often lost in the literature, which tends to focus on the case law itself. However, in order to understand how sea-fisheries law can be enforced most efficiently and effectively,

¹⁴ The document referred to in the following section is permanently redacted, and has not been made available to the Examiners. The Examiners have noted that current rules and practices pertaining to the operation of the relevant agency prevent accessibility to the referred document.

¹⁵ Kadish argues that non-criminal sanctions may enhance enforcement possibilities, since proof and evidentiary requirements are more onerous in criminal prosecutions than in civil suits. See Kadish S.H., "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30(3) *University of Chicago Law Review* 423, 442.

every step in the process of criminal prosecution must be examined, from initiation of investigation to conclusion in court. It is particularly important to acknowledge the role of the investigator and the demands placed on him/her in terms of upholding fair procedures and evidential requirements throughout the investigative process. This may prove challenging where investigators do not receive the same level of training as the Gardaí. As the *Fitzpatrick* case demonstrates, failures in investigative standards can be fatal to successful prosecution.¹⁶ The author is fortunate to possess a unique insight into investigations, case file preparation and prosecution, which would not otherwise be accessible. As the majority of sea-fisheries cases are unreported, it is only due to the author's position that enforcement practices and case studies can be discussed in detail.¹⁷

Detection of offence

If the information collected during an inspection or any other investigation leads an officer to believe that an infringement of the rules of the CFP has been committed, he/she must caution the person suspected of committing the infringement. It is essential that the caution is given as soon as the officer forms a suspicion that an infringement has been committed. If there is a delay in cautioning, this may result in admissions of non-compliant behaviour being inadmissible as evidence in court, which can severely weaken a case. If the answers to previous questions without caution provide the grounds for suspicion, the person must

¹⁶ *DPP v Fitzpatrick* (Dublin Circuit Court, 23rd May 2017).

¹⁷ Much of the insight into how enforcement operates in practice is based on the Standard Operating Procedures of the SFPA which were prepared by the author. The latest versions are dated December 2021 and are attached as an appendix. These procedures are not publicly available which may add to transparency in the enforcement process.

immediately be cautioned before the officer can continue to ask questions. The officer must ensure that the person has understood the caution.

It is best practice to inform the person of their right to a solicitor. However, case law would suggest that failure to do so is not fatal to admissibility of evidence. In *DPP v Gormley* and *White*¹⁸ the Supreme Court held, respectively, that a suspect's right not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody and that the constitutional right to a trial in due course of law encompasses a right to have early access to a lawyer after arrest. Following on from these joined cases, the Gardaí began allowing solicitors to attend interviews with suspects after the DPP advised that where a request is made by a suspect who is detained in a Garda station to have a solicitor present for interview, the request should be acceded to. However, as statistics show that suspects do not always exercise this right, the absence of a solicitor is not fatal to the admissibility of evidence.¹⁹

The caution must be reissued if a significant amount of time has passed since the previous caution, where there has been a change of investigating officer, or where the officer forms the suspicion that another offence has been committed. If, at the time of boarding a vessel, an offence is already suspected, i.e. it is known that the vessel does not hold a valid fishing licence, the caution should be administered immediately on boarding. In the event that any questioning is conducted before cautioning, which would be inadmissible in court, the same questions should be repeated following caution to gain the required admissibility of any admissions or

¹⁸ [2014] IESC 17.

¹⁹ In 2017 the uptake was about 48% as per Conor Lally "Most arrested not availing of right to solicitor presence at questioning" *Irish Times* (22 September 2017).

any evidence discovered. Ideally, the officer should take contemporaneous notes of the responses of the Master made under caution. Where admissions are made, the Master should be offered the opportunity to sign the notes.

Other additional procedures must be carried out by officers during an investigation. The officer must note the suspected infringement in the inspection report. They must communicate their findings from the inspection to the operator, who must be given the opportunity to comment on the inspection and its findings. The operator's comments must be reflected in the inspection report and the report offered to him for signature.²⁰ The officer must indicate in the fishing logbook that an inspection has taken place. A copy of the inspection report must be sent to the operator as soon as possible and in any case no later than 15 working days after the completion of the inspection. In the case of the inspection of a fishing vessel flying the flag of another Member State or third country, a copy of the inspection report must be sent without delay to the flag Member State or third country concerned, but only if an infringement has been found in the course of the inspection.²¹ The inspection report is normally exhibited as evidence. Previous inspection reports have been used by defence barristers to demonstrate a good compliance record and also to impute that an officer did not previously consider something to be an offence, suggesting either incompetency or a deliberate effort to charge an accused for some offence. This is discussed in Case Study One below.

The officer is obliged to inform the person suspected of having committed the infringement that the infringement may result in the assignment of the

²⁰ Art.76 of the Control Regulation.

²¹ *Ibid.*

appropriate number of points.²² This information must also be noted in the inspection report which should immediately be forwarded to the SFPA. This remains an obligation under EU law regardless of whether Ireland has an operational point system and highlights the disconnect between EU law and national sea-fisheries law.

Contemporaneous Notes

Contemporaneous notes are the only document permitted to witnesses in the witness box in any court case. These are notes taken by the officer during the course of the investigation. Therefore, complete and detailed notes of events as they occur can be vital to a case in court. Contemporaneous notes also assist officers in writing their statement. A copious number of rules have developed over time in relation to the procedures which should be followed by investigators when taking contemporaneous notes. It may not be fatal to a case where one of the rules is not complied with. However, it may result in the notes being inadmissible, or the officer not being permitted them in the witness box. It may also simply undermine the voracity of the evidence of the witness in the eyes of the jury. It very much depends on how much of an issue the defence counsel wishes to make of the error.

Notes should be written in pen, rather than pencil, and be legible. Only an authorised notebook should be used and only one at a time. No pages should be left blank and if this accidentally occurs, they should be marked as such. Any errors must be corrected by drawing a line through the error and initialling the correction. Notes should never be altered, deleted or destroyed. Only one officer should use the notebook. Notes must be stored in a safe and secure location. Notes cannot be added to at a later date. They must be written contemporaneously. Abbreviations should be

²² *Ibid* Art. 80.

avoided unless clear. Every page must be numbered. Officers should never write anything they are not prepared to be questioned on in court. Therefore, only facts and observations should be recorded and not opinion evidence. At the beginning of each entry, the day, date, time and location should be recorded. Block capitals should be used for places and names. Individuals should be quoted verbatim if possible. If photographs are taken, the location and time they were taken should be recorded. All evidence seized should be recorded. The names of all persons encountered in the premises/vessel during the investigation should be recorded. General observations, such as the weather, can prove useful as will be seen in case study one and should be recorded where possible. All action taken and all decisions made should be noted.

Contemporaneous notes can prove extremely useful at trial and at a minimum serve as an aide memoire for witnesses where events may have taken place a number of years previously. In practical terms, it is difficult to record notes contemporaneously where an inspection takes place in adverse weather conditions. The copious rules in relation to contemporaneous notes are just one example of the onerous standards investigators must meet in undertaking a criminal investigations and prosecution. It can be challenging for officers to comply with all of the rules associated with how to record notes correctly in order to ensure their admissibility.²³

Gathering Evidence

All investigations must proceed from an impartial, unbiased viewpoint with the presumption of innocence as the central tenet of the investigation. Therefore, all evidence must be gathered including evidence tending to support the innocence of

²³ They rely on Standard Operating Procedures as written by the author as well as training which may only be provided intermittently.

the person, even where this undermines the officer's case. The presumption of innocence is at the very core of the criminal trial²⁴ as there is a natural imbalance of power between the endless resources of the State versus the individual on trial. The presumption is at the heart of all fair procedures which must be complied with throughout an investigation, as well as the rules of evidence which must be complied with at trial.

Officers are entitled under Section 16 of the 2006 Act to seize evidence in relation to an investigation. This includes fish, fishing equipment, documentary and electronic evidence. Officers must act in accordance and within these powers. In the case of a search warrant, officers must be accompanied by Gardaí. Evidence should not be seized if there is another way of obtaining the evidence in question. Extreme caution must be exercised when seizing computers and other electronic equipment. Officers should ideally ensure that they have appropriate resources to carry out a thorough investigation and assessment of evidence eg. a large volume of documentation requires staff to go through all of the documents in detail and will need to be stored and exhibited properly. A computer which has been seized may require an IT expert and may need to be cloned. However, resources are almost always an issue for enforcement agencies. A full complement of resources is rarely available for large-scale investigations. For example, the investigation by the ODCE was found to be fatally flawed in the *Fitzpatrick* case.²⁵ One of the reasons for this was a lack of resources within the ODCE to properly conduct the nine-year investigation. The taking of witness statements was outsourced to an outside firm

²⁴ The Irish superior courts have acknowledged the principle as a "fundamental postulate" of the criminal law which is constitutionally protected as part of the right to fair trial. See Hamilton C., "The Presumption of Innocence in Irish Criminal Law: Recent Trends and Possible Explanations" (2011) 2(1) *Irish Journal of Legal Studies* 3, 4. See also *O'Leary v Attorney General* [1993] 1 IR 102.

²⁵ *DPP v Fitzpatrick* *supra* note 9.

and the manner in which this was done proved to be one of the major reasons why the jury was directed to acquit the accused. This case emphasises that witness statements must be taken correctly and should never be coached or redrafted. Full disclosure of all documents relating to the investigation should be given to the defence. Where it emerges that important documents have not been disclosed, this can jeopardise the whole trial and result in the jury being discharged or even in an acquittal. All investigations must be commenced in an impartial, unbiased manner. In the *Fitzpatrick* case, it was found that investigators had begun the investigation presuming guilt, only gathering evidence to prove this assumption of guilt to the exclusion of any evidence tending to support the innocence of the accused. Material was shredded which could have aided the defence and proved to be a fundamental flaw in the investigation. All material must be included in the case and not just material which goes to the guilt of the accused. This upholds the presumption of innocence.

Where the author of a trade or business record is not known, where there are multiple authors, or where the record is held in non-legible form eg. electronically, a certificate signed by the person who provides the document is required under Section 6 of the Criminal Evidence Act 1992. Evidence may be deemed inadmissible without such a certificate. This requirement exists to get around the hearsay rule,²⁶ which would make such evidence inadmissible without this certificate.²⁷ It can be challenging for officers to identify when this certificate is required during an

²⁶ Classic definition of hearsay provided by Sir Rupert Cross “a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated”. See Cross R., *Evidence* (Oxford: Butterworths, 1974) 401.

²⁷ *Myers v Director of Public Prosecutions* [1965] A.C. 1001.

investigation, as they may assume their powers under the 2006 Act are sufficient to obtain the evidence in question.

At all times, the chain of evidence must be preserved. The safe and secure storage of evidence is crucial. This means exhibits must be tagged with a unique reference number and must be kept in either evidence bags or an evidence locker. However, storage space to properly store exhibits often presents an issue for regulatory agencies and, therefore, the strict rules on storage of exhibits cannot be fully complied with. It is open to defence counsel to challenge exhibits and chain of custody, but this does not always occur in the context of regulatory prosecutions, once again highlighting the variances between criminal and regulatory prosecutions.

Original exhibits should never be marked. These should be safely stored and working copies made which can be marked in pencil with exhibit numbers. There should be an exhibits officer to manage the signing in and out of exhibits and to ensure the chain of evidence is preserved. If the exhibits officer changes, adequate handover must be arranged. A break in the chain of custody can be fatal not only to the admissibility of evidence, but to the case as a whole in some instances. While this represents standard procedure amongst the Gardaí, it is more challenging to implement in the context of regulatory investigations, where officers do not receive the same level of training or have such frequent involvement in criminal investigations and prosecutions.

Evidence from the Electronic Logbook

In most sea-fisheries prosecutions, the electronic logbook is the primary piece of evidence. All vessels greater than 10 metres in length are obliged to have an electronic logbook, known as ERS. This is stored in an electronic hub with a read-

out on the vessel. Normally, the original document must be available in court to prove an exhibit. However, for electronic evidence there is no original which could present issues. To avoid proving the electronic logbook, the inspecting officer may obtain a printout of the electronic logbook and present this to the Master. This could be done at the time of the initial inspection or during a subsequent cautioned interview. This can then serve as the original in court. Alternatively, the officer must mention in his/her statement that they logged into the software system to access the logbook and that the exhibit which they present with their statement is the logsheet which was produced from the software system. This avoids lengthy technical explanations in court which only serve to confuse and delay the court. This procedure is followed by the Gardaí where they use software to obtain mobile phone records rather than having to adduce expert evidence in every case. The complexities around gathering and relying on electronic evidence to prove a fisheries case are yet another example of the challenges presented by criminal prosecution and the rules of evidence which must be complied with.

Digital Photographic Evidence²⁸

Photographic evidence can be used to corroborate oral evidence which is based on official statements. As with all evidence, photographic evidence must be proved. The officer taking the photograph must be able to state in court that the photograph reflects a true and accurate representation of what they witnessed. They must also have recorded what they saw in their contemporaneous notes at the time the photograph was taken as the photograph can only be used to corroborate what

²⁸ The following section contains detail on the precise requirements applicable to digital evidence and is derived from the Standard Operating Procedures of the SFPA as written by the author and appended to the thesis.

they saw. Photographs must be taken in context. The time the photo was taken and the subject of the photo should be noted. The camera used to take the photo series must be maintained in the custody of the officer taking the photographs at all times. As soon as practicable, the images from the camera's memory card, which should have been empty prior to use, must be copied onto a CD or memory stick. This should be done only by the officer who actually took the photos. A Digital Photograph CD Register must be created with all of the details of the case recorded.

The images should not be opened or viewed prior to the transfer from memory card to CD. The original image should not be altered or changed in any way. A second copy of all the images should be saved, from which any further copies can be made. The officer should verify that the master copy and working copy of the photo series have been successfully created and, if satisfied, all images on the memory card should be deleted. The master copy must be maintained in a sealed envelope or bag in a secure location solely for use in the subsequent court case along with the Digital Photograph CD Register where applicable. Any retrieval of the master copy should be noted in the register, similar to an exhibit list. The images from the working file should be printed, labelled and used as reference material for the evidentiary statement. All photographs referenced in the officer's statement must be exhibited with the statement. Each photograph must have an exhibit number and short description underneath. The description should be factual and should never be suggestive.

However, in line with technology advances, CDs are used less and less frequently. Camera phones have replaced cameras and memory sticks have almost entirely replaced CDs. Essentially the same procedures apply for transferring photos or videos from a phone to a memory stick. Copies are made and the original memory

stick is stored as an original exhibit which is used during the trial itself should the court wish to view the evidence. It is preferable, from a practical point of view, that photographs are taken with a camera, as if a camera phone is used, strictly speaking the phone itself should be stored as an original exhibit. This is inconvenient and impractical for officers and regulatory bodies who would have to continuously replace phones. In most cases, the investigating officer does not have a camera in his/her possession at the time of the discovery of the offence and therefore, phones are mainly used to take photographs. Therefore, although not strictly correct, this has become standard practice but is open to challenge at trial. It is clear from the detail provided above that the rules around photographic evidence are extremely complex. In the author's experience, investigating officers struggle to comply with all of the chain of custody measures applicable to photographs, again demonstrating the difficulties with applying criminal standards to regulatory breaches.

Cautioned Interview²⁹

It is best practice that following an inspection, the person suspected of committing an infringement should be invited for cautioned interview. This gives the officer an opportunity to compile all the evidence and present it to the person for comment, giving the person an opportunity to explain any irregularities. An invitation to attend a cautioned interview is sent to the person either by post or electronically. The person must be advised that the interview will be under caution and of their right to be accompanied, including their right to have a solicitor or other legal representative present. This letter should include a very general outline of the subject matter of the cautioned interview. It should also inform the person that they

²⁹ The detail provided in this section is also derived from the Standard Operating Procedures of the SFPA as written by the author and appended to the thesis.

are not legally obliged to attend and can leave at any time during the interview. The letter should be produced as an exhibit in any subsequent case file. The interview should be conducted in SFPA premises or a private, neutral location. It is the right of the person to leave a cautioned interview. Therefore, the interview should not be conducted in the premises of the person where they cannot leave.

Questions should be prepared in advance for a cautioned interview. Two officers should be present, one to ask questions and one to write down responses. Each person's responsibility should be made clear in the Memorandum of Interview. All evidence should be presented to the accused person to give them an opportunity to respond and comment. A record of the interview must be maintained by means of a Memorandum of Interview which details the questions put to the person and their corresponding answers. At the conclusion of the interview, the interviewee should be given the opportunity to read over the Memorandum of Interview to ensure it accurately reflects the questions and answers and to initial or sign and date it to confirm his/her agreement. The officer who asked the questions should also check the record is accurate and sign his/her agreement.

Where possible, it is best practice to video record cautioned interviews, particularly in the case of an uncorroborated confession. Video recording of interviews ensures that evidence is available in the event of any allegation of ill-treatment or that the confession was compelled, altered or falsified. Of course, the accused retains the right to refuse to be videotaped. It is now standard practice for the Gardaí to video interviews with suspects where the offence carries a sentence of greater than five years. Although officers are not required by law to video all cautioned interviews, the courts have strongly advised that interviews with persons

suspected of serious crime should be videotaped.³⁰ Availability of video recording facilities have been a persistent issue for the Gardaí, therefore this may also present an issue for SFPOs. Similar to ordinary cautioned interviews, a copy of the transcript must be offered to the accused for signature and the video must comply with chain of custody requirements. The level of detail provided in the preceding discussion serves to again highlight the magnitude of the obligations placed on regulatory inspectors which in the experience of the author advising on such investigations, presents significant challenges to regulatory enforcement.

Enforcement Options

When an infringement is detected, there are a number of ways the case may proceed:

1. The most immediate enforcement option is to detain the vessel and secure a 48hr detention order as discussed in Chapter 3. The purpose of a detention order is to complete the investigation and is followed by a case file to the DPP. It is a more direct line into the court system because the detention order and bond involves the court from the outset rather than waiting for a direction from the State Solicitor with delegated authority from the DPP before the case enters the system.
2. Where the vessel is not an Irish fishing vessel, the case may be transferred to the competent authority of the flag Member State with the agreement of the Member State concerned and on condition that the transfer is more likely to achieve EU enforcement objectives referred to in Art.89(2) of the

³⁰ See for example, *DPP v Connolly* [2003] 2 I.R. 1, *The People (DPP) v Kelly* (Special Criminal Court, 26th November 2004) and *DPP v Murphy* [2005] IECCA 52.

Control Regulation. The decision to transfer proceedings is made by the SFPA once reported by the officer.³¹

3. A case file may be submitted to the DPP, potentially in parallel to points for serious infringements where the system is operational.
4. The SFPA may pursue a case summarily itself as an authority. However, this option is extremely limited in nature and only applies to an action for obstruction or a food safety issue.³² This is quite unusual as many enforcement agencies only pursue criminal prosecution under their own auspices and rarely take cases through the DPP, thus confining themselves to mainly summary prosecutions as only the DPP can take a case on indictment.³³

Preparation of Case File for the DPP

A case file is usually initiated by the detecting officer, who is the lead officer unless another is formally nominated and assigned. The case file is a comprehensive file of all of the pertinent evidence in the case, which includes witness statements, physical and documentary evidence formally exhibited, cautioned interviews and any other material evidence relevant to the case. The case file must prove every element of the alleged offence(s). The evidence which it contains is held to the criminal standard of proof and is therefore extremely challenging for officers to produce,

³¹ For example, in a recent case against a Norwegian vessel, the case was transferred to Norway due to anticipated difficulties in proving the case to the criminal standard and the likelihood of the DPP directing no prosecution for this reason. Norway accepted the case on this basis.

³² The limited nature of the power to pursue a summary prosecution independent of the DPP may be due to the fact that fisheries offences were historically prosecuted through the Attorney General whereas many regulatory agencies are responsible for new areas of regulation which do not possess such a tradition.

³³ The tendency of regulatory agencies to pursue only summary prosecution under their own powers is discussed further below.

particularly in a format which can be easily understood by legal professionals unaccustomed to the subject matter. In general, the case file should include:

- A contents page
- A report for the DPP
- All statements
- An exhibit booklet. This may include a separate photograph booklet and documentary exhibit booklet depending on the case file in question.

Preparation of Statements

Witness statements must be freely given and under caution. The officer's statement is a witness statement as they are a witness for the State. Any error or omission which occurs in a witness statement should be corrected or added to by means of a supplementary statement. This avoids multiple versions of statements. An officer's statement is their written account of what happened - what they did, saw, heard and any other relevant matters. All witnesses should write statements as soon as possible after the event so that the event is fresh in the mind. Contemporaneous notes should be an aid to preparing the statement. Statements must be written by every officer involved in the investigation. They must be written independently of other officers without any type of coaching. They must be written in the first person, eg. "I found". In the *Fitzpatrick* case, there was evidence of multiple versions of statements which suggested that witnesses were coached. Therefore, due to this fundamental breach of procedures along with other issues, the judge directed an acquittal.³⁴

³⁴ *DPP v Fitzpatrick supra* note 9.

The following information should be contained if applicable in the various statements from officers involved in the prosecution:

- Name and address.
- Authorisation under legislation.
- Reason for the inspection.
- Date and time.
- That the officer identified himself/herself to the person in authority and requested to inspect the vessel and relevant documentation.
- Any discrepancies or irregularities in documentation clearly outlining how these discrepancies contravene the relevant legislation.
- If, when and how the officer cautioned the person, eg. I cautioned Mr. Murphy, the Master of the vessel, using the words “You are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence”.
- Confirm the witness understood the caution and their response
- If the officer inspects or weighs the vessel’s catch, the officer should clearly outline the procedure used and exhibit all weights noted. The calibration certificate for the scales should also be exhibited.
- The officer’s statement must contain details of all findings. It must be clear on exactly what the officer did.
- That the Master was informed of any alleged breaches discovered.
- Any responses/admissions on the part of the Master of the vessel.
- Jargon and abbreviations should be avoided.

- The overall length of the vessel should be included in the body of the statement as this is relevant to the imposition of penalties under the 2006 Act.
- The officer should refer to any exhibits correctly in the statement by reference to exhibit numbers.
- A valuation of the catch and gear on board must be made and noted in the statement as it is this valuation that assists the DPP in deciding the court in which the prosecution will take place.
- All evidence to be introduced must be included in a statement, otherwise the evidence cannot be introduced in court.

The writing of statements can be a demanding task for officers as, although they must give the full facts, they must not stray into opinion evidence and or hearsay evidence. A seemingly insignificant piece of information may be omitted from the statement which may prove crucial and then cannot be introduced as evidence, although it is open to the prosecution to adduce evidence right up until the trial.

In the writing of the statement itself and the subsequent delivery of that evidence in court, each element of the offence must be covered in order for the prosecution to prove its case. For example, in order to prove a drink driving offence, evidence must be adduced that the person was driving in a public place. Prosecuting counsel may not lead the witness by asking was the person in charge of the vehicle in a public place; the evidence must be freely given and must be included in the statement. Similarly, it is difficult for officers in the middle of a live investigation to consider the evidence needed to prove every element of an offence. For example, an officer may discover a large amount of illegal catch in a truck and may seize the catch assuming this will be sufficient to ground a prosecution. However, there may

be no offence which covers transport of the catch. Offences may only cover catching and retention, which would be against the Master, and selling, which would be against the person offering the product for sale. At the point of transport, it is not possible to prove either offence, leaving no enforcement options other than confiscation. Therefore, unless, from the outset, investigations seek to cover each element of an offence, often no prosecution can take place. Officers may produce statements and case files for which no offence can be proved, which may be demoralising and frustrating.

Report for the DPP

The lead officer must write a report for the DPP. This report is privileged and is not discoverable by the defence. It may contain information which cannot be included in a statement, eg. previous history of the accused, opinion etc. The report should include a summary of the case, relevant legislation, all witnesses and suspects and recommended charges. The report should be written in chronological order and pitched at the level of a person reading the report who has no knowledge of the fishing industry. The DPP prefers as much information as possible and encourages officers to be candid since it is a privileged document. Therefore, all information should be included, including any perceived weaknesses in the case. The report is useful to the DPP in determining whether there is a public interest in prosecuting the case.

Submission of Case File

Ideally lead officers should complete files in an expeditious manner. However, often, as previously stated, resource issues result in delays in completing and submitting files. Files are submitted to the Legal Case Management Unit within the SFPA before being submitted to the DPP to ensure files meet the standards

required by the DPP. The Legal Case Management Unit then liaises with the lead officer to resolve any issues with the case file. Once the file is complete, it is sent to the State Solicitor for West Cork who possesses a delegated authority from the DPP to issue directions for fisheries cases.³⁵

Role of the DPP

The DPP has delegated authority to the State Solicitor for West Cork to direct on all fisheries cases without the need for the case to go through the central DPP office. This special arrangement is quite unique in Irish criminal procedure, but was found to be convenient due to the expertise of the State Solicitor for West Cork in prosecuting sea-fisheries cases over a number of years. There are substantial advantages to the existence of a dedicated State Solicitor to direct on all fisheries cases rather than submitting to the central DPP office. As previously stated, the State Solicitor for West Cork is an expert in the field, and this eliminates the need to explain every element of the case as he already possesses an in-depth knowledge of the subject area. He can identify gaps in the case almost immediately and is also aware of elements of the case which do not require proving in court. He is also best placed to advise State Solicitors around the country who have far less experience in the field. This results in more accurate directions, charges and legal opinions.

Once the State Solicitor with delegated authority has reviewed the case file, a direction is issued for either summary disposal, prosecution on indictment or *nolle prosequi*. The decision to prosecute is based on the available evidence disclosing a

³⁵ This is quite an unusual arrangement, see below. Usually all criminal cases in Ireland are sent to the Office of the Director for Public Prosecutions in Dublin for direction.

prima facie case if it is in the public interest.³⁶ Cases where there is sufficient evidence to prosecute do not automatically proceed unless it is also in the public interest to pursue the case. The seriousness of the case and any mitigating factors are taken into account in deciding whether a prosecution is in the public interest.³⁷ For example, factors might include that conviction could result in significant penalty versus a low likelihood of any significant penalty being imposed by a court, or where the cost of bringing the prosecution would far outweigh any benefit to be gained. Relevant factors vary from case to case and it is very much a matter of discretion, keeping in mind fairness and consistency.³⁸ Minor cases often do not satisfy the public interest test, leaving a gap in enforcement which may have a cumulative detrimental effect.

The length of time since an offence was committed must also be considered. Where there has been considerable delay, it is possible that the case may not be prosecuted. For summary cases, summons should be issued within six months from the date of the original commission of the offence, whereas for indictable cases, there is no such time limit. Where the delay was caused or contributed to by a long investigation, it must be considered whether the length of the investigation was reasonable in the circumstances. Whether there is a real and serious risk of an unfair trial, or whether there is specific prejudice caused to the suspect due to delay is also relevant. If the suspect has admitted the offence it lessens the significance of any delay.³⁹

³⁶ Director of Public Prosecutions, *Guidelines for Prosecutors*, 4th edition (October, 2016) 12 https://www.dppireland.ie/app/uploads/2019/03/Guidelines_for_Prosecutors_4th_Edition_-_October_2016.pdf accessed 1 April 2022.

³⁷ *Ibid* 16-17.

³⁸ *Ibid* 17.

³⁹ *Ibid* 18.

Once a direction has been given, the file is then sent to the applicable State Solicitor where the subject of the file resides. There may be a delay in obtaining direction on fisheries cases due to the dual role of the State Solicitor for West Cork, which is the largest division in the country, and also being the sole solicitor with authority to direct on fisheries cases nationally. There may be further delay between when the applicable State Solicitor receives the file, and the case being heard in court. Traditional crime⁴⁰ inevitably takes priority and, in particular, custody cases which have to take precedence due to a person's liberty being at stake. This demonstrates how, as previously stated, the court system is designed to cater for conventional notions of crime rather than regulatory crime.

The Court System

In the author's experience, the average fisheries case takes on average 2-3 years from detection to completion in court. This is an average of both summary and indictable cases. Cases which are directed for summary disposal may be dealt with relatively quickly because there is less delay in the District Court. A summary prosecution is also more likely to result in conviction due to the nature of proceedings. Cases are heard by a judge, which eliminates the need to explain much of the law and legal principles as is necessary before a jury in the Circuit Court. However, if the judge acquits the accused of any charges in the District Court, the DPP has no right of appeal. The higher penalties applicable in the Circuit Court necessitate a judge and jury, which means that everything must be explained to the jury and less procedural shortcuts can be taken, which takes more time than a case in the District Court. Indictable cases are normally adjourned multiple times and can

⁴⁰ As discussed in Chapter 4.

take much longer than summary cases to come before the courts, often a number of years.

As mentioned above, many regulatory agencies choose to pursue mainly summary cases independently rather than submit files to the DPP for prosecution on indictment.⁴¹ In the experience of the author, this is due to a number of factors. Agencies are more likely to win their case at District Court level and, conversely, a loss is less significant than it would be in the Circuit Court. As the penalties are much higher on indictment, accused persons are more likely to fully contest a case on indictment than they are at District Court level. Preparation of cases for the DPP on indictment may be considered by many agencies to be extremely resource intensive and requiring expertise and experience, which they may not possess, or may not be able or willing to spare. The delay and costs involved may also prove less attractive than taking a case in the District Court which can deliver a “short sharp shock” to regulatees, which may be considered more effective in many contexts. The uncertainty and the surrender of control which is entailed in sending a case to the DPP can also be difficult for agencies where the agency has greater control in instructing its own private solicitor firm for summary cases. Agencies may be dissatisfied with the penalties imposed by the courts, which they may deem an inadequate representation of the seriousness of the offence or the amount of time and resources which went into the investigation and case file, particularly, for example, in health and safety cases where a serious injury has occurred.⁴² Disproportionate

⁴¹ For example, the EPA prosecuted over 150 cases at District Court level since 2000 but has only submitted ten files to the DPP for prosecution on indictment for more serious cases of environmental crime. See EPA, *Focus on Environmental Enforcement in Ireland* (EPA, 2009) 4-5 https://www.epa.ie/publications/compliance--enforcement/licensees/reporting/FoEE_Exec-Summ_Chpt1.pdf accessed 1 April 2022.

⁴² The EPA states that in considering the type of measure it will employ, it assesses the impact of the enforcement activity by analysing the inputs, outputs and outcomes. This suggests that where the

penalties do not have a deterrent effect on either the accused to prevent reoffending or on other regulatees. Disproportionate penalties also do not stigmatise commission of the offence where the censure of the court, coupled with higher penalties, is one of the main motivations of the agency in pursuing a case through the DPP on indictment. The combination of these factors means that many agencies are reluctant to stray from summary prosecution,⁴³ unless the scale of the offence is such that summary prosecution would be inappropriate and a District Court judge would likely refuse jurisdiction. In the context of sea-fisheries, apart from the limited exceptions mentioned above, all cases are taken at the suit of the DPP whether summary or indictable.

Summary Cases

Summary trial is intended to provide the speediest disposition of justice.⁴⁴ The State Solicitor with delegated authority must consider the effect of any delay likely to arise from his direction. Prompt disposal of a case can have a greater deterrent effect, even where the penalty is lower than it would be in the Circuit Court. However, speed of disposal is only one factor. The nature of the case and whether the circumstances make the alleged offence one of a serious character unfit to be dealt with summarily is also considered. In deciding whether to elect for or consent to summary disposal, whether on a plea of guilty or otherwise, the main

inputs outweigh the outcomes, which may be the case in prosecutions on indictment, that another measure may be utilised which better balances all considerations. *Ibid* 4.

⁴³ A similar trend may be observed in the UK where all prosecutions during the period of reference for the study were in the local Magistrates Court which is the equivalent of the District Court in Ireland. See Clientearth, *The Control and Enforcement of Fisheries in England* (2017) 22 <https://www.clientearth.org/media/itpfxqh/the-control-and-enforcement-of-fisheries-in-england-ce-en.pdf> accessed 1 April 2022.

⁴⁴ Director of Public Prosecutions, *Guidelines for Prosecutors*, 5th edition (December, 2019) 53 <https://www.dppireland.ie/app/uploads/2021/01/Guidelines-for-Prosecutors-5th-Edition-eng.pdf> accessed 1 April 2022.

factor to be taken into account is whether the sentencing options open to the District Court would be adequate to deal with the alleged conduct complained of having regard to all the circumstances of the case and in particular the seriousness of the offence.⁴⁵

As previously stated, the District Court operates relatively efficiently. Cases tend to proceed more quickly because there is no jury, less oral evidence and usually no barristers. Cases are by their nature less serious and complex with lower potential penalties. However, at the time of writing, a number of judges have come out of retirement to cover numerous vacancies across the country which have arisen as a result of District Court judges being on long-term sick leave. Therefore, the system is quite vulnerable when judges are not available with poor contingency arrangements.

The variance of attitudes amongst District Court judges to particular types of crime or family law proceedings is quite striking. District Court judges gain reputations for dealing with certain cases in a certain way.⁴⁶ Therefore, some judges treat sea-fisheries cases extremely seriously, but others treat it less seriously, issuing very low fines. It is unsatisfactory in terms of consistency and fairness that, for a similar offence, a master may receive a €50 fine from one judge or a fine closer to the €5000 maximum from another judge.⁴⁷ The district itself can have an influence in

⁴⁵ *Ibid.*

⁴⁶ For example, in child care proceedings O'Mahony *et al.* note that practice varies enormously from judge to judge and court to court. See further O'Mahony, C., Burns, K., Parkes, A. and Shore, C., "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30(2) *International Journal of Law, Policy and the Family* 131-157 and O'Mahony, C., Burns, K., Parkes, A., "The right of the child to be heard? Professional experiences of child care proceedings in the Irish district court" (2015) 27(4) *Child and Family Law Quarterly* 423-444.

⁴⁷ Maguire notes that a recurrent criticism of the Irish sentencing system is that judicial sentencing practices are widely inconsistent. See Maguire N. "Consistency in Sentencing" (2010) 2 *Judicial Studies Institute Journal* 14. See further Hamilton C. "Sentencing in the District Court: 'Here be

terms of the prevalence of fishing as an occupation in the community. Foreign masters are also more likely to receive a higher fine than an Irish master which is discriminatory and unfair given the objectives of the CFP for harmonised enforcement and a level playing field across Member States.⁴⁸ In general, Member States tend to feel as though they control own nationals but that other Member States are not doing the same; and industry feels controlled by its own Member State while other Member States do not control their own nationals.⁴⁹ Third countries are often blamed as scapegoats as part of this narrative.⁵⁰

Cases on Indictment

For more serious cases, the State Solicitor with delegated authority directs that the accused be sent forward for trial on indictment. A number of factors are relevant to this decision, including in particular the scale and value of the breach. Prior to the trial on indictment taking place, the accused must be served with the Book of Evidence. This contains all of the evidence which the prosecution intends to present at trial. The Book of Evidence consists of the statement of charges, a list of witnesses and all statements and exhibits. The indictment itself can be altered up until the trial and is often amended during the trial. The prosecution can introduce new evidence at any time as long as it is provided to the defence beforehand.

Cases which have been directed to be dealt with on indictment are usually adjourned a number of times. This is due to both the overloaded criminal system and

dragons'' (2005) 15 *Irish Criminal Law Journal* 9. See generally O'Malley T., *Sentencing Law and Practice* (Dublin: Round Hall, 2000).

⁴⁸ See table of fines applied to vessels of different nationalities in Blomeyer & Sanz *supra* note 2, 129-130.

⁴⁹ Lado E. P. *The Common Fisheries Policy: The Quest for Sustainability* (Oxford: Wiley Blackwell, 2016) 287.

⁵⁰ *Ibid* 88.

the lack of priority assigned to fisheries cases. Traditional crime takes priority in the court list. Therefore, it can take months and even years to obtain a trial date. Where a fisheries case is listed for trial and is due to be heard, a custody case still takes priority should one arise. Where a person is deprived of their liberty, it is entirely proper that this should take priority over a regulatory case. However, the courts should ideally have the ability to deal with both without having to adjourn one of the cases. When a case is adjourned, it is put back to the next sessions which can be a number of months and which can quickly add up to years where there are multiple adjournments. Where cases are joint SFPA and Naval Service inspections, the Naval ship is often at sea and therefore, the witnesses are not available, resulting in further adjournments. In other cases, the Naval ship makes itself available and comes into port to attend a case which is subsequently adjourned at short notice. This is a considerable cost to the State and a waste of valuable resources.

O'Mahony *et al.* have observed a similar trend in the context of child care cases in the District Court.⁵¹ They found that judges were overloaded with cases resulting in inadequate time to deal with child care cases and often multiple adjournments. Child care cases are assigned a low priority for court time in areas where they form a small proportion of the overall court docket. In the case of fisheries, it is a small proportion of the court docket in every area. Therefore, the under resourcing of the courts is an issue across the board, making it all the more difficult to argue for greater priority for fisheries in particular when there are so many competing demands on the courts.

⁵¹ *Supra* note 46 Child Care Proceedings in Non-Specialist Courts 131-157.

Delay in reaching the court list and multiple adjournments have a particularly negative effect on the availability of witnesses who may have left the employment of the State or been seconded abroad. Each time a case is listed for trial, those witnesses must take annual leave and travel to court. This is at considerable cost to the State and personal inconvenience to the witness. Where cases are adjourned for a number of years there can be issues with witness recollection. Exhibits, including essential documentary proofs, can be misplaced over time or may not comply with chain of custody requirements, possibly resulting in evidence being ruled inadmissible. An inadmissible piece of evidence can substantially weaken a case and may call the integrity of the entire investigation into question.

Although fisheries offences are strict liability offences,⁵² defence counsel almost always argue lack of intention or ignorance of the law. De Prez observes a similar trend in the context of environmental prosecutions, opining that strict liability “acts as a cloak for many defendants, for as the prosecution is not required to prove ‘fault’ this leaves defence counsel plenty of room to deny culpability in order to attract the sympathy of the bench”.⁵³ Due to the difficult and dangerous nature of fishing as an occupation, significant sympathy exists among judges and juries. They may take intention into account even though it should not form part of their verdict. Traditional legal principles, including strict rules of evidence, must apply to all fisheries prosecutions. However, these principles and rules are applied far more rigorously in a case on indictment due to the higher potential penalties involved. The burden of proof itself, “beyond a reasonable doubt”, is challenging to meet in terms of regulatory crime, which can be highly technical and complex. The challenges

⁵² See generally Simester A. (ed), *Appraising Strict Liability* (Oxford University Press: Oxford, 2005).

⁵³ De Prez P. “Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions” (2000) 12 *Journal of Environmental Law* 65, 78.

presented by applying legal principles and rules of evidence to regulatory cases is explored in two case studies below.

Plea Cases

Most fisheries cases are dealt with on a plea of guilty. The procedure is the same regardless of whether it is a summary or indictable case. The defence solicitor approaches the State Solicitor offering to plead guilty to fewer than all of the charges in the prosecution, or to a lesser charge or charges. The remaining charges are either not proceeded with by entering a *nolle prosequi* or are taken into consideration by the sentencing judge in imposing the penalty but without proceeding to conviction.⁵⁴ Agreements as to charges and plea must be consistent with the requirements of justice. The offer of a plea will not be accepted by the State Solicitor unless it is appropriate having regard to the nature of the criminal conduct of the accused and the likely outcome of the case.⁵⁵ A plea will also not be accepted if to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence.⁵⁶ The State Solicitor takes all circumstances of the case into account and usually the plea is accepted due to the desirability of having the case dealt with promptly and the saving in terms of resources.

In plea cases, the State Solicitor or inspecting officer gives a brief outline of the facts, answering any questions the judge may have. The defence solicitor may also put questions to the inspecting officer. The State Solicitor explains the penalties applicable to the section and the defence offers any relevant issues in mitigation. The judge then imposes a fine which may be up to €5,000 in the District Court. For

⁵⁴ DPP Guidelines for Prosecutors *supra* note 44, 37.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

indictable offences, automatic forfeiture of catch and gear applies in addition to a fine of up to €35,000 for boats greater than 18 metres in length, which most boats fall under in terms of prosecutions. The State Solicitor and defence will have agreed a reduced valuation for the forfeiture on foot of the plea. The judge takes the guilty plea into account when deciding on the fine to be imposed. The accused is entitled to benefit from the plea as it saves the State time and resources in not having to proceed to trial. The judge may take any other measures into account at his/her discretion. For example, in a recent case the judge took into account the fact that the Master had not been the Master of a vessel since the incident in question.⁵⁷ They also take any previous fisheries convictions into account. Although an accused is entitled to a reduction in penalty following a plea, the obligation still applies under EU law to impose sanctions for serious infringements which are effective, proportionate and dissuasive and to deprive the person of the economic benefit derived from the infringement. In practical terms, the accused retains a considerable profit in many plea cases. Therefore, it is arguable that penalties applied in plea cases often do not satisfy EU standards.

As previously discussed in Chapter 3, due to poor drafting in s.28(5) of the 2006 Act, considerable confusion remains as to the application of automatic forfeiture as a consequence of conviction on indictment. Although *Martinez*⁵⁸ established that mandatory forfeiture of the entire catch and gear is a proportionate sanction expressly mandated by EU law, with no discretion afforded to the trial judge, the section has been inconsistently applied in the Circuit Court and has been sent as a preliminary reference to the CJEU. In a recent case, the judge opined he

⁵⁷ *DPP v Sandis Stenders* (Waterford Circuit Court, 10th May 2018).

⁵⁸ *Ex tempore* judgment of O'Neill J delivered on 27th November 2008. See Chapter 3.

should only impose forfeiture of the part of the catch to which the offence related as opposed to the entire catch as required under legislation.⁵⁹ In another case, the defence successfully argued that a defective boarding ladder was a health and safety issue and therefore, the judge was not obliged to impose the forfeiture, as automatic forfeiture only applies to fisheries offences. The judge agreed and this was never appealed by the State.⁶⁰ In a similar defective boarding ladder case a few years later, the same defence solicitor did not argue this point in front of the same judge and forfeiture of the value of the catch and gear was imposed.⁶¹ Therefore, the section is applied with great inconsistency which is undesirable.

Sometimes, the accused enters a plea unexpectedly and witnesses are not present to read in the evidence. This means that the State Solicitor, or occasionally a stand-in where the State Solicitor is unavailable, reads in the evidence and often does not have the expertise to counter claims made by the defence in mitigation. For example, in a recent case, the defence argued that it is difficult to identify the difference between two species, one of which is prohibited and one of which is legal. However, the witness explained the diagnostic features to the court and the fact that all fishers would be aware of the differences.⁶² The State Solicitor cannot be expected to possess this level of knowledge. In other cases, the stand-in solicitor or barrister has not been aware of automatic forfeiture provisions for a plea on indictment resulting in no forfeiture being awarded.⁶³ Where forfeiture is not ordered, the fine alone cannot satisfy the EU sanction requirements.

⁵⁹ *DPP v Jose Hipolito Bares Soto* (Cork Circuit Court, 23rd May 2019).

⁶⁰ *DPP v Manuel Montejano* (Cork Circuit Court, 22nd November 2016).

⁶¹ *DPP v Javier Juncal Iglesias* (Cork Circuit Court, 24th October 2018).

⁶² *DPP v Manuel Juncal Juncal* (Cork Circuit Court, 4th November 2019).

⁶³ *DPP v Mark Bates* (Wexford District Court, 23rd September 2019).

Therefore, criminal enforcement places onerous demands on inspectors at the investigation stage and also on the prosecution if the case results in criminal trial.

The two case studies discussed below demonstrate how the procedural safeguards of the criminal law operate in practice and offer useful insights into the difficulties associated with criminal prosecution of regulatory offences. The case studies provide a basis for assessing how criminal prosecution might be utilised more effectively in the sanctioning of serious sea-fisheries offences and also serve to highlight the moral force and influence of the criminal law.

Case Study One- *DPP v Gerrit Plug*⁶⁴

Charges

The DPP directed five charges on indictment.

1. Failing to record all estimated discards above 50 kg of live weight equivalent in the logbook.⁶⁵
2. The carrying or use of grading equipment on board a fishing vessel⁶⁶
3. Discarding species subject to quota.⁶⁷
4. Exceeding the maximum allowed space between bars in the water separators.⁶⁸
5. Failing to carry on board certified drawings related to the catch handling and discharge capabilities.⁶⁹

Charge number 5 was withdrawn at the commencement of the trial as the vessel had since obtained drawings. The judge directed the withdrawal of charge number 2 from the jury. The jury convicted on the remaining three charges.

⁶⁴ Donegal Circuit Court, 27th March 2015.

⁶⁵ Art.14(4) of the Control Regulation.

⁶⁶ A grading machine sorts fish by size. Art.30 of Council Regulation (EC) No. 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [1998] OJ L125/1 (the Technical Regulation).

⁶⁷ Art.19 of the Technical Regulation.

⁶⁸ A water separator separates water from fish. Art.32(a) of the Technical Regulation as inserted by Art.15(1) of Council Regulation (EC) No. 227/2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption [2013] OJ L78/1 (the 2013 Regulation).

⁶⁹ Art.32(a) of the Technical Regulation as inserted by Art.1(15)(3) of the 2013 Regulation.

Case Background

The vessel concerned in this case was the *Annelies Ilena* which is the largest “super-trawler” in Europe. It was formerly known as the Irish registered *Atlantic Dawn* which accounted for one third of Ireland’s fishing capacity. It was dubbed “The Monster Boat” by Greenpeace and a number of other environmental NGOs.⁷⁰ It has a capacity to catch 400 tonnes of fish a day and is 144.6m long. It and other so-called “super trawlers” tend to attract considerable negative media attention,⁷¹ leading to increased scrutiny of inspection and enforcement measures undertaken.

Timeline of Events

The vessel was the subject of a joint Irish Naval Service and SFPA inspection at sea within Irish territorial waters on the 22nd of November 2013. Therefore, due to its position at sea, the vessel was bound to comply with EU fisheries law. Sea birds were observed feeding in wake of vessel which would indicate the presence of fish. When boarded by officers, the Master Mr. Gerrit Plug was given the opportunity to update his logbook as he is entitled to do upon inspection. At the time of this case, discards above 50kg had to be recorded in the logbook.⁷² However, the logbook had no discards recorded. One of the officers observed fish being put through a high-grading machine and then sent to a discard chute. A high grading machine is a machine which separates fish by size. The smaller, less valuable fish are discarded and the larger fish retained and frozen to maximise profits. The Master was cautioned and admitted the discard chute led to the sea. A small quantity of fresh fish

⁷⁰ See <https://www.greenpeace.org/archive-africa/en/News/Blog/west-african-communities-rally-to-protest-mon/blog/46543/> accessed 26 November 2019.

⁷¹ See for example, Nicky Ryan, “The World’s Largest AND Second Largest Supertrawlers are in Irish Waters”, *The Journal* (17 January 2015).

⁷² Art. 14(4) of the Control Regulation. The landing obligation has since come into force, otherwise known as “the discard ban”.

was recovered from the chute as evidence. As this practice is illegal, the vessel was then ordered to port and detained.

The vessel was escorted by the Naval Service into the port of Killybegs and custody of the vessel handed over to the Gardaí as is standard practice. At a special sitting of Sligo District Court, the court granted a 48 hour detention order but refused to apply the bond of €5,922,544 as put forward by the DPP and instead imposed a bond of €250,000. Judicial review proceedings were then brought by the DPP seeking to quash this order.

In the High Court, it was accepted that the maximum amount in fines was €105,000 and that costs were always fixed at €5,000. The dispute arose as to the value of the catch and the gear subject to forfeiture. The DPP argued that this was €5,812,544. The President of the High Court held that s.21 of the 2006 Act provides that the bond must cover the maximum fine but that the word maximum is not used in relation to the value of the catch and gear and therefore, the District Court judge had a discretion to place a value on the forfeiture that was less than the maximum.⁷³ This presented a significant loss to the State prior to the trial itself as the bond was set at a much lower amount than the State had originally applied for.

Challenges of Investigation

The sheer size of this vessel proved extremely challenging in terms of carrying out a thorough investigation. The discard chute was too long to follow to the sea and thus it was not possible to conclusively prove that the chute was intended to function as a discard chute. Officers attempted a makeshift test by tying a high-

⁷³ *DPP v Judge Kilrane and Gerrit Plug* (HC, 26 November 2013).

visibility jacket to the end of a pole and inserting it as far as they could down the chute. Officers from the Navy were stationed at the end of the chute outside of the vessel. However, they could not see the high-visibility jacket. Only a small amount of discards could be retrieved from the chute, making it impossible to prove the quantity discarded.

Trial

The Defence argued that no witness saw any fish entering the sea. The prosecution could not prove that the discard chute led to the sea. However, the sea bird activity in the wake of the vessel proved useful to the prosecution in this regard as circumstantial evidence. The necessity to adduce evidence to prove that the chute was in fact a discard chute, that fish were discarded by means of this chute and what volume was discarded, demonstrates the difficulties in proving each element of an offence to the criminal standard of proof.

The administrative complications involved in submitting cases to the DPP were exposed by the defence in their challenge of hearsay evidence. All witnesses had submitted statements. However, not all witness statements were included in the Book of Evidence. Specifically, the defence challenged hearsay evidence where one officer measured the bars of the water separator and another officer wrote down the figures being called out. Only the statement of the officer who measured the bars was included in the Book of Evidence. The defence allowed a late statement to be introduced to prove this element. The witness had to be summoned with only a couple of hours' notice, which may not be feasible in all cases.

The defence also challenged the length of time between cautioning of the Master which could have resulted in evidence being excluded. This highlights the

importance of adherence to the Judges' Rules⁷⁴ and the absolute necessity of procedural fairness throughout an investigation. This demands extremely high standards of investigation and is particularly onerous for regulatory inspectors who do not have the same level of experience as the Gardaí in criminal investigative standards.

The defence challenged the veracity of "expert" opinion. SFPOs have always been considered by the DPP to qualify as expert witnesses. Expert witnesses differ to ordinary witnesses as they are entitled to give opinion evidence which is useful to the court due to the complexity of fisheries law. Although fisheries offences are strict liability offences, the motivation of the fisher is almost always explored in evidence. SFPOs frequently give expert opinion on why a fisher would behave in a certain way, on fishing practices and on their interpretation of fishing records. In this case, the defence challenged an SFPO's ability to identify a high grading machine. In particular, the SFPO was questioned on what kind of inspection was conducted in order to determine the machine was a high grading machine. The prosecution relied on the SFPO's qualifications and experience to identify the machine.

The defence created confusion between the high grading machine and the water separator. Although both machines contain bars, in the case of the high grading machine, the bars separate the fish by size, whereas in the water separator, the space between the bars must be a certain length as provided for under EU Regulation.⁷⁵ The high grading machine was identified by the SFPO as such a machine and was not inspected. However, the water separator was inspected and the space between the bars measured and found to be non-compliant. The defence

⁷⁴ Written in 1912 to govern the taking of statements from suspects during an investigation.

⁷⁵ *Supra* note 68.

introduced confusion by questioning why the high grading machine bars were not inspected and measured, despite there being no law governing the space between the bars on a high grading machine. The offence is one of carriage of a high grading machine. Under the particulars of the offence, use of the high grading machine technically need not be proven.

The defence also accused the SFPO of having an animus towards the accused. This constitutes a standard tactic in the arsenal of a defence barrister during cross-examination at criminal trial but can be quite difficult for SFPOs and other types of professional witnesses. However, all witnesses at criminal trial are subject to the same type of questioning in cross-examination and there can be no exceptions for State witnesses. Robust cross-examination is an essential element in testing the evidence of the prosecution to the criminal standard of proof and is a core feature of the adversarial system. In particular, the defence focused on the high grading machine not being discovered during a previous inspection by the same SFPO. This added weight to their challenge of the ability to identify the high grading machine without some type of inspection of the machine. Combined with the confusion introduced between the two machines, this resulted in the judge conflating the different law for each machine and he withdrew the high grading machine charge from the jury.

Decision and Sentence

The jury found the Master guilty on the three remaining counts before it. The judge stated that the Master had a duty to be compliant with fisheries laws for a vessel of its size. He imposed the maximum fine applicable under each section which was €35,000, amounting to a total fine of €105,000. These offences also require

automatic forfeiture of the value of the catch and gear in addition to the fine. However, the defence argued that the State had failed in the High Court to obtain a bond equal to the forfeiture value and, therefore, automatic forfeiture was not available. Due to the *Martinez* judgment being an *ex tempore* judgment, it was not published in any law reports so neither the prosecution nor the defence could access and produce the judgment on this section in court. Therefore, the judge ruled in its absence and interpreted that the section did not impose automatic mandatory forfeiture of catch and gear. The State appealed this judgment. However, due to the untimely death of the Master, the appeal was dropped.

Lessons Learned

This case underlined the importance of a number of legal rules for fisheries cases. First, the need to avoid hearsay in statements by ensuring the person whose speech is reported in a statement has also made a statement and is available to confirm this in court. Had the witness in this case not been available at short notice, the evidence may have been excluded from the jury which would have resulted in a complete lack of evidence supporting the charge of excess space between the bars of the water separator and likely the withdrawal of the charge from the jury.

This emphasises the importance of close communication and co-operation between the regulator/enforcement body and the DPP, particularly the applicable State Solicitor prosecuting the case. However, this is not always possible given the demands on the time of the State Solicitor. It is possible that a greater number of State Solicitors per area would result in the applicable solicitor having more time to engage with cases. Close communication is beneficial to both the prosecuting authority and the State Solicitor for future cases. More often than not, in many court

cases, the first time the regulator or public body meets its own counsel is on the court steps. Where time is afforded for pre-case consultation, it gives the State's counsel a better understanding of the law governing sea-fisheries with which they are usually unfamiliar. This in turn results in counsel being better placed to present the best possible case and to avoid any confusion as occurred in this case. This could result in trials proceeding more expeditiously and may correspondingly lower costs. A pre-case consultation also often identifies gaps in evidence, as occurred in this case, which can then be rectified prior to trial.

This case also highlights the value and persuasiveness of video evidence which can be useful to both the prosecution and defence. When the judge and jury are dealing with an unfamiliar subject matter such as the various parts of a fishing vessel and fishing equipment, it is extremely helpful for them to be walked through video evidence so that they can actually see the subject matter of the case. However, there can be issues with video facilities in some of the older courts around the country in which case the prosecution has to organise the lease of equipment to be brought into the court. This cost falls to the State.

This case served to, once again, underscore the complexity of the law in this area and the difficulty faced by both the prosecution and defence in explaining it to both judges and juries. The complexity and technicality of sea-fisheries law in general invites evasion through loopholes and "creative compliance" from regulated entities who are disposed not to comply with the regulatory regime.⁷⁶ As the technicality of rules increases so does the possibility for less scrupulous players to

⁷⁶ McBarnet D., and Whelan C., "Creative Compliance and the Defeat of Legal Control: The Magic of the Orphan Subsidiary", in Hawkins K. (ed.) *The Human Face of Law* (Oxford: Clarendon Press, 1997).

find loopholes.⁷⁷ Overly legalistic regulation can also be ineffective because its very legalism dissipates voluntary responsibility - the will to comply with reasonable regulatory objectives.⁷⁸ Some simplification of the law would be welcome, particularly in terms of the volume of legislation. However, detailed, technical rules are perhaps unavoidable given the complexity of the area. In this case, the defence very successfully exploited the intricacy of the law and subject matter to confuse the judge into conflating two charges, that of the high grading machine and the water separator. As the case was, at its core, a high grading case, it was a significant loss to the State to have the high grading charge withdrawn. It is difficult to see how this situation can be remedied, as even simplification of the law would not simplify the subject matter of the case itself with which judges and juries are unlikely to be familiar. However, if the majority of fisheries cases were dealt with administratively by an independent panel, its members could build up expertise in the field.

The importance of adherence to the Judges Rules in terms of cautioning was also highlighted. Onerous standards are necessarily placed on investigating officers, be it the Gardaí or public bodies, in the context of the presumption of innocence and the various rules of evidence. However, as previously discussed, it is challenging for regulatory inspectors, who are less accustomed to investigation of crime in the same way the Gardaí are, to meet these standards in the course of an investigation. Officers of a number of regulatory agencies are granted extensive enforcement powers by the Oireachtas, often with many powers akin to that of the Gardaí but are not trained in the same way as the Gardaí. If, as in the opinion of the author, criminal prosecution were to be confined to serious breaches of sea-fisheries law, officers

⁷⁷ Black J. in Parker C., Scott C., Lacey N. and Braithwaite J. (eds) *Regulating Law* (Oxford: Oxford University Press, 2004) 128.

⁷⁸ *Ibid.*

should be equipped with the training to properly investigate serious breaches whilst fully adhering to fair procedures and chain of custody requirements. The State cannot expect officers of regulatory agencies to conduct investigations to the extremely high standards demanded by the courts and legal system without corresponding ongoing and up-to-date training. Officers normally rely on training provided by their employer and Standard Operating Procedures, but these cannot cover every eventuality that they are likely to encounter. Refreshment training is an absolute necessity as developments in the law unfold. Similar to the lack of priority assigned to fisheries cases in court lists, training to investigate regulatory crime may not be prioritised as it may not be considered to have the same consequences as traditional crime.

If the government goal is to ensure effective enforcement of regulatory norms by granting such extensive investigative and enforcement powers to officers of regulatory agencies, more priority must be afforded to regulatory crime, while also providing for other means of enforcement for breaches which do not satisfy the harm focus of the criminal law.⁷⁹ In the opinion of the author, this dual approach is necessary for effective enforcement of regulatory norms.⁸⁰ The implementation of such a system would require all investigations to be carried out to the criminal standard, as it may not be clear at the investigative stage whether the breach justifies

⁷⁹ As previously discussed in Chapter 4.

⁸⁰ A submission to the LRC notes that significant enhancement in the range and scope of civil and administrative penalties is necessary so as not to delegitimize the use of criminal law in respect of significant regulatory matters. Law Reform Commission, *Issues Paper Regulatory Enforcement and Corporate Offences* (2016) 8 https://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Regulatory%20Enforcement%20and%20Corporate%20Offences%20final.pdf accessed 1 April 2022.

criminal prosecution, which further supports the need for regulatory inspectors to develop greater expertise in criminal investigative procedures.

As previously discussed, it can take a substantial amount of time to pass new fisheries legislation in the Dáil. However, it is clear from this case that the forfeiture provision in particular needs to be clarified as this adversely affected the initial bond and also the penalty imposed, which could not be appealed. A clear provision would avoid repetition of this situation. It is an inconsistent and unfair practice that in some cases forfeiture is imposed and in others it is not because of judicial interpretation rather than the specific circumstances of the case. The Circuit Court does not create precedent. However, this judgment could be raised in future cases where mandatory forfeiture is challenged and may prove persuasive to the court. The relevant section should be amended for clarity and consistency. Such an amendment depends on the outcome of the preliminary reference to the CJEU on whether automatic forfeiture under Irish law is consistent with the principle of proportionality.

Case Study Two - *DPP v Tony Byrne and Norfish Ltd*⁸¹

Charges

Both the company and the director of the company were charged under s.24(1) of the Metrology Act 1996 which makes it an offence to knowingly render the weighing instrument inaccurate and knowingly use the inaccurate instrument. On conviction there is a possible custodial sentence and large fine attached. The company was found guilty of both charges. The director was found guilty of rendering the instrument inaccurate but not guilty of knowingly using the inaccurate instrument.

Case Background

Norfish is a pelagic processing factory based in Killybegs, Co.Donegal. It is a family-run business which employs up to 50 staff on seasonal basis in an area which would be heavily dependent on fisheries for employment. It is the second smallest factory in Killybegs and accounted for approximately 6% of pelagic processing in Killybegs in 2013. A number of vessels are tied to Norfish including an exclusive relationship with one vessel which lands all of its fish there.

Timeline of Events

This case resulted from a routine factory inspection. One vessel was discharging its catch into the factory at the time of inspection. Upon entry into the factory by officers, a factory staff member pressed a switch on the wall and rushed out. Further investigation revealed that the switch caused the Marel scales to go into fault mode where the scales stopped cumulative weighing of fish. The factory's

⁸¹ Donegal Circuit Court, 29th March 2017.

weigh permit was withdrawn due to the suspected interference with the accuracy of the scales. The director of Norfish, Mr Tony Byrne, was cautioned. Video evidence of the scales and switch was recorded by officers. The cold store was sealed overnight until officers could return to complete the inspection. Upon their return in the morning, the seals had been interfered with so investigation of the cold store could not be completed. Documentary evidence and electronic equipment was seized. A Legal Metrology Service Inspector who previously certified scales was requested to inspect the scales. The calibration certificate for the scales was withdrawn and a non-compliance notice issued by the inspector. The scales were then recalibrated and a calibration cert reissued along with an SFPA weigh permit.

Challenges of Investigation

The sheer scale of the investigation proved challenging. The working environment was problematic, the cold store being -23⁰C and the officers did not have appropriate clothing to hand. When the seals were subsequently interfered with, that meant that no evidence could be garnered from investigation of the cold store, which could have been valuable evidence in showing the volume of fish which was weighed by inaccurate scales. However, it would not have been possible to prove beyond reasonable doubt that the fish had in fact been weighed by the inaccurate scales, once again demonstrating the difficulties of proving every element of the offence. Were a lower burden of proof to apply as would be the case for administrative sanctions, it may have been possible to draw an inference that the fish in the cold store had been weighed on the inaccurate scales.

The time required to fully inspect the factory meant that a change of staff was unavoidable. However, this can result in a lack of cohesion and may result in new

staff missing new evidence or not being aware of the significance of certain pieces of evidence. The volume of documentation which had to be examined was extensive and time-consuming with little resources. The electronic equipment also had to be professionally cloned which is expensive. Because the case took a considerable amount of time to come to trial, there were multiple changes of exhibits officer. When the case came to trial, exhibits had been lost and/or, incorrectly stored, making them difficult to find and raising serious questions over the chain of custody. The defence could have challenged the admissibility of evidence, which could have put the entire case in jeopardy. A number of key witnesses had also left the employment of SFPA or had moved abroad during the time the case took to come before the courts. Every time the case was listed the State had to organise and fund the travel of the witnesses. It is also inconvenient for witnesses as they have to take annual leave or take unpaid leave to travel.⁸² Delay also inevitably results in difficulties with recollection of events. It inhibits cross-examination when witnesses have to rely so heavily on statements written several years before without a detailed memory of events to allow counsel to delve into greater detail than the statements provide.

The burden of proving the case to the DPP was more difficult in this case than in previous cases encountered by the SFPA, as the case concerned a factory rather than a vessel. The DPP directed that the SFPA had not sufficiently proved a weighing offence under fisheries regulations and instead directed under the Metrology Act 1996. Although this was not crucial since the case still went to court and in fact may have been an advantage to the prosecution in that the Metrology Act carries far higher fines than the Sea-Fisheries and Maritime Jurisdiction Act 2006

⁸² Witnesses may be entitled to expenses.

and a custodial sentence,⁸³ it should be possible to prove an offence against a factory under fisheries legislation. It is DPP policy not to issue reasons for its direction so it is difficult for any public body including the Gardaí to amend its practice to ensure cases are directed on by the DPP. Possible reasons include the lack of interview with the Master of the vessel discharging catch at the time of inspection and the lack of a complete inspection of the cold store.

Trial

The defence focused on how quickly Norfish would go out of business if fishermen were not being paid correctly for weight. The prosecution could not counter this argument because there was no evidence gathered from the discharging vessel which would suggest that vessels may be aware of scales manipulation. The defence argued that the switch was to allow the machine to be washed without weighing water. The prosecution focused on the elements of the offence, i.e. the rendering and use. In strict liability offences, there is technically no need to disprove the “why” arguments of defence. Video evidence was useful in proving existence of the switch and use of the switch in this regard.

The jury found the company guilty on both charges but found the director guilty of the rendering charge but not the use charge. This may be due to the difficulty of explaining to the jury that the director did not have to personally use the machine in order for it to constitute use in the legal sense.

⁸³ Not available for the majority of offences under the 2006 Act as previously discussed in Chapter 3.

Decision and Sentence

The judge refused the Probation Act because of the seriousness of deliberately installing a device where a derogation to weigh had been given. As such, under EU law all fish should be weighed on landing on the quay wall before transportation to a factory. However, in Ireland many factories benefit from a derogation to this rule which allows them to weigh fish after transportation, as long as the factory has been granted a weigh permit. The judge emphasised the breach of trust, the importance of accurate weighing to protect fish stocks and the damage to the reputation of the industry. The company was fined €25,000. The director was given a 6 month suspended prison sentence on condition that €10,000 was paid to the local hospice and €10,000 to the local branch of the RNLI.

Lessons Learned

Considerable resources are required for large-scale investigations which are not always available. It highlighted the need to secure all evidence even where it does not appear relevant at the time so that all angles of an investigation are covered in order to avoid gaps in evidence. More practical, situation-based training would be beneficial for officers, such as the type provided to the Gardaí or the Fire Service as it can be difficult in the middle of an investigation to determine what evidence is relevant and what is not. Officers need to be more offence focused in order to gather evidence to prove the elements of the offence. No interview was conducted with the Master of the vessel discharging at the time of the investigation which proved to be a major weakness in the case and is likely one of the reasons that the DPP stated the SFPA had not proved a fisheries weighing offence. The prosecution was confined to the time at which the officers discovered the inaccurate weighing, as the case file did

not prove continuous use over an extended period of time. With greater available resources, further analysis of historical weighing records may have provided the DPP with enough evidence to pursue a more extensive prosecution. Given the serious consequences of long-term manipulation of weighing, it is important that such non-compliance is targeted and sanctioned.

A number of general lessons can also be taken away from this case. As in Case Study One, proper handling of exhibits is crucial to preserve the chain of evidence. There is also a need for greater communication with the DPP so that future cases can be strengthened in order to pass muster regarding the DPP's evidential test. The benefits of inter-agency cooperation were also highlighted and should be strengthened in all future operations and investigations. However, as Kilcommins *et al.* note, there is no unifying enforcement strategy across regulatory agencies or with other law enforcement institutions such as the DPP.⁸⁴ Greater co-operation between agencies could result in more comprehensive and co-ordinated enforcement actions, which could be supported where appropriate by the DPP.

Conclusion

“The difficulties of prosecuting regulatory crime are well documented”.⁸⁵

The two case studies illustrate the difficulties associated with a full criminal trial for fisheries offences. Every aspect and detail of the case is contested by the defence, making it difficult for investigating authorities to satisfy the burden of proof. The legislation is confusing for both judges and juries, which is exploited by

⁸⁴ Kilcommins S., Leahy S. And Spain E., “The Absence of Regulatory Crime from the Criminal Law Curriculum” in Gledhill K. and Livings B. (eds.) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Oxon: Routledge, 2017) 11.

⁸⁵ *Ibid* 20.

the defence. Rules of evidence are strict and can result in vital evidence being excluded, which can result in the loss of a charge or charges. Resources within the investigating authority, the DPP and the courts can have an adverse effect on the case in terms of the quality of the investigation, preparation for the trial and delay in obtaining a hearing.

However, the traditional command-and-control model of regulation and enforcement is well established in Ireland and cannot be easily displaced, as it is ingrained within the wider legal system within which sea-fisheries law operates.⁸⁶ Obtaining sufficient resources within regulatory agencies will probably always be an issue. There is increasing awareness of the limits of the traditional model of regulation and enforcement, which has resulted in a general trend towards alternative forms of regulation and enforcement. Alternatives to the existing model should not mean weaker regulation or enforcement, but rather a more appropriate role for the criminal law. It need not be a binary choice between the traditional model and alternative methods. Both models can and should be operated in a complimentary and mutually supportive manner as part of a dual system. Where breaches are dealt with by means of the most appropriate sanction route, whether administrative or criminal, sanctions imposed are more likely to be effective, proportionate and dissuasive.

There are a number of advantages to criminal prosecution which are exemplified by the two case studies. Significant penalties were imposed in both cases due to the seriousness of the offences. In both cases, the judges emphasised the

⁸⁶ The Irish reliance on this model of regulation has been noted by the OECD. See OECD, *Regulatory Reform in Ireland: Government Capacity to Ensure High Quality Regulation* (OECD, 2001) 9 <https://www.oecd.org/ireland/2510916.pdf> accessed 1 April 2022.

duty on the industry to comply with the law, which is aimed at ensuring sustainability and were critical of the reputational damage to the industry as a whole. Considerable negative press coverage followed both cases, which demonstrates how criminal prosecution has a moral value which should not be easily dismissed. Although negative press coverage may not always feature, a moral stigma is attached to criminal prosecution from a social perspective.⁸⁷ Therefore, an effective criminal system is essential to the proper functioning of alternative sanctions⁸⁸ ensuring the effectiveness of lower tier, administrative sanctions. In other words, criminal prosecution is the “big stick”⁸⁹ and should continue to be utilised for serious offences.

However, as Mr. Justice Charleton has stated “[i]t is difficult to argue that things can remain exactly as they are”.⁹⁰ Although Justice Charleton made this comment in the context of civil cases, reform is needed in the court system in general. The issue of costs must be addressed. However, high costs are so ingrained in the legal system of this jurisdiction that they are almost expected. In the context of costs for environmental litigation, Ryall suggests that if the issue of costs is to be tackled it should be by an expert and well-informed group, with direct experience of the costs rules in practice, as they are best placed to identify appropriate amendments to the current costs rules and to explore the likely implications of any proposed

⁸⁷ Hart describes this moral stigma as the central distinguishing feature of the criminal sanction. See Hart H.L.A., “The Aims of the Criminal Law” (1958) 23 *Law and Contemporary Problems* 401, 405.

⁸⁸ See Croall H., “Combating Financial Crime: Regulatory Versus Crime Control Approaches” (2003) 11 *Journal of Financial Crime* 45, 53.

⁸⁹ Braithwaite J., “On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers” (1997) 47(3) *University of Toronto Law Journal* 305.

⁹⁰ Charleton P., and Molloy S., “Case Management: Fairness for the Litigants, Justice for the Parties” (2015) 20(3) *The Bar Review* 59, 61.

changes. She also opines that it is vital that the judiciary and the Courts Service are involved in this process from the outset.⁹¹

Possible methods to address delay include reform of the procedural laws to speed up hearings, introduction of modern case management systems, greater use of modern technology over paper, improvement of court facilities, and increase and reform of funding for courts. A number of courts around the country have been completely renovated and provided with more modern technology such as video links to jury rooms. The recently introduced Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 has the potential to expedite many aspects of the legal process and ease issues with delay by providing for remote hearings and allowing witnesses to give evidence by video link, which is potentially an extremely positive development.

In the context of civil cases, two SIs which amended the Rules of the Superior Courts were introduced in 2016. One addressed pre-trial case management and the other, the actual conduct of trials. The aim of the new measures was to improve the efficiency of the courts and increase settlements prior to trial. The SIs required the exchange of expert and factual evidence and required some cooperation between experts. They also required pre-trial conferences and introduced rules to manage the length of pleadings and trials in order to speed up the process and reduce costs. The rules on the conduct of trials came into force in October 2016. However, the rules regarding pre-trial case management have been postponed due to the lack of judges available to case manage High Court proceedings. Therefore, lack of availability of judges is an ongoing, politicised issue, which needs to be addressed in

⁹¹ Ryall A., "Planning for Access to Justice in Environmental Matters" (2014) 21(4) *Irish Planning and Environmental Law* 131, 137.

conjunction with any rules on increasing efficiency of trials. It should also be noted that no such rules apply to criminal cases.

Criminal law should be more focused on the truly criminal,⁹² in other words, conduct which satisfies the harm focus of the criminal law requiring moral censure. Where these conditions are not met, then the criminal law is not necessary or appropriate and constitutes an inappropriate and unwieldy response⁹³ for less serious sea-fisheries offences. Over-reliance on criminal prosecution may even risk devaluing criminal prosecution.⁹⁴ The imposition of a fine may not be the best way to achieve changes in behaviour, particularly for less serious offences where the fines are low and certainly, where fines are disproportionate to the seriousness of the offence. In most cases, administrative sanctions would better reflect the range of circumstances involved in regulatory breaches, including sea-fisheries offences.⁹⁵

In *O'Sullivan*, the Supreme Court seemed to propose that sea-fisheries should move towards administrative sanctioning, acknowledging the procedural demands and delays associated with the court system,⁹⁶ which suggests that it would be constitutionally permissible to introduce administrative sanction system for fisheries as an alternative to criminal enforcement, at least in certain cases. However, this suggestion was tempered by a warning against any system which does not satisfy the requirements of procedural justice in order to speed up the enforcement process,⁹⁷ albeit allowing for the fact that these standards need not be as high as those which

⁹² Macrory R., "Reforming Regulatory Sanctions- Designing a Systematic Approach" in Oliver D., Prosser T. and Rawlings R., *The Regulatory State: Constitutional Implications* (Oxford: Oxford University Press, 2010) 242.

⁹³ Macrory *supra* note 8.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *O'Sullivan v Sea Fisheries Protection Authority & ors* [2017] IESC 75, 36 & 51.

⁹⁷ *Ibid* 36.

apply to a criminal trial.⁹⁸ Given the experience thus far in relation to the point system, any proposed alternative sanctions must incorporate procedural justice and ensure fairness throughout the process with a right of appeal to the courts.

⁹⁸ *Ibid* 46.

Chapter 6

Turning the Tide

Alternative Sanctions for Sea-Fisheries

Introduction

The waters around Ireland contain some of the most productive fishing grounds and biologically sensitive areas in the EU.¹ In 2010, an estimated 1.3 million tonnes of fish were taken by the fishing fleets of EU Member States from Irish waters.² Most of these Member States deal with fisheries offences by means of administrative sanctions.³ However, criminal prosecution remains the only option in the enforcement of sea-fisheries law in Ireland. This reliance on criminal enforcement brings with it a whole host of problems as discussed in detail in Chapter 5. The pursuit of a criminal prosecution is frequently difficult and time-consuming, mainly because the criminal law entails particular procedural safeguards and outcomes, which can seem inappropriate and heavy-handed where the harm caused is not truly “criminal” in intent.⁴ The criminal law may also fail to adequately sanction regulatory breaches where they do not satisfy the definition of a criminal offence.

¹ Marine Institute, *Atlas of the Commercial Fisheries Around Ireland* (Marine Institute, 2009) 1.

² Marine Institute, *Fisheries & Ecosystems* available at <http://www.marine.ie/Home/site-area/areas-activity/fisheries-ecosystems/fisheries-ecosystems> (06 April 2016).

³ See Blomeyer & Sanz: Beke M., Ackermann R. and Blomeyer R. *The CFP- Infraction Procedures and Sanctions Imposed Throughout the EU 2014* (European Union, 2014) 37 <https://op.europa.eu/o/opportal-service/download-handler?identifier=2f47e0b9-b69f-43b0-8688-57773bd330a8&format=pdf&language=en&productionSystem=cellar&part=> accessed 1 April 2022.

⁴ Environmental Protection Agency, *A Study on the Use of Administrative Sanctions for Environmental Offences in Other Comparable Countries and Assessment of Their Possible Use in Ireland* (EPA, 2009) 3 http://www.epa.ie/pubs/reports/enforcement/Admin_Sanctions_final.pdf accessed 1 April 2022.

This chapter assesses whether it is possible to introduce alternatives to criminal prosecution, and, if so, what kind of sanctions are most suitable to apply to fisheries offences. It identifies if there are any legal reasons why administrative sanctions may be difficult to introduce in Ireland, given the lack of tradition of administrative sanctioning. It also suggests how such sanctions might be implemented in practice in the context of constitutional limitations and the requirement for procedural safeguards.

The Possibility of Administrative Sanctions

With the exception of Ireland, all EU Member States deal with breaches of sea-fisheries law by means of administrative sanctions, either exclusively, or in conjunction with criminal prosecution for serious offences. Administrative sanctions are very suitable for minor breaches which in Ireland would normally be dealt with in the District Court. Administrative sanctions could constitute a more proportionate response to minor breaches which could save both the State and the accused time and money. However, they may also be useful in sanctioning more serious breaches of sea-fisheries law.

The 2006 Act defines almost all breaches of sea-fisheries law as indictable criminal offences and provides for onerous maximum fines. The onus then shifts to the judiciary to match the level of penalty to the crime. In debating the 2006 Act at the Bill stage, the then Minister stated that that this was necessary to satisfy the need for deterrent and dissuasive penalties under the CFP: “It is important that Ireland sends out a clear message that illegal sea fishing is serious and will be dealt with accordingly”.⁵ He argued that administrative sanctions would not be able to achieve

⁵ Dáil Deb 17 November 2005, vol 68, col 610.

this given the need to deprive the offender of the economic benefit of the infringement. Therefore, the values involved meant that administrative sanctions, which the industry lobbied for at the time, would not be possible. The Minister stated that because fines were pitched at such a high maximum level, this meant that they could only be applied to criminal acts which must be dealt with by a court under Art. 34.1 of the Constitution.⁶ The required level of sanction would trespass on the exclusive role of the courts in the administration of justice,⁷ making administrative sanctions unconstitutional.

The Constitutional Hurdle

As previously discussed, all breaches of sea-fisheries law are defined as criminal offences under Irish law. In *Melling v Ó Mathghamhna*⁸ Kingsmill Moore J considered the characteristics of a “crime”. He noted that crime is almost impossible to define but one characteristic which was common to almost all attempted definitions was that crime usually involves punishment or punitive sanction.⁹ Clearly, this definition would mean that administrative sanctions would not be possible in this jurisdiction, since the imposition of a sanction would automatically make the act a crime which would accordingly have to be dealt with by the courts.

⁶ Art. 34.1 provides that “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public”. Similarly, Art. 38.1 provides “No person shall be tried on any criminal charge save in due course of law” and Art. 38.5 provides that no person shall be tried without a jury, with certain exceptions.

⁷ Art. 37.1 provides that “Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution”.

⁸ [1963] 97 ILTR 60.

⁹ *Ibid* 72.

However, in *Melton Enterprises Ltd v The Censorship of Publications Board*,¹⁰ the court indicated that the imposition of a punishment did not automatically make an infringement a criminal matter. “Criminal matters” under Art. 37.1 of the Constitution encompasses the whole criminal process. However, it is the imposition of a punitive sanction *as part of the administration of justice* which would violate Art. 37.1 of the Constitution. Therefore, where there is no administration of justice prior to the imposition of the sanction, it may fall outside the definition of a criminal matter.

The characteristics of the administration of justice were comprehensively set out by Kenny J in *McDonald v Bord na gCon* as follows:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the imposition of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
5. The making of an order by the Court, which as a matter of history is an order characteristic of Courts in this country.¹¹

¹⁰ [2003] IESC 55.

¹¹ [1965] IR 217.

Some confusion existed as to whether all of these characteristics must be fulfilled in order for a process to qualify as being an unconstitutional administration of justice. In *Keady v Commissioner of An Garda Siochana*, McCarthy J was of the opinion that all of the *McDonald* criteria had to be satisfied.¹² However, O’Flaherty J stated that it was possible to isolate “two essential ingredients” from the *McDonald* criteria, namely that there be a contest between parties with the infliction of some form of liability or penalty on one of the parties.¹³ In a later case, O’Flaherty J altered this position and held that all of the criteria must be satisfied.¹⁴ More recently, *O’Connell v The Turf Club*¹⁵ confirmed that a procedure which does not satisfy all the *McDonald* criteria is definitively not an administration of justice. Therefore, the courts have attempted to narrow the application of Art.34.1 and allow for more quasi-judicial decision-making with Morgan noting that “there has undoubtedly been some retrenchment in judicial thinking as to the proper limits of the judicial function”.¹⁶

However, administrative bodies are still not permitted to determine guilt. In *Maher v Attorney General*¹⁷ a provision in the Road Traffic Act 1968 provided that a certificate showing the presence of alcohol in the urine or blood was “conclusive evidence”¹⁸ of the presence of alcohol. This was held to be “an invalid infringement of the judicial power” due to the fact that it involved a determination of guilt which falls within the judicial function.¹⁹ Similarly in *State (Murray) v McRann*, Finlay P

¹² *Keady v Commissioner of An Garda Siochana* [1992] 2 IR 197, 204.

¹³ *Ibid* 212-213.

¹⁴ *State (Plunkett) v Registrar of Friendly Societies (No.1)* [1998] 4 IR 1, 5.

¹⁵ [2015] IESC 57.

¹⁶ Morgan D.G. “‘Judicial-O-Centric’ Separation of Powers on the Wane?” (2004) 39(1) *Irish Jurist* 142, 160.

¹⁷ [1973] IR 140.

¹⁸ S.44(2) of the Road Traffic Act 1968.

¹⁹ *Supra* note 17, 143.

stated that “[t]he essential ingredient of a criminal matter must be its association with the determination of the question as to whether a crime against the State or against the public has been committed”.²⁰

As previously stated, administrative sanctions are most easily applicable to minor offences. Art.38.2 of the Constitution provides that minor offences may be tried in the District Court. However, there is no definition of “minor offence” in the Constitution. Such definitions are usually left to be provided for by statute. In *Melling v Ó Mathghamhna*²¹ the Supreme Court considered what constitutes a minor offence. The court held that the severity or seriousness of the punishment, the moral guilt of the accused, the law in 1937 when the Constitution was adopted,²² and public opinion should be considered when determining whether an offence is minor. Furthermore, it should be noted that where a number of minor offences are detected this does not make one collectively serious offence.²³ As long as each individual penalty falls under the minor category, it is not constitutionally significant that when added together the fines amount to a substantial figure.

The application of administrative sanctions to minor offences may be considered part of the requirement for the functions of the administrative body to be “limited” under Art. 37.1. In *Re Solicitors Act*, the Supreme Court stated that if the powers of the administrative body are exercised in such a way as to “affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as

²⁰ [1979] IR 133, 135.

²¹ *Supra* note 8.

²² The use of historicism as a method of interpretation has been used inconsistently and often incoherently by the Irish judiciary. See further Langwallner D., “The Incoherence of Historicism in Irish Constitutional Interpretation” (2008)13(5) *The Bar Review* 109.

²³ See *State (Rollinson) v Kelly* [1984] IR 247, 267. See also *State (Wilson) v Neilan* [1985] IR 89, 98.

‘limited’”.²⁴ The court held that the striking off of a solicitor meant that he/she could never practice again and this could not be described as a limited power or function given the profound effect on the individual’s life. However, in *Keady*, the court held that a Garda does not lose any qualification by virtue of his dismissal. Therefore, the powers of the Garda Commissioner in *Keady* were limited but the power of the Law Society in *Re Solicitors Act* was not. Administrative sanctions for minor offences could be described as “limited” by their nature where they do not affect the life of the individual as described in *Re Solicitors Act*.

A further requirement imposed by the courts for an administrative body to satisfy the “limited” function test, is that the body can have no role in the selection of the administrative penalty. Fixed penalties are permissible. However, the body cannot select a penalty from a range of penalties provided for under legislation. As was stated by O’Dalaigh CJ in *Deaton v Attorney General and the Revenue Commissioners*, the legislation provides the general rule and the judiciary applies that rule. Where a range of penalties are provided for under legislation, then the selection of the penalty falls within the judicial function.²⁵ Relying on this case law, any administrative sanctions would be limited to FPNs.

Based on this interpretation of the Constitution, the Oireachtas introduced a number of administrative sanctions in the form of FPNs in a range of fields. Such administrative sanctions are possible as long as no determination of guilt or innocence is made by the decision-making body. The most common example is road traffic offences where a Garda issues an FPN. It is permissible for a Garda to issue this sanction but crucially the Garda only “alleges” that an offence has been

²⁴ [1960] IR 239.

²⁵ *Deaton v Attorney General and the Revenue Commissioners* [1963] IR 170, 182-183.

committed.²⁶ There is no official finding of guilt and the motorist may dispute the FPN in court. The Gardaí also cannot enforce payment of the FPN as this would constitute an administration of justice. Therefore, criminal proceedings are instituted where the FPN is not paid.

A feature of the legislation which provides for administrative sanctions is that it is carefully worded so as to avoid a finding of guilt which would render the legislation unconstitutional. Under s.5 of the Road Traffic Act 2006 blood alcohol level is evidence of an alleged offence having been committed. However, the section uses the phrase “concentration of alcohol purported to be present” in order to avoid stating it is conclusive proof and constitute a finding of guilt. The penalties under this section may be quite serious in that a person could be disqualified from driving. Therefore, serious penalties could be imposed by an administrative body for breaches of sea-fisheries law, as long as they allege an offence rather than determine guilt. Additionally, there must be an opportunity to dispute the finding in court.

Anecdotally, during the consultation period on FPNs for fisheries offences, there was a suggestion that FPNs could only be applied to offences which are not already covered by any criminal prosecution.²⁷ However, a number of driving offences which would previously have been prosecuted are now dealt with by means of an FPN in addition to penalty points. This suggests it is possible for a criminal offence to be dealt with by FPN or other administrative sanction as long as there is an opportunity to dispute the administrative sanction in court. However, in the opinion of the author, provision for an FPN system only for fisheries would still

²⁶ See for example, s.103 of the Road Traffic Act 1961.

²⁷ The Government also stated that administrative sanctions were not possible for the types of offences under the 2006 Act due to Art. 33 of the Constitution. See 610 Dáil Deb col. 878 in Long R. *Marine Resource Law* (Dublin: Round Hall 2007) 234-235.

leave a dearth of sanction options for middle ground offences which are too serious to be dealt with by an FPN but are not serious enough to be prosecuted. Therefore, the potential for administrative financial sanctions must be examined.

The Central Bank Administrative Sanction Procedures

Recently, the Oireachtas has introduced a far more radical administrative sanction system to be enforced by the Central Bank. Where a regulated entity has committed a prescribed contravention,²⁸ the Central Bank may impose monetary penalties not exceeding €10,000,000 in the case of a corporate or unincorporated body or 10% of the annual turnover of a regulated financial service provider in the last financial year, whichever is greater. In the case of a natural person, the monetary penalty cannot exceed €1,000,000.²⁹ Where the regulated entity has been prosecuted, then no monetary penalty can be applied in relation to that offence.³⁰ However, other penalties may be imposed such as a caution or reprimand, direction to cease a contravention, disqualification from participating in the management of a regulated entity and suspension or revocation of the authorisation of the regulated entity.

On the face of it, it appears that the substantial sanctioning power vested in the Central Bank would constitute an administration of justice which is by no means limited given the potential sanctions, particularly the maximum monetary penalties

²⁸ A prescribed contravention may include breach of a provision, code, direction or condition of a designated enactment or SI. It may also include breach of an obligation imposed on a person under Part IIIC of the Central Bank Act 1942 which is the section which empowers the Central Bank to impose administrative sanctions.

²⁹ S.33AQ of the Central Bank Act 1942 as amended by s.68 of the Central Bank (Supervision and Enforcement Act 2013). See also Central Bank of Ireland, Outline of the Administrative Sanction Procedure (2013) 29-30 <https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/enforcement/administrative-sanctions-procedure/legislation-and-guidance/outline-of-the-administrative-sanctions-procedure.pdf?sfvrsn=8> accessed 1 April 2022.

³⁰ S.33AT of the Central Bank Act 1942 as inserted by s.10 of the Central Bank and Financial Services Authority of Ireland Act 2004. See also Outline of the Administrative Sanction Procedure *ibid* 32.

and power to disqualify. The Bank is also empowered to select a sanction from a range of sanctions provided for under the legislation, which would on the face of it appear to be unconstitutional based on the case law. It is proposed to examine the constitutionality of this system, in particular whether it constitutes an administration of justice; whether the powers and functions of the Central Bank are limited; and whether the selection and level of penalties is permissible in order to determine the scope of administrative sanctions which are possible in this jurisdiction, and which may be applied to sea-fisheries law.

An Administration of Justice?

To constitute an administration of justice, each of the *McDonald* criteria must be satisfied. Therefore, each criterion will be briefly examined and discussed:

1. A dispute or controversy as to legal rights or a violation of the law.

On the basis of *Keady* as discussed above,³¹ the dispute between the Central Bank and the regulated entity does not concern a dispute as to legal rights or violation of criminal law. In *Keady*, it was held that an inquiry, similar to the inquiry which would be conducted by the Central Bank did not constitute a contest between parties. Therefore, this criterion is not satisfied.

2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the imposition of a penalty.

Given the substantial penalties which the Central Bank can impose and also their explicit increased emphasis on deterrence and their expectation that greater

³¹ p 214.

penalties than ever before will be imposed,³² it would appear on the face of it that this criterion would be satisfied. However, this criterion should be considered in light of the fourth criterion and whether this penalty can be enforced by the decision-making body.

3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties.

The Central Bank may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention. The financial service provider has a right of appeal to the Irish Financial Services Appeal Tribunal³³ and a further right of appeal to the High Court.³⁴ He/she can then appeal to the Supreme Court but on a point of law only.³⁵ Therefore, this criterion is not satisfied given that there is a right of appeal to the courts.

4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment.

Where a disqualification order is made by the Central Bank, this is confirmed by the District Court. If such an order is made by the Appeals Tribunal and subsequently appealed, the High Court may confirm the order of the Tribunal. If necessary, the Appeals Tribunal may apply to the High Court to enforce an order

³² Outline of the Administrative Sanction Procedure *supra* note 29, 29.

³³ Established under s.57C of the Central Bank Act 1942 as inserted by s.28 of the Central Bank and Financial Services Authority of Ireland Act 2003.

³⁴ S.57AK of the Central Bank Act 1942 as inserted by s.15 of the Central Bank and Financial Services Authority of Ireland Act 2004.

³⁵ S.57AL of the Central Bank Act 1942 as inserted by s.28 of the Central Bank and Financial Services Authority of Ireland Act 2003.

made by them.³⁶ Therefore, this criterion is not satisfied as the courts confirm orders made by the Bank and enforces them if necessary.

5. The making of an order by the court which as a matter of history is an order characteristic of courts in this country.

In *Re Solicitors Act*, the court emphasised the fact that the power to strike off solicitors lay traditionally with the courts and that, due to the importance of the relationship between solicitors and the courts, this should continue. In *O'Connell v The Turf Club* it was held that particular weight should be given to this point. No such tradition exists between the courts and financial bodies. The Central Bank has always had responsibility in this area. Therefore, this criterion is not satisfied.

Limited Functions and Powers?

A further issue to be considered is whether the function and power of the Central Bank is “limited” as required by Art.37.1 of the Constitution. As previously stated, in *Re Solicitors Act*, the Supreme Court stated that if the powers are exercised in such a way as to “affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as ‘limited’”. Any monetary penalty imposed by the Central Bank must not cause a corporate entity to cease business or cause an individual to be adjudicated bankrupt.³⁷ This represents an attempt to limit the power of the Bank. However, the courts have not been consistent in their interpretation of what they consider to be “limited”.

³⁶ S.33AW of the Central Bank Act 1942 as inserted by s.10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

³⁷ *Ibid* s.33AS.

In *Re Solicitors Act* the power of the Law Society was not limited because the individual could never practice again in a profession which necessitated years of study. In *Keady*, the powers of the Garda Commissioner were limited because disqualification of a Garda did not mean he/she lost any qualification. The reasoning here is somewhat dubious. The decision is more likely to be based on the historic ties between the courts and solicitors and it appears that *Re Solicitors Act* has been confined to its own facts,³⁸ adding weight to the argument that sanctions imposed by the Central Bank, including disqualification, are constitutional.

Selection of Penalty and Determination of Guilt

There are a range of sanctions provided for under the Central Bank Act 1942. The Bank has discretion to choose which penalty is appropriate, taking into account factors such as the nature, seriousness and impact of the contravention, the conduct of the regulated entity after the contravention, the previous record of the regulated entity and any other general considerations.³⁹ Where a regulated entity has been found either guilty or not guilty by a court, then the Bank may not impose a monetary penalty.

This represents a slight contrast to the point system for licence holders of fishing vessels where points can remain on the licence even where the Master is found not guilty by a court. However, as previously discussed, points are applied on the licence prior to any criminal prosecution taking place against the Master. The legislation in the case of the Central Bank is aimed at preventing application of a monetary penalty following a criminal prosecution. Furthermore, the point system

³⁸ Morgan D.G. *supra* note 16.

³⁹ Outline of the Administrative Sanction Procedure *supra* note 29, 30-32.

does not involve a monetary penalty. It could be argued that points on a licence are as punitive as a monetary penalty since it can potentially result in suspension and ultimately revocation of the licence.⁴⁰ If the licence holder is selling the licence, he is also obliged to inform the buyer that points are attached to it, which may result in him obtaining a lesser price for the licence. However, this would be unlikely to reach the amount which the Central Bank may impose as a monetary penalty which, as previously discussed, may be substantial. The State is still obliged to introduce a point system for masters, in which case the State may need to choose to either apply points against the Master or refer the case for prosecution, as it may offend the double jeopardy principle if both sanction routes were pursued.

If it is determined that there are reasonable grounds to suspect that a prescribed contravention is being, or has been, committed the Central Bank may refer the matter to an inquiry. The inquiry then determines the issue and may impose a penalty. The regulated entity can appeal to the Irish Financial Services Appeals Tribunal, then to the High Court and finally to the Supreme Court on a point of law only. Therefore, the final determination of guilt rests with the courts, which suggests that the Central Bank system does not violate the principle that determination of guilt is part of the judicial function. To add further weight to this argument, O’Flaherty J held in *Keady* that the disciplinary procedure “was not a contest between parties; it was, as its name says, an inquiry”.⁴¹

⁴⁰ Outside of the point system, Churchill notes a reluctance in the UK to suspend or revoke licences due to the loss of livelihood for the fisherman concerned, at least for a time. See Churchill R.R. “Enforcement of the Common Fisheries Policy, with Special Reference to the UK” in Harding C. And Swart B. (eds.) *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth Publishing, 1996) 91.

⁴¹ *Supra* note 12, 212.

On the face of it, the administrative sanction regime, specifically the selection of penalty, appears to violate *Deaton* which found that the application of a rule under legislation falls squarely within the remit of the judicial function. However, a number of administrative sanction regimes provide for selection of penalty by an administrative body. To get around the rule established by this case, the legislation provides that the High Court confirms sanctions imposed by the Central Bank. Other administrative sanction regimes provide for similar High Court confirmation. However, the fines which may be imposed are significantly lower than the Central Bank. The Broadcasting Authority of Ireland can apply to the High Court to confirm the imposition of an administrative sanction of up to €250,000.⁴² Similarly, the Property Services Regulatory Authority can impose an administrative sanction of up to €250,000 which takes effect when confirmed by the High Court. By contrast, the Central Bank imposed a €3.5 million fine on Ulster Bank Ltd for failure of its IT system in 2012.

Level of Sanctions

Any administrative sanction regime must be proportionate.⁴³ In *Registrar of Companies v Anderson*, the Supreme Court observed that an administrative sanction that was excessive and disproportionate to the administrative objective to be achieved might amount to a criminal penalty.⁴⁴ As previously discussed, the imposition of a penalty alone does not automatically create a criminal offence which

⁴² For breach of certain provisions of the Broadcasting Act 2009.

⁴³ It is important to consider the criteria established in *Engel and Others v Netherlands* [1976] ECHR 3 as to whether or not a penalty could be considered a criminal charge and thereby violate Art.6 of the ECHR. The court stated that the classification of the offence under national law, the nature of the offence and the nature and degree of severity of penalty must be considered. The type and level of sanction remains a Member State competency see C-440/05, *Commission v. Council* Judgment of the Court (Grand Chamber) of 23 October 2007.

⁴⁴ [2004] IESC 103, 26.

must be dealt with by a court. Heavy administrative sanctions to the level imposed by the Central Bank could be regarded as punitive in nature requiring a trial and the procedural safeguards associated with criminal proceedings. However, in *McLoughlin v Tuite* the court held that the imposition of a penalty alone, even a penalty intended to deter or punish non-compliance, is not sufficient in itself to create a criminal offence.⁴⁵ According to Kingsmill Moore J in *Melling v Ó Mathghamhna*, the indications that an offence is a criminal offence are that it constitutes an offence against the community and not an individual, it involves a punitive sanction and it requires *mens rea*.⁴⁶ Thus, unless the specific terms of the legislation creating the sanction reflect these criteria, a heavy administrative sanction does not in itself amount to a criminal penalty requiring a full criminal trial.⁴⁷

However, the sanction must still be proportionate. Proportionality requires that the maximum statutory amount of any administrative sanction should be imposed only in the gravest circumstances.⁴⁸ Therefore, as previously discussed, a monetary penalty imposed by the Central Bank must not cause a corporate entity to cease business or cause an individual to be adjudicated bankrupt. Whether this proviso is enough to satisfy the requirement for proportionality would depend on the facts of the case. The requirement for the High Court to confirm the sanction imposed by the Central Bank helps to ensure that sanctions are proportionate.

⁴⁵ [1989] IR 82.

⁴⁶ *Supra* note 8, 71.

⁴⁷ Law Reform Commission, *Issues Paper Regulatory Enforcement and Corporate Offences* (2016) 23 https://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Regulatory%20Enforcement%20and%20Corporate%20Offences%20final.pdf accessed 1 April 2022..

⁴⁸ *Ibid* 24.

Purcell v Central Bank of Ireland

The constitutionality of the inquiry conducted by the Central Bank was recently challenged in *Purcell v Central Bank of Ireland*.⁴⁹ The applicant argued that the inquiry constituted an administration of justice and also that the inquiry breached his constitutional right to a trial, under Art.38 of the Constitution, and his rights under Art.6 of the European Convention on Human Rights. The outcome of this challenge is very useful in terms of assessing the boundaries of any new administrative sanction regime for sea-fisheries or other area of regulation in Ireland.

In relation to the administration of justice argument, the High Court judgment focused on four main questions:

- (i) Whether the statutory inquiry proposed was an administration of justice and therefore unconstitutional.

Hedigan J held that the inquiry did not constitute an administration of justice as it did not satisfy any of the *McDonald* criteria.⁵⁰ It is somewhat of a stretch to say that the €500,000 maximum fine and disqualification order capable of being imposed by the Central Bank do not constitute the imposition of a penalty. However, it must be considered in light of the fact that the Central Bank cannot itself enforce its decision and must have the penalty or disqualification order confirmed by a court. Therefore, because it is the courts who technically impose the penalty or disqualification, the inquiry avoids satisfying this criterion. This opens up the possibility of large monetary penalties in a similar administrative sanctioning system for fisheries or any other area, as long as the courts confirm the penalty.

⁴⁹ [2016] 7 JIC 2941.

⁵⁰ *Ibid* 8.7.

- (ii) Whether the inquiry sought to impose vicarious penal liability on the applicant and was unconstitutional.

The judge was quite emphatic in his pronouncement that the system did not impose penal liability. He stated that the legislation provided for quite distinct criminal offences. Just because the Central Bank inquiry could find conduct was a contravention which might also be a criminal offence does not transform the inquiry into a criminal process. “The inquiry does one thing. A criminal court does quite another”.⁵¹ He held that the role of an inquiry is to find out what is going on and/or what has happened, as distinct from the role of a criminal trial which is solely to determine whether an accused is guilty or not guilty of a specified offence. Therefore, the court held that the inquiry does not satisfy any of the *indicia* of a criminal offence identified in *Melling v O'Mathghamhna*.

- (iii) Whether the financial burden on the applicant was oppressive.

The judgment did not directly address the question of whether the potential penalty was oppressive or unfair but concentrated on whether the costs incurred from the inquiry itself were unfair or oppressive. The judge held that the applicant could represent himself in order to avoid such costs. This seems unrealistic as it is standard practice to have at least a solicitor, if not a junior counsel, as representation at administrative proceedings of this nature given the potential serious findings against the subject of the inquiry. He also held that the applicant should have adequate insurance cover to cover the costs.⁵² The applicant did have insurance but the cover only extended to a certain level. In the opinion of the author, this section of the

⁵¹ *Ibid* 8.8.

⁵² *Ibid* 8.9.

judgment is harsh and improbable in practice. The applicant had taken reasonable steps to insure himself against costs. It is unreasonable to expect applicants to go much further than this. Had the applicant chosen to forego legal representation it may have placed him at a serious disadvantage given the complexity of financial legislation and level of potential sanction.

(iv) Whether the burden imposed on the applicant in pursuing an inquiry was disproportionate to the public interest.

Hedigan J categorically dismissed this argument, declaring “[o]ne has merely to articulate the proposition in order to reject it”.⁵³ The public interest in this case, given the effects of the financial collapse on the Irish economy, was of paramount importance in order to avoid a repeat of the crash. Although sustainability and conservation are certainly in the public interest, the same level of priority cannot be said to apply to fisheries.

Therefore, the administrative sanctioning system of the Central Bank has been approved by the courts, paving the way for far more radical administrative sanctioning regimes across many areas of regulation. There appears to be a general move towards greater administrative sanctioning in Ireland, particularly for minor offences.⁵⁴ However, the Central Bank regime represents an escalation in the level of sanctions which the State is willing to empower an administrative body to impose. The onerous nature of the Central Bank regime should be viewed in light of the widespread abuses which occurred during the Celtic Tiger and subsequent financial

⁵³ *Ibid* 8.10.

⁵⁴ Keyes notes that to some degree, this has been prompted by European Union legislation. See Keyes F., *Administrative Financial Sanctions* (Oireachtas Library and Research Service, November 2019) 3 https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf accessed 1 April 2022.

crash. The State may be more reluctant to introduce an administrative sanction regime of comparative weight to sea-fisheries. However, if a case is taken by the Commission against Ireland for non-enforcement of the CFP, this could provide a catalyst for change as indeed it did in the past.⁵⁵ Such a situation is looking increasingly likely given the adverse findings against Ireland in an EU audit of Ireland's enforcement regime in the pelagic fishing industry⁵⁶ and also for non-implementation of the point system for masters.

The Revenue Commissioners Administrative Sanction Procedures

A further example of a comprehensive administrative sanction regime is provided by The Finance (No. 2) Act 2008 which introduced a new civil penalty regime to be implemented by the Office of the Revenue Commissioners.⁵⁷ The Revenue had already been empowered to impose penalties prior to this Act being introduced. However, the new civil penalty regime lowers the standards of proof the Revenue are required to meet and provides far less safeguards for taxpayers in order to expedite the process of imposing civil penalties. The definition of behaviour giving rise to a civil penalty has been changed from “fraudulently” and “negligently” to “deliberately” or “carelessly”, thereby significantly reducing the burden of proof which must be met in order for a civil penalty to be imposed.⁵⁸ The level of fixed penalties which may be imposed was also substantially increased.

⁵⁵ JUDGMENT OF THE COURT (Sixth Chamber) of 18 November 2004 in Case C-317/02: Commission of the European Communities v Ireland OJ C 261 of 26.10.2002. See further Chapter 2.

⁵⁶ Lorna Siggins, “EU critical of ‘severe’ weaknesses in Ireland’s fisheries controls” *Irish Times* (5 November 2018).

⁵⁷ Similar to Macrory, the term civil penalty is used in the sense of an administrative sanction rather than a penalty imposed by the courts in a civil capacity.

⁵⁸ Burke J. and McGuinness C., “New Civil Penalty Regime” *Irish Tax Review* (January, 2009) 69. This change could be due to the risk of the words “fraudulently” and “negligently” being suggestive of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights. See further Law Reform Commission, *A Fiscal Prosecutor and a Revenue Court* (Consultation Paper, 2003)

The new legislation provides that in the absence of agreement on a penalty, Revenue may issue an opinion setting out the amount of penalty which it believes the person is liable to pay. The taxpayer then has 30 days to pay the penalty. Failure to do so means Revenue may, depending on the amount of the penalty involved, apply to the District, Circuit or High Court to enforce the penalty. There is no option for the taxpayer to appeal the opinion to the Appeal Commissioners and is likely to lead to inconsistencies between the outcomes in various courts. Burke and McGuinness note that the costs associated with court proceedings, particularly High Court proceedings, represent a deterrent if not a prohibitive factor for most taxpayers and therefore, in the absence of any other avenue of appeal, they are left with no option but to pay the penalty imposed.⁵⁹ In addition, unlike Appeal Commissioner hearings which are heard in camera, such court proceedings are heard in public which may be a further deterrent for taxpayers who do not wish for their tax affairs to be public knowledge.

An increase in power exercised by a public body should be proportionate to an increase in safeguards for affected parties.⁶⁰ In 2003 the Revenue Powers Group recommended that a number of additional safeguards be introduced by way of legislation to address the disparity between the rights of the individual and the need for Revenue to exercise its powers effectively. The group accepted the need for far-reaching Revenue powers provided that adequate safeguards applied to their use and recommended that the legislation should carry the key restraints on the use of the

73-96 https://www.lawreform.ie/_fileupload/Reports/Report%20Fiscal%20Prosecutor.pdf accessed 1 April 2022.

⁵⁹ *Ibid* 70.

⁶⁰ See generally Hogan G. and Morgan D.G., *Administrative Law in Ireland* (Dublin: Round Hall, 2010) Chapter 12.

powers, which may be amplified in codes of practice and operations manuals.⁶¹ A distinction must again be drawn between sea-fisheries and tax law where there is more incentive to introduce an onerous civil penalty regime in order to recover monies owed to the State.⁶² It is more difficult to identify an obvious victim in sea-fisheries cases and therefore, the same level of motivation is not present.⁶³

Under the terms of the legislation, prosecution may still be pursued following the imposition of a civil penalty. This has posed a problem for judges when considering the fine to be imposed given that the taxpayer has already been penalised. As O'Malley remarks:

Most of the case law and commentary on proportionate punishment proceeds on the assumption that the sole official response to an offence is a judicially-imposed sentence usually in the form of a fine or a term of imprisonment. Increasingly, however, responses to crime are becoming more complex and multi-layered. Several offences carry disqualifications as well as formal punishment and many, potentially at least, may be the subject of civil proceedings resulting in an award of damages against the offender ... The existence of such measures, which seem set to become more prevalent,

⁶¹ Revenue Powers Group, Report to the Minister for Finance (November, 2003) 1.

⁶² For example a Revenue survey indicates that deterrence remains an important determinant of compliance behaviour, as do fairness and trust and that the majority of the population considers tax evasion unacceptable. See Walsh K. "Understanding Taxpayer Behaviour-New Opportunities for Tax Administration" (2012) 43(3) *Economic and Social Review* 451, 463.

⁶³ Although awareness of the importance and value of marine and coastal ecosystems is rising. See Worldbank, *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (World Bank, 2017) 56
<https://openknowledge.worldbank.org/bitstream/handle/10986/24056/9781464809194.pdf?sequence=8&isAllowed=y> accessed 1 April 2022,

together with the growth of civil penalties, poses a problem for any sentencing system claiming to be guided by proportionality standards.⁶⁴

In *People (DPP) v Redmond* the court stated that “[i]t is plainly not possible for a sentencing court in a case such as this to ignore the fact that other penalties, which may be much greater in amount than the cumulative sum of the maximum fines for these charges have already been paid.”⁶⁵ The Court cited O’Malley who suggests “a concept of cumulative punishment in which a court must have regard to the total price paid by the offender for his offence”.⁶⁶ The Revenue Powers Group considered a number of potential responses to this issue.

The first potential solution is for Revenue to postpone agreement on civil penalties until the criminal case had been determined. The Group concluded that it is almost certain that this would not solve the problem. The trial judge would require some undertaking from Revenue as to the course being adopted in relation to civil penalties or adjourn the imposition of his/her sentence until the civil penalties had been disposed of.⁶⁷

The second possibility is to permit the judge in the criminal proceedings to determine the civil penalties. However, this could challenge the distinction between civil and criminal penalties.⁶⁸ Another potential solution considered by the Group was to only prosecute cases where the civil penalties would be modest. However,

⁶⁴ O’Malley T., *Sentencing Law and Practice* (Dublin: Round Hall, 2000) 130, emphasis added.

⁶⁵ *People (DPP) v Redmond* [2001] 3 I.R. 390, 402.

⁶⁶ *Supra* note 64, 128.

⁶⁷ Revenue Powers Group *supra* note 61, 28.

⁶⁸ *Ibid* 29.

this might result in less serious offenders being convicted and the more serious offenders escaping prosecution through settlement.⁶⁹

Finally, the Group considered foregoing civil penalties altogether in cases where a prosecution is being instituted. Although this solution does overcome many of the legal problems, the Group concluded that Revenue might have to waive the right to collect substantial civil penalties in favour of proceedings in which they would be required to prove their case beyond reasonable doubt and where the fine imposed might only represent a fraction of the civil penalty foregone.⁷⁰ This type of language and rationale suggests that the focus of Revenue enforcement is maximum monetary return rather than moral condemnation by means of criminal prosecution.

Overall, the group did not reach any conclusion as to how to solve the issues with judges imposing low fines where a civil penalty had already been issued. Consensus seems to be emerging that agencies should choose either administrative sanction or criminal prosecution to comply with the double jeopardy principle. The group pointed out that there is a public interest in civil penalties, most of which are published.⁷¹ Therefore, they argue that civil penalties still carry a moral stigma which is normally reserved for criminal prosecution, opening up the possibility of Revenue moving away from criminal prosecution because of the difficulties it poses in terms of burden of proof and low fines. Serious cases with robust evidence can still be pursued by means of the courts and a custodial sentence sought.

Herein lies the intrinsic difference between Revenue civil penalties and any possible sea-fisheries administrative sanctioning system. Revenue offences deprive

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

the public purse of funds in a far more obvious, immediate and quantifiable way than illegal fishing does. Therefore, Revenue is empowered by legislation to pursue criminal prosecution as well as impose onerous civil penalties which garner significant public interest and social stigma. Similarly, the level of sanction capable of being imposed by the Central Bank's administrative sanctioning system constitutes a response to the financial crash, for which financial institutions have been deemed responsible. Therefore, although the two regimes demonstrate the possibilities for new administrative sanction regimes in this jurisdiction, it remains to be seen whether the same sanction levels or equivalent far-reaching powers of a public body in an administrative sanctioning system for sea-fisheries would be introduced. The most important lesson to be garnered from the two regimes is that an administrative sanctioning system is constitutionally possible. The appropriate limits of that system must then be ascertained. There is no set formula on which to base a system of administrative sanctions for sea-fisheries which guarantees that it will pass constitutional muster. However, an Oireachtas research report on administrative sanctions notes that the courts, understanding the essential importance of administrative financial sanctions to efficient and effective regulatory enforcement, have taken a highly pragmatic approach to questions regarding their constitutionality.⁷²

Over-reliance on Criminal Prosecution

In the UK, the Macrory Review indicates that the UK reliance on criminal prosecution does not provide the flexibility, fairness or moral accuracy required to

⁷² Keyes supra note 54, 24.

achieve optimal compliance across all regulatory regimes.⁷³ Macrory recommends the adoption of a civil penalties regime and a broader enforcement toolbox which would complement, rather than replace, the existing regime.⁷⁴ Similarly in the Irish context, according to a report by the EPA, it is possible that reliance on criminal prosecution for regulatory offences is undermining the concept of criminality and trivialising criminal cases in situations where non-criminal sanctions would have provided a more proportionate means of addressing the moral culpability of the offender and the financial penalty imposed.⁷⁵ The report concludes in much the same fashion as the Macrory report, in finding that the deterrent effect of criminal sanctions for environmental offences has been somewhat reduced due to relatively low penalties being imposed by the courts.⁷⁶ Similarly, an EU report on administrative sanctions for fisheries offences finds that the moral stigma attached to a criminal conviction has also lost its deterrent effect due to the systematic use of criminal sanctions.⁷⁷ This supports the contention that criminal prosecution should be reserved for serious regulatory offences, while administrative sanctions are a more appropriate response for other regulatory breaches.

Given the dependence of administrative sanctions on the threat of more serious criminal sanctions, it follows that the effectiveness of such sanctions is also likely to suffer where the deterrent effect of criminal enforcement is diminished.

⁷³ See Macrory R., *Regulatory Justice: Sanctioning in a post-Hampton World* (May, 2006) <https://restorativejustice.org.uk/sites/default/files/resources/files/Regulatory%20Justice%20Sanctioning%20in%20a%20post-Hampton%20World%201.pdf> accessed 1 April 2022, Macrory R., *Regulatory Justice: Making Sanctions Effective*, Final Report (Cabinet Office, 2006) https://www.regulation.org.uk/library/2006_macrory_report.pdf accessed 1 April 2022.

⁷⁴ EPA *supra* note 4, 39.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Cacaud P., Kuruc M. and Spreij M., *Administrative Sanctions in Fisheries Law* (The Development Law Service UN Food and Agriculture Organization Legal Office, Rome, 2003) 2.2.5 <https://www.fao.org/3/y5063e/y5063e.pdf> accessed 1 April 2022.

Where the criminal enforcement regime is not performing the function that may be expected of it, it may lead to difficulties in the enforcement regime as a whole.⁷⁸ The EPA report mentioned above suggests that the deterrent effect of criminal sanctions would improve if criminal prosecution was reserved for serious breaches and recommends the introduction of additional sanctions, including administrative sanctions, which would enable the regulator to negotiate penalties and deal more readily with less serious breaches.⁷⁹

Macrory also concludes that a greater range of administrative sanctions should be made available to the regulator, reserving the most serious cases for criminal prosecution. He points out that making such options available to the regulator would itself reinforce a more appropriate role for the criminal courts⁸⁰ which can in turn be underlined by recommendations to improve effectiveness of the criminal courts in censuring regulatory non-compliance. Bearing this in mind, in the author's view, more varied enforcement powers outside of criminal prosecution will strengthen the effectiveness of criminal prosecution when it is required for a serious breach of sea-fisheries law.⁸¹

Types of Administrative Sanctions

Civil Penalties

The terms "administrative sanction" and "civil penalty" are often used interchangeably. Civil penalties may take the form of judicial civil penalties which are imposed by the courts or administrative civil penalties which are imposed by the

⁷⁸ EPA *supra* note 4, 40.

⁷⁹ *Ibid.*

⁸⁰ Macrory, Making Sanctions Effective *supra* note 73, 3.4.

⁸¹ See Kadish S.H., "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30(3) *University of Chicago Law Review* 423, 438.

regulator. In A judicial civil penalty is one imposed by the courts in a civil capacity rather than a criminal capacity. Civil penalties usually take the form of a monetary sanction similar to a fine which would be imposed as a result of criminal prosecution.

Judicial civil penalties are useful for more serious regulatory offences which may require the involvement of the courts but may not necessarily be criminal in nature. They may also be useful if there is a concern that criminal sanctions are not operating effectively, and if there are practical difficulties and public perception issues, civil sanctions may enhance the sanction system and provide more flexibility.⁸²

The involvement of the courts in a civil capacity overcomes many of the constitutional hurdles associated with alternatives to criminal prosecution. However, civil penalties may not solve the issues with delay as a civil case may take a similar length of time to a criminal case to come before the courts. It may be more efficient for the SFPA to propose the sanction, an independent panel to issue the sanction and for a court to confirm the sanction, with an option to also appeal to the courts. Although the lower burden of proof which applies to civil penalties would be advantageous to the regulator, the same lower burden of proof could apply to administrative financial sanctions which would provide a better solution for fisheries as they are capable of being imposed more efficiently than judicial civil penalties.

⁸² EPA *supra* note 4, 6.

Warning Letters

Warning letters are situated near the bottom of an enforcement pyramid. They are useful in that they can be issued to regulatees to inform them that the regulator is aware of a breach but that no further action will be taken as long as that breach ceases or is not repeated. Therefore, they add an element of fairness by giving the regulatee an opportunity to reform their behaviour before any escalated enforcement action is taken. The regulator can keep a record of warning letters to keep track of behaviour. A recurrence of the breach, or a failure to cease the action considered to be a breach, may result in the regulator taking further action. Warning letters are most effective when there is a threat of more serious sanctions if the warning letter is ignored. As the warning is recorded, it may be referred to in any subsequent proceedings to strengthen the regulator's case.

In Ireland, planning authorities are given the power to issue warning letters under the Planning and Development Act 2000.⁸³ In the case of an unauthorised development, the planning authority may issue a warning letter which gives the person 4 weeks to make a submission to the planning authority. Once the letter has issued, the authority has to investigate the matter with a view to deciding whether further action is required. This decision must be taken as expeditiously as possible, although there is a statutory objective to decide this within 12 weeks of the warning letter issuing.⁸⁴ Therefore, the warning letter starts the clock ticking in order to expedite the enforcement process. Enforcement of sea-fisheries law in its current form is a long, drawn-out process and this type of timeline triggered by the issue of a

⁸³ S.152 of the Planning and Development Act 2000.

⁸⁴ Department of Environment, Community and Local Government, *A Guide to Planning Enforcement in Ireland* (November, 2012) 8 <https://www.opr.ie/wp-content/uploads/2021/01/Planning-Leaflet-6-A-Guide-to-Planning-Enforcement-in-Ireland.pdf> accessed 1 April 2022.

warning letter would be very beneficial to speed up the enforcement process where further investigation is appropriate.

The EPA and local authorities issue warning letters without any statutory basis, which have proven to be very effective in addressing non-compliance.⁸⁵ The SFPA and the Naval Service previously issued warning letters on a frequent basis for minor breaches of sea-fisheries law which were recorded and further action taken if the breach reoccurred. However, as there was no formal statutory basis for the issuing of warning letters, the practice ended in 2014.⁸⁶ The EU Commission has recommended that warning letters should be reintroduced for minor breaches of sea-fisheries law in Ireland.⁸⁷ The reintroduction of warning letters would be useful to address minor breaches, to give regulatees the opportunity to comply and to provide a richer picture of non-compliance which would inform any decision on whether escalated enforcement action is necessary.

Fixed Penalty Notices

An FPN is a monetary penalty which a regulated entity is given an opportunity to pay as an alternative to prosecution. Where a person pays an FPN, he/she waives their right to have their case heard in court. They cannot then be prosecuted for the offence for which the FPN was issued. Where a person neither pays the FPN nor opts to have their case heard in court, the amount of the FPN may be increased. Where the increased FPN remains unpaid, the body who issued the notice may seek to enforce the notice in court. In some instances, where an FPN is

⁸⁵ EPA *supra* note 4, 23.

⁸⁶ Based on legal advice from the Attorney General.

⁸⁷ Recommendation of EU Commission in Mission Report on Ireland's sanctioning system available due to the author's position.

paid but another similar offence is committed, the regulator may escalate enforcement action to criminal prosecution. It is important to note that an FPN is not the same as a fine. A fine is a consequence of a criminal conviction imposed by a court. The court usually has a discretion as to the level of fine imposed, albeit within certain parameters defined by statute. FPNs are usually more specifically defined under legislation, with specific offences attracting a specific monetary penalty, which is usually quite a low-level sanction.

Watchman notes that the idea of FPNs is superficially attractive.⁸⁸ An FPN can be issued quickly, or even on-the-spot, by the regulator saving the time, money and resources needed for preparing a criminal prosecution. FPNs are used for relatively minor offences and amount to a relatively low monetary penalty. There is a danger that providing for FPNs to deal with certain offences might be perceived as sending out the wrong message about the seriousness of that offence. That perception is lessened where the amount of the FPN is significant. However, the higher the penalty, the greater risk that the penalty is not proportionate to the offence or the circumstances of the offender and that, in turn, might give rise to a high rate of refusals to pay the FPN and only a relatively small reduction in the number of cases dealt with by the courts,⁸⁹ which is one of the reasons for introducing FPNs in the first place.

One of the initial steps in the process of designing an FPN system is to assess an appropriate penalty amount for each specific offence. In order to fairly assess the appropriate amount, it may be necessary to consult with the regulated industry in

⁸⁸ Watchman J. "Planning Enforcement and Enforcement Related Reforms" (2008) 125 *Scottish Planning and Environmental Law* 13, 18.

⁸⁹ *Ibid.*

question.⁹⁰ Consultation has the advantage of involving industry in the process and obtaining agreement on the introduction and scope of FPNs.⁹¹ In Ireland, FPNs are usually a set amount, pitched at quite a low level. However, in the UK, FPNs for environmental offences can either be a set amount or can vary by taking other factors into consideration such as the size of the business.⁹²

In the context of a potential FPN system for sea-fisheries, substantial guidance can be drawn from the Scottish system of FPNs as discussed in the case study to this chapter. If Ireland were to follow the Scottish example, the legislation should provide for general categories of offences with a fixed penalty amount attached to each category. It could be extremely difficult to designate certain specific offences as being suitable for the application of an FPN given the variables involved in breaches of sea-fisheries legislation. The value, conservation status, quantities etc. would all be factors which would need to be considered before determining whether an FPN is appropriate. Therefore, applying the FPN to categories of offences provides greater flexibility and ensures that an FPN is a proportionate sanction in the circumstances.

⁹⁰ Raakjaer Nielsen and Mathiesen note in the Danish context that the lack of involvement of fishers undermines the legitimacy of the management system which may have a negative impact on the incentive to comply with the imposed regulations. To improve the incentive for compliance, they propose that fishers need to be more involved with the processes of management. They acknowledge the challenge to develop appropriate institutional structures, involving researchers, administrators, enforcement agencies, the fishing industry and other stakeholders that will overcome the present barriers of fisheries management. See Raakjaer Nielsen J. and Mathiesen C., "Important factors influencing rule compliance in fisheries lessons from Denmark" (2003) 27(5) *Marine Policy* 409.

⁹¹ EPA *supra* note 4, 23-24.

⁹² Department for Business Enterprise and Regulatory Reform, *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (July, 2008) 36
<https://webarchive.nationalarchives.gov.uk/ukgwa/http://www.berr.gov.uk/files/file47135.pdf>
accessed 1 April 2022.

Some FPN schemes confer a discretion on the regulator to vary the penalty amount to account for the extent of the breach, the cooperation of the offender, as well as proportionality to the non-compliance. However, this type of variable FPN would be unusual in the Irish context and will be discussed further in Chapter 7 in light of the Scottish system. An appeal mechanism might be considered which allows the offender to bring the matter to a higher authority if disagreements arise over the level and type of penalty imposed.⁹³ However, the traditional system in Ireland would be for the offender to dispute the FPN in court, which may provide a better option in the context of a potential FPN system for fisheries as this practice is so well-established.

A further consideration is the ability of the offender to pay. For some individuals the level of penalty may be cost prohibitive.⁹⁴ In the context of sentencing law, O'Malley argues that "[r]egard must be had to the means of the offender when a fine is being imposed."⁹⁵ Most FPN schemes are enshrined in legislation with specific amounts attached to each offence. There should be scope built into the legislation for the regulator imposing the FPN to take account of ability to pay. Macrory notes that some regimes have set thresholds for payment, or introduced settlement options where it is possible to reduce the amount of the penalty by investing in preventative measures that would contribute to ensuring that the violation does not recur.⁹⁶

⁹³ *Ibid.*

⁹⁴ See O'Neil M.M. and Prescott J.J. "Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay Alternatives to Imprisonment" *Law and Contemporary Problems* 82.

⁹⁵ *Supra* note 64, 314.

⁹⁶ Macrory, Sanctioning in a post-Hampton World *supra* note 73, 3.60.

Any FPN system for sea-fisheries would also need to consider to whom the FPN should be issued. An FPN could potentially be issued to both Master and licence holder. Usually only the Master is prosecuted for sea-fisheries offences. Therefore, it is likely that it would be most appropriate to also issue the Master with an FPN rather than the licence holder where the Master is deemed responsible. However, there should be an option for an FPN to be issued to a licence holder if appropriate in the circumstances. It is submitted that it is highly likely that the licence holder would be the person to actually pay the FPN, since they normally pay for the Master's legal fees in the event of a prosecution.

Enforcement Undertakings

An enforcement undertaking is better described as an administrative action rather than an administrative sanction, where the regulated entity agrees in writing to remedy a detected breach within a certain timeframe. This undertaking is a legally binding document which may be enforced in court. The drafting of the undertaking is likely to involve negotiation between the regulated entity and the regulator. Where the breach is controversial, this may lead to protracted negotiations which could take considerable time. The regulated entity may seek to delay the escalation of enforcement action by holding up the finalisation of the enforcement undertaking, thus exploiting the process. The regulator is required to monitor the progress of the agreement and to assess whether the objectives of the agreement have been met by the regulated entity, which again draws on the time and resources of the regulator.⁹⁷ Disputes may arise over interpretation of the agreement's objectives and as to

⁹⁷ EPA *supra* note 4, 23

whether these objectives have been achieved, which may involve further negotiation eventually requiring the adjudication of the courts.⁹⁸

Enforcement undertakings are a novel measure in that the regulatee approaches the regulator to offer the enforcement undertaking which can be tailored to the individual circumstances of the offence and the offender and, therefore, represent a flexible and creative way of addressing regulatory non-compliance.⁹⁹ In the context of environmental offences, the Environmental Agency in the UK only considers accepting an enforcement undertaking where:

- The agency is confident that the terms of the enforcement undertaking will be complied with;
- The agency believes a breach of relevant legislation has occurred;
- The agency considers the enforcement undertaking to be the correct regulatory outcome taking into account:
 - the nature of the offence and its impact;
 - other forms of enforcement available, to remedy the issues concerned, to the environment and the community.
- the offer is above what the company would normally need to do to comply;
- the offer is given in good faith;
- the offeror makes a positive commitment, at the right company level to stop the offending conduct or alleged breach and to maintain compliance;

⁹⁸ *Ibid.*

⁹⁹ Abbot C., "The Regulatory Enforcement and Sanctions Act 2008" (2009) *Environmental Law Review* 38, 43.

- the offeror rectifies the consequences of the conduct, including interacting with any third party affected by the offence;
- the offer does not contain restrictions on how the agency may publish its acceptance in cases involving pollution of the environment or harm to human health and it is demonstrated that any necessary remediation or restoration work commenced or will commence at the earliest opportunity.¹⁰⁰

The agency is more likely to accept an enforcement undertaking where it is offered early and proactively.¹⁰¹ An enforcement undertaking is not normally accepted where:

- it falls under certain classes of harm;¹⁰²
- legal proceedings have commenced;
- the offence was intentional or of the most severe environmental impact;
- it has already been decided that a prosecution is appropriate in the public interest;
- offer is made after the issue of a Variable Monetary Penalty notice of intent;
- the undertaking contains a clause denying liability;

¹⁰⁰ Environment Agency, *Policy Paper Annex 1: RES Act- The Environment Agency's Approach to Applying Civil Sanctions and Accepting Enforcement Undertakings* (20 December 2019) 3.1 <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings> accessed 1 April 2022.

¹⁰¹ *Ibid.*

¹⁰² The Enforcement Agency use culpability and harm guidelines in determining the seriousness of a breach and which offence category it should come under in terms of assessing the appropriate penalty which should apply. See Sentencing Council, *Environmental Offences Definitive Guideline* (2014) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf> accessed 1 April 2022.

- the undertaking contains any clause that sets up defences for possible breach of an enforcement undertaking.¹⁰³

Under the Regulatory Enforcement and Sanctions Act 2008, an undertaking can be accepted where the regulator has reasonable grounds to suspect that a relevant offence has been committed. Where an undertaking is accepted, that person cannot be convicted of the offence to which the undertaking relates, nor can a fixed or variable monetary penalty be imposed on that person. However, where there is a breach of an undertaking, the regulator may prosecute the business for the original offence or may impose an administrative sanction.¹⁰⁴

The UK did not implement Macrory's suggestion of "Undertakings Plus" wherein he opined that the system should be flexible enough to incorporate situations whereby a regulator may consider that while an undertaking may be appropriate, the circumstances of the breach also require the payment of a financial penalty, for example, where there has been clear financial gain.¹⁰⁵ This would seem to undermine the spirit of the enforcement undertaking and would make regulated entities less likely to engage with such a process.

Kellett advises that in the context of environmental offences these types of agreements are more effective when negotiated with companies with a good compliance history and not as suitable in the case of intentional breaches in bad faith.¹⁰⁶ They are also not as suitable for dealing with serious cases which would be dealt with more appropriately by means of criminal prosecution. He also points to

¹⁰³ *Ibid* 3.2.

¹⁰⁴ *Ibid* 3.5.

¹⁰⁵ Making Sanctions Effective *supra* note 73, 4.30.

¹⁰⁶ Kellett P., "Balancing the Stick and Carrot in Securing Compliance and Enforcement in England" (Law and Environment Conference, UCC, April 2016).

the danger of clauses in the agreement denying liability or setting up a defence for possible non-compliance.¹⁰⁷

Enforcement undertakings could be particularly effective when dealing with a fleet of vessels owned by one licence holder. Rather than prosecuting each master individually, the entire fleet can be targeted at once, thus addressing the illegal activity in a much more efficient manner which is more beneficial to the resource. Coupled with the threat of escalated enforcement action, an enforcement undertaking could prove extremely effective in the case of continuous breaches by a fleet. However, as previously stated, enforcement undertakings are less effective in the context of intentional breaches and so may need to be offered by the licence holder of the fleet as part of a new working relationship with the regulator or enforcement body. Therefore, the regulator must retain the right to prosecute or impose an administrative financial sanction where the undertaking is not complied with. Therefore, the effectiveness of the enforcement undertaking, as with all other lower tier sanctions, depends on the effectiveness of the apex level sanctions.

Negotiated Compliance Agreements

A negotiated compliance agreement (NCA) is essentially the same as an enforcement undertaking i.e. an agreement between the regulator and the regulated entity where the regulated entity voluntarily agrees to rectify or remediate a non-compliance. However, as the literature treats them separately, it is proposed also to discuss them separately in this section. NCAs are “increasingly touted as the wave of

¹⁰⁷ *Ibid.*

the future”.¹⁰⁸ Negotiation may be a more efficient use of resources because it is more likely to produce a result that all sides can accept. Moreover, negotiation is said to be more likely to produce creative solutions because it forces the parties to focus on cooperation rather than confrontation.¹⁰⁹ This is an attractive offer for both regulators and regulated entities because it saves time, money and resources on both sides while still addressing the breach. NCAs are particularly useful to regulators where the intention is to correct non-compliance rather than to punish. Even where a breach is punishable as a strict liability offence, conviction may not remedy the underlying cause of non-compliance.¹¹⁰ NCAs are particularly useful in that they may include follow-up clauses to ensure compliance, which a fine in court may not achieve.

Taking the example of sea-fisheries law, there is quite a high level of recidivism¹¹¹ which could be addressed by an NCA with certain fleets which includes follow-up clauses. For example, the Office of the Director of Corporate Enforcement (ODCE) makes agreements for breaches of company law which include follow-up provisions that allow the ODCE to seek evidence of rectification and to issue warnings of sanctions that may be sought if a default continues or reoccurs. In this way, steps such as seeking High Court orders or commencing criminal

¹⁰⁸ Ashford N.A. and Caldert C.C., “Negotiated Regulation, Implementation and Compliance in the United States” in Croci E. *The Handbook of Environmental Voluntary Agreements: Design, Implementation and Evaluation Issues* (The Netherlands: Springer, 2005) 135.

¹⁰⁹ *Ibid* 136.

¹¹⁰ Law Reform Commission *supra* note 47, 29.

¹¹¹ The evidence on compliance in fisheries suggests that the fishing population can be divided into two groups: those that usually comply and those that frequently violate. This characterization is consistent with the evidence on criminal activity in general. See Sutinen J.G., Rieser A., and Gauvin J.R. “Measuring and Explaining Noncompliance in Federally Managed Fisheries” (1990) *Ocean Development and International Law* 21(3) 335, 337.

prosecution can be reserved for the most serious cases rather than being used as the default enforcement options.¹¹²

Cacaud *et al.* found that out-of-court settlements, which are similar to NCAs, allow the fisheries authority to tailor the sanction to a particular case in a more effective manner than a court would.¹¹³ Out-of-court settlements may result in a swifter decision than criminal proceedings and could be more effective which in turn may have the effect of strengthening the authority of the enforcement officers.¹¹⁴

In the US, the National Oceanic and Atmospheric Administration (NOAA) can agree to settlement conditions well beyond those specifically authorised by statute. The NOAA routinely tailors the sanction to the circumstances of the offender in order to maximise the sanction effectiveness. Often creative solutions to non-compliance are driven by a lack of money on the part of the offender but can also occur because monetary relief is not seen as the most meaningful.¹¹⁵ Instead, significant emphasis is placed on education and advice. Some alternative solutions used have included:

- public service videos, advertisements in newspapers or trade publications taken out by violators where the violator explains to his peers what he has done wrong and tries to help them benefit from his mistakes;
- community service in a task related to the violation;
- installation and use of vessel monitoring systems where it is not otherwise required;

¹¹² *Ibid.*

¹¹³ *Supra* note 77, 2.2.4.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

- sale of vessels;
- permanent surrender of permit.¹¹⁶

Utilising the knowledge and experience of the regulator, as occurs in the US, may result in more tailored and appropriate penalties for breaches of sea-fisheries law than are possible through criminal prosecution alone.

NCAAs should be provided for by statute to avoid being unenforceable voluntary agreements. Statutory provisions authorising NCAAs give binding legal effect to agreements and help ensure that the agreement achieves its regulatory objective.¹¹⁷ Such agreements depend on the possibility of criminal prosecution which is likely to result in a substantial fine. If there is no real likelihood of enforcement proceedings being commenced, there is little incentive to negotiate an agreement.¹¹⁸ Therefore, NCAAs are more effective for dealing with breaches which are capable of being prosecuted which underlines the need for criminal prosecution to operate as a real and substantial threat.

Variable and Discretionary Penalties

Variable and discretionary penalties are so-called as they consist of a payment of a variable amount to be determined at the discretion of the regulator. To avoid concentrating too much power in the regulator, legislation usually provides a maximum penalty which the regulator can vary at its discretion. Similar to FPNs, where a person pays a variable monetary penalty, he/she waives the right to have

¹¹⁶ *Ibid.*

¹¹⁷ Law Reform Commission *supra* note 47, 30.

¹¹⁸ Revenue Powers Group *supra* note 56, 31.

their case heard in court and also cannot subsequently be prosecuted for the offence to which the variable monetary penalty relates.

Macrory suggests that the final decision on the level of variable monetary penalty should not be made by officers on the ground where potentially large sums are involved.¹¹⁹ They can make a recommendation but not make the final decision. This would serve to ensure that the relationship between the inspector and the business is not compromised. The separation of the decision-making process also helps ensure that the regulator is consistent, transparent and accountable in the use of administrative sanctions and provides a framework to ensure that industry are protected from the inappropriate application of administrative sanctions.¹²⁰ He suggests using either the courts or a specialist tribunal to gather the monies which should be handled independently from the regulator that imposed them.¹²¹ It should also be clear that the monies do not in any way fund the regulator but instead go into government funds. The transparency this provides boosts confidence in the fairness of the system and is essential to avoiding perverse incentives to apply high monetary penalties.¹²²

Following the issuing of the penalty, there should be a right of appeal to an independent tribunal or the courts to ensure fairness. Macrory prefers the tribunal option for two main reasons. Firstly, the tribunal could be composed of members with specialist expertise in the matter. For example, in the case of sea-fisheries, judges may not fully appreciate the environmental damage caused by the breach.

¹¹⁹ Macrory, Making Sanctions Effective *supra* note 73, 3.44.

¹²⁰ *Ibid* 3.61.

¹²¹ *Ibid* 3.61-3.62.

¹²² Macrory R., "Sanctions and Safeguards: The Brave New World of Regulatory Enforcement" (2013) 66 *Current Legal Problems* 233, 247-249.

Secondly, cases would not be considered alongside traditional crime which Macrory believes to be entirely different in nature.¹²³ Fines imposed by courts for regulatory breaches may be quite low when the same court is faced with serious violent crime, which relates back to the harm focus of the criminal law as discussed in Chapter 4.

Macrory argues that a tribunal could provide a more flexible, accessible and expeditious appeal mechanism than the courts.¹²⁴ This would depend on the tribunal operating efficiently. Tribunals in this jurisdiction are notoriously slow in coming to a conclusion. If the appeal could be made to a specialist board such as exists in relation to planning or aquaculture licensing, this could be a more efficient route of appeal. However, it is likely that, at least in the initial phases of such a system, the decision of the board would be appealed to the High Court and possibly also the Court of Appeal and Supreme Court. This would lead to an extremely prolonged appeals process. It may be more efficient to allow appeals proceed directly to the courts rather than introducing an administrative appeals board. The extra value this would add to the process needs to be considered and is discussed further in Chapter 7.

In the UK, guidance was issued to illustrate how regulators might calculate a variable and discretionary penalty. Where a breach would ordinarily constitute a summary offence, the maximum level of penalty is usually £5,000. For other offences, possible aggravating factors include:

- Seriousness of the regulatory non-compliance, e.g. the harm to human health or the environment, the duration of the non-compliance etc;

¹²³ Macrory, Making Sanctions Effective *supra* note 73, 3.49.

¹²⁴ *Ibid.*

- A history of non-compliance by the business;
- Financial gain made by the business as a result of non-compliance with regulations;
- The conduct of the business after the non-compliance has been discovered;
- Previous actions taken by the regulator, or other regulators, to help the business into compliance.

Possible mitigating factors include:

- A previously good compliance record;
- Action taken to eliminate or reduce the risk of damage resulting from regulatory non-compliance;
- Voluntary reporting of regulatory non-compliance;
- Actions taken to repair the harm done by regulatory non-compliance;
- Co-operation with the regulator in responding to the non-compliance.¹²⁵

It is likely that variable and discretionary penalties for breaches of sea-fisheries legislation would be appealed on the grounds that they usurp the judicial function. However, based on the extensive administrative sanctioning and civil penalties regime operated by the Central Bank and Revenue Commissioners, it seems that variable and discretionary penalties are constitutionally permissible. Judicial reviews of legislation introducing variable and discretionary penalties would cause significant delay and would be extremely expensive. Part of the rationale for introducing administrative penalties is to speed up the enforcement process by

¹²⁵ Guidance to the Act *supra* note 92, 47.

removing criminal prosecution which is time-consuming and prone to delays. The potential time, resources and cost savings would be negated in the short term if the system is subject to judicial review.

However, in the long term, in the opinion of the author, variable and discretionary monetary penalties would improve enforcement by providing more effective, proportionate and dissuasive sanctions as required by EU law. Therefore, the introduction of this type of administrative penalty regime would need to be done carefully to insulate the system from challenge as much as possible. In particular, penalties should be confirmed by a court and appeals mechanisms need to be extremely robust.¹²⁶ Chapter 7 examines how a system of variable and discretionary penalties might operate in practice in conjunction with other alternative sanctions as well as criminal prosecution.

In the UK it is possible to pursue both a variable monetary penalty and a criminal prosecution for certain offences where appropriate. In the Irish context, the Revenue has faced issues with low fines being imposed in the criminal courts where a monetary penalty has already been imposed by the Revenue. Therefore, the Revenue has moved more towards only pursuing a monetary penalty because it offers the opportunity to recover more funds for the public purse. In the case of sea-fisheries, it may be more appropriate to only pursue criminal prosecution in serious cases and forego any monetary penalty. In the opinion of the author, pursuing both administrative and criminal action may be viewed as unfair by industry and the public. As previously discussed, this is due to the intrinsic difference between sea-fisheries offences and Revenue or financial offences in terms of how apparent the

¹²⁶ As previously discussed in this chapter pp. 222, 224, 249-250.

financial damage is to the taxpayer. There is also an undeniable difference in pursuing an individual fisher versus the director of a financial institution or company. An Oireachtas Report on administrative sanctions notes that although simultaneous administrative and criminal action may be constitutionally permissible, legislation usually tends to only allow for one option in order to uphold the perception of fairness.¹²⁷ Therefore, it is almost certain in an area as politically charged as fisheries that legislation would not allow for both an administrative financial sanction as well as criminal prosecution.

Monetary Benefits Penalty Orders

A monetary benefits penalty order is a further sanction option where the offender must pay a sum equivalent to the profit obtained from the breach. Such an order may be made on its own or more usually accompanies an administrative financial sanction. Therefore, this type of sanction depends on the regulator being able to quantify the benefit or profit obtained. It may also depend to a large extent on ability to pay, particularly where it would endanger the liquidity of the business in question. It may be very difficult to quantify benefit obtained and even more difficult to prove. This would require economic analysis of a violation and particular expertise. Even then, this may be a matter of opinion or an estimation and impossible to prove. There is also a danger that the penalty may be seen as arbitrary, likely to lead to many challenges and appeals. This may lead to a protracted and expensive process with no discernible gain.¹²⁸

¹²⁷ Keyes *supra* note 54, 15.

¹²⁸ EPA *supra* note 4, 24.

In the context of fisheries offences, a valuation of the total catch to which the offence relates is always provided to the court. In the case of a detention, the value of the catch is paid to either the SFPA or the court and is held until the trial has concluded. The value is returned in the case of a finding of not guilty by the court, or the difference between the court order and the sum held is returned where the accused is found guilty or enters a plea of guilty. Therefore, there is already an established practice of valuing the catch and the offender having to pay that sum. This suggests that in the case of fisheries offences a monetary benefits penalty order could be tacked on to another administrative sanction. However, one could argue where only a portion of the catch is illegal, that only this figure could be considered the profit subject to the monetary benefits order. Such a calculation would also have to assess the costs to be deducted in terms of wages, fuel etc. which would reduce the figure further. It would be a more straightforward solution for the administrative sanction itself to simply include and reflect the profit obtained from the infringement rather than attempting to isolate such a figure for the purposes of this type of order.

Compensation Orders

Compensation orders are most commonly imposed for environmental offences where there has been environmental damage. They are normally used in conjunction with another type of penalty. The compensation order may go to remediation of the damage or to compensate either the regulator or a third party for the costs incurred in taking action or remedying the breach.¹²⁹ It is common for costs to be awarded against a guilty party. However, in sea-fisheries cases, the State do not always request an order for costs where the accused has pleaded guilty. It would be

¹²⁹ *Ibid* 20.

difficult, if not impossible to quantify in monetary terms the damage caused by a particular breach of sea-fisheries legislation and it is submitted that a compensation order would not remedy this damage in the same manner as is possible in, for example, a site remediation for an environmental offence. Therefore, this type of administrative penalty is not suitable for breaches of sea-fisheries law.

Publicity Orders

Name and Shame or Publicity orders are a novel type of sanction which involves publicity of the offence and the penalty imposed by either the regulator or the offender themselves. For example, the Food Safety Authority of Ireland regularly publishes lists of food establishments which have breached food safety requirements and the corresponding action taken. The EPA also publishes details of prosecutions and fines imposed. It is also possible to require the offender to publish details of the breach and its consequences, penalty imposed and action taken.

Taking the concept a step further, the EPA can publish details of businesses on their National Priority Site List for enforcement, which is frequently picked up by the media, generating significant public interest.¹³⁰ This is quite an intrusive power given that the businesses have not been convicted by a court but are a top priority for the EPA due to issues with compliance and in some cases are the subject of public complaints. It is essentially a public threat of escalated enforcement action designed to force companies into compliance.

The introduction of such a measure could be potentially damaging to the relationship between a regulator/enforcement body and the regulated entity. In the

¹³⁰ See for example, Clíodhna Russell, "Five Worst Offenders for breaching environmental laws named" *The Journal* (12 July 2017).

case of sea-fisheries, frequently the licence holder is a private person as opposed to a company. The publication of the regulator's top enforcement priorities could be considered a violation of their right to privacy under the Constitution. It may be possible to publish the names of the vessels which are a priority. However, vessel names can easily be connected to the owner, therefore the same issues may be encountered. It is also a possibility that where administrative sanctions are imposed, the regulator could publish a list of sanctions issued and their recipients.

Publication of the names of non-compliant licence holders or masters would underline the seriousness of fishing offences which damage the environment in a similar way to the businesses published by the EPA. A number of the businesses on the EPA list are reported because they are causing a nuisance to the public. Fishing offences are often invisible to the public but also have an adverse effect on the marine environment in terms of the loss of biodiversity and ecosystem services which the public should arguably be made more aware of.

Administrative Sanctions for Fisheries?

In Australia, an administrative sanction regime was introduced in the 1990s in relation to company directors to confine criminal prosecution to only the most serious offences where directors had acted fraudulently or dishonestly.¹³¹ Administrative sanctions were to deal with all other offences committed by directors. The new regime was to reflect the principles of responsive regulation.¹³² It was thought that administrative sanctions would provide a more flexible and cost-

¹³¹ S. 9.4B of the Corporations Act 1989 as inserted by s. 17 of the Corporate Law Reform Act 1992.

¹³² See Gething M., "Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?" (1996) 24 *Australian Business Law Review* 375, 379-80 and Gilligan G., Bird H. and Ramsay I., "Civil Penalties and the Enforcement of Directors' Duties" (1999) 22 *University of New South Wales Law Journal* 417, 425.

effective response to misconduct in comparison to criminal prosecution which was previously used exclusively to deal with breaches. However, the Australian courts resisted administrative sanctions, considering them to be quasi-criminal and requiring the same high standards and procedures as criminal trials.¹³³

Welsh notes that the regime has not been implemented in a manner consistent with the principles of responsive regulation as was envisaged,¹³⁴ which would demand that the regulatory body considers whether or not an administrative sanction is an appropriate response prior to initiating a criminal prosecution. In the majority of cases, this should result in more administrative sanctions than criminal prosecutions. However, this has not transpired in the Australian experience.

Welsh suggests that this is due to the regulator's decision-making process being inconsistent with responsive regulation.¹³⁵ The regulator is acting in a political environment where vigorous public and political debate about its actions needs to be taken into consideration. The regulator must continuously provide strong justification for any decision not to take a criminal prosecution. Responsive regulation does not consider in detail how the political and social environment in which a regulator operates might influence the regulatory strategy adopted by it, which has been shown to have the potential to completely undermine its implementation.¹³⁶ Partly due to this political and social pressure, it is only after a criminal prosecution has been ruled out that the regulator's decision-making process

¹³³ Hutchinson B., "Administrative Sanctions for Corporate Wrongs" (2014) 21(11) *Commercial Law Practitioner* 246.

¹³⁴ Welsh M., "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" (2009) 33 *Melbourne University Law Review* 908, 909.

¹³⁵ *Ibid.*

¹³⁶ Parker C., "The 'Compliance' Trap: The Moral Message in Responsive Regulatory Enforcement" (2006) 40(3) *Law and Society Review* 591, 593.

begins to resemble the model that is envisaged by responsive regulation.¹³⁷ In other words, the regulator automatically refers the majority of cases to the public prosecution service due to societal and political pressure to be tough on white collar crime, even where criminal prosecution is not appropriate. When the public prosecutor confirms that no criminal prosecution will be instituted, then the regulator is finally free to begin to properly consider what type of penalty would most appropriately address the breach. Most likely, the regulator is aware that the case will not meet the threshold for criminal prosecution but refers the case anyway in order to be seen to be taking action.

Sea-fisheries law and the SFPA operate under similar political and social pressure, albeit in the opposite sense, where criminal prosecution of Irish fishers is controversial, but where administrative sanctions are also contentious. Therefore, an administrative sanction system for fisheries, and indeed any other administrative sanction regime which may be introduced in other areas of regulation in Ireland, must be designed carefully in order to avoid a continuing practice of automatic referral for prosecution. The regulator should be able to freely exercise its discretion, subject to procedural safeguards, to assess the breach and select the most appropriate penalty, which in some cases may be to do nothing at all. Therefore, the regulator must operate as an independent entity. It is valuable to acknowledge the political and social pressure at play in so that any proposed system can avoid such pitfalls to the greatest possible extent.

¹³⁷ Welsh *supra* note 134, 910.

Coffee found that regulators are likely to choose criminal sanctions over administrative sanctions where they have both types of sanctions at their disposal.¹³⁸ Responsive regulation posits that in these situations the most successful regulators will, in the majority of cases, utilise administrative sanctions, reserving criminal sanctions for the worst cases. However, Coffee argues that regulators prefer the publicity associated with criminal prosecution, including that it benefits the regulator's image as a tough enforcer which provides a deterrent effect. This can in turn result in greater funding for the regulator and boost staff morale.¹³⁹

It is submitted that these findings are not directly applicable to sea-fisheries since fines in many cases are low in comparison to the profit gained which does not have a deterrent effect. Sea-fisheries cases in general do not garner a huge amount of publicity or boost staff morale. In the experience of the author, staff are often frustrated by the outcome of cases submitted for criminal prosecution. However, it is clear that the regulator would need comprehensive guidelines to ensure appropriate sanction choice. The enforcement pyramid "can make the task of regulation appear deceptively simple".¹⁴⁰ In practice, it can prove challenging to implement,¹⁴¹ especially in a highly politicised environment such as sea-fisheries.

A study of the effectiveness of administrative regimes in relation to EU environmental regulations found the following benefits to administrative sanction regimes which may be instructive to any administrative sanction regime for sea-fisheries:

¹³⁸ Coffee J.C., "Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can Be Done About It" (1992) 101 *Yale Law Journal* 1875, 1888-1889.

¹³⁹ *Ibid* 1888-9.

¹⁴⁰ Haines F., *Corporate Regulation: Beyond "Punish or Persuade"* (Oxford: Clarendon Press, 1997) 219.

¹⁴¹ Parker *supra* note 136.

1. The procedure is faster and less costly as compared to criminal proceedings, the results of which are uncertain.

The State incurs extremely high costs in taking a criminal prosecution in the case of every breach of sea-fisheries law.¹⁴² There is usually considerable delay in cases coming before the courts where cases are consistently adjourned, particularly where a trial on indictment is necessary, which increases costs. It is also important to consider the costs associated with cases which result in no prosecution due to evidential issues, which occurs quite frequently given the high burden of proof which must be satisfied. Where a criminal case is successfully pursued, usually by means of a guilty plea, the fines imposed can differ greatly between various courts around the country. Similarly, different judges dealing with comparable cases has resulted in vastly different outcomes. Sometimes, even the same judge can impose very different fines in broadly similar cases. This may depend on arguments made in mitigation, or the judge's own view of the case.

2. The administrative competent authority can take a measure that is immediately applicable so that the infringement can be tackled with the shortest delay, notwithstanding the possibility for the addressee to challenge such decision before a court.

Due to the delays inherent in taking a criminal prosecution, this would be a welcome benefit of administrative sanctions in making the enforcement of sea-fisheries law more efficient. It could also result in a better outcome for the marine environment as

¹⁴² Similar to costs and delays experienced in the UK see Comptroller and Auditor General, *Fisheries Enforcement in England* (2003) <https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2003/04/0203563.pdf> accessed 4 April 2022.

offences could be addressed more quickly resulting in less damage. The knowledge that sanctions will be applied immediately may provide a greater deterrent. There is also a greater likelihood of an administrative sanction being applied where many cases may not meet the DPP evidential test. It may also provide a greater deterrent to other regulatees where they can see sanctions being applied immediately. However, it is important to be realistic about the immediacy of sanctions given the right of appeal which would have to be built into the system. This may prevent sanctions from being applied immediately, at least in the initial stages of implementation which would likely entail a high volume of appeals. Where appeals are made to the High Court, this could take a number of years. However, once the system beds down, administrative sanctions should operate much more efficiently than criminal prosecution.

3. The administrative enforcement regime offers a great variety of measures, including accessory measures that can be applied either before or concurrently to the sanction imposed. Such measures may provide an incentive or be coercive in nature.

The existence of a greater range of administrative sanctions would allow the SFPA to tailor the action or sanction to the regulatee in question. The SFPA could select the most appropriate tool possible to address the type and scale of breach of fisheries law with knowledge of the offender's compliance history. It would also allow the regulator to work with individuals and companies to foster relationships where appropriate, but also the freedom to act quickly in addressing serious or repeated non-compliance more coercively. Currently, the regulator has no option but to proceed to criminal prosecution which is neither appropriate nor effective in many cases. The feasibility of combining extra measures with the sanction would depend

on the circumstances of the case but would most likely only be possible in the context of enforcement undertakings or negotiated compliance agreements. Where a person has already paid an FPN or variable monetary penalty, it may not be possible to require any further action on their behalf.

4. Administrative sanctions are better tailored to address environmental infringements as they primarily concern the conditions under which an activity may be exercised.

This is also true of sea-fisheries legislation, in that the regulations primarily concern the conditions which must be met in order to fish. As a highly regulated industry, vessels are subject to a myriad of conditions. The volume of legislation can be extremely difficult for judges and juries to comprehend. Therefore, administrative sanctions may address a breach of the conditions more effectively and efficiently as they are proposed by the regulator with knowledge of the legislation and the significance of the breach.

5. Administrative sanctions can be imposed on legal persons as well as on natural persons, which help overcome limitations of criminal systems where only culpa in eligendo or in custodiendo applies.

This point is also applicable to sea-fisheries, in that previous prosecutions of companies have resulted in extremely low fines in comparison to prosecution of the Master who was actually in control of the vessel at the time of the offence. This does not take account of the fact that the Master is effectively an employee of the company, which could also be culpable in the commission of the offence. Where prosecution of a company is not effective, it may be more appropriate to impose an administrative sanction on a company where there are consistent issues with

compliance in relation to a fleet belonged to the company rather than prosecuting the individual masters which would not show any pattern of offending. Targeting the company may be more effective in achieving compliance across the fleet and may result in a better outcome for the marine environment.

6. Wherever the person exercising an activity potentially harmful to the environment is linked to the administrative competent authorities through a special relationship (permit, registration, reporting obligation), the administrative measures and sanctions can be imposed on the basis of an informed decision.¹⁴³

The SFPA may be better placed to make an informed decision as to proposed sanction than a judge as the regulator has a full grasp sea-fisheries legislation and the consequences of the breach, including its effect on the marine environment. The regulator has access to a full compliance history which allows the regulator to tailor the sanction more effectively, where a judge must be guided by submissions made to him by both the prosecution and defence on the level of fine to be imposed.

However, an independent panel and High Court confirmation of sanction would be necessary to actually impose the sanction in order to satisfy fair procedures and constitutional requirements. Therefore, the role of the regulator would be confined to proposing the sanction in question.

¹⁴³ Milieu Ltd. and Huglo Lepage Associates, *Study on measures other than criminal ones in cases where environmental Community law has not been respected in the EU Member States Summary Report* (2004) 64 https://ec.europa.eu/environment/legal/crime/pdf/cd_summary_report.pdf accessed 4 April 2022.

In addition to highlighting the advantages of administrative sanction regimes, the same study identified that their efficiency in terms of enforcement may be undermined for the following reasons:

1. There is great discretion left to competent authorities with regard to the decision to sanction or not. In addition, there is no immediate control over the administration's appreciation of the situation.

It is essential to any potential administrative sanction regime in this jurisdiction that control is exercised by means of court confirmation of sanction and a robust appeal system to the courts. The regulator should also issue guidelines on how it selects an appropriate, proportionate sanction to ensure consistency, transparency and accountability. Commentators also recommend that the regulator should have to report on its enforcement decisions and sanction choices to the legislature to further enhance accountability.¹⁴⁴ For example, the SFPA could publish details in its annual report as well as presenting to an Oireachtas committee annually in order to ensure it is exercising its discretion fairly and in line with a really responsive strategy.

2. In most Member States, sanctions can only be imposed after “warnings” have been addressed, thus giving more place to negotiations rather than punishment.

The regulator should take the most appropriate action and should not be tied to issuing a warning first. As previously discussed in the context of planning law, warning letters can be very useful in getting the enforcement process moving.

However, a warning letter should not be a prerequisite for more severe enforcement

¹⁴⁴ Macrory, Making Sanctions Effective *supra* note 73, 2.12. See also Kilcommins S., Leahy S. And Spain E., “The Absence of Regulatory Crime from the Criminal Law Curriculum”, 11 in Gledhill K. and Livings B. (eds) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Oxon: Routledge, 2017).

action if such action is necessary. Similarly, there should be no requirement to offer an FPN first if this does not reflect the seriousness of the breach. The regulator should be able to enter into the pyramid at the appropriate level and not be required to start at the bottom in all cases, hence the author has recommended a really responsive approach which allows for greater flexibility and tailoring of sanction than the classic responsive approach.

3. The proximity between competent authorities and local companies may affect the margin of manoeuvre of the competent authority in a way that leads to bargaining to achieve compliance rather than to a deterrent punishment, thus giving priority to some private vested economic interests instead of protecting the environment.

There is a risk that this could occur in the case of the SFPA. However, a more varied regulatory toolkit combined with accountability mechanisms would help to ensure that the regulator can take compliance-orientated actions as well as propose deterrent sanctions. Enforcement undertakings and NCAs do involve bargaining but this can be positive rather than negative. Placing the responsibility for choice of sanction on higher levels of management rather than officers in the field can also avoid issues with proximity, while simultaneously protecting the working relationship between officers and the industry. The adjudication of an independent panel in determining whether a sanction should apply would also help to alleviate the risk of proximity.

4. The lack of transparency in the decision-making process leaves aside the public and NGOs, creating some obscurantism in particular when enforcement tasks are not differentiated from other administrative duties such as permitting.

Court confirmation of sanction and an appeal system through the courts is in the public domain which would ensure transparency in the process. Administrative sanctions are usually published which would also go towards transparency. A consultation process should be undertaken when the system is being designed to ensure both the industry and the public have an opportunity to air their views. Their input should inform any proposed system and should not be tokenistic. Reporting on sanctions to the government would also provide a forum for submissions from the industry, NGOs and the public.¹⁴⁵

5. Administrative enforcement procedures are not implemented in an integrated manner. Administrative sanctions are rarely designed in a coherent and integrated manner which leads to a fragmented regime where some sanctions may be stricter in case of certain infringements than for others.

A coherent and integrated system of sanctions must be prioritised to ensure administrative sanctions deliver a more effective, proportionate, dissuasive and efficient system than is currently in place. Consultation with industry and the public is necessary to achieve this along with streamlined internal procedures within the regulator itself to ensure consistency, transparency and accountability in the application of sanctions. If sanction choice were to remain with inspectors, this may lead to inconsistency in sanction choice. However, the application of detailed guidance procedures by the regulator and the involvement of an independent panel and the courts, where their decisions are publicly available would enhance

¹⁴⁵ Sutinen and Kuperan point out the importance of legitimacy of the regulator in securing compliance. Systematic reporting of this nature goes to the legitimacy of the regulator/enforcement body. See Sutinen J.G. and Kuperan K. "A Socio-Economic Theory of Regulatory Compliance" 26 (1999) *International Journal of Social Economics* 174, 187.

coherence, consistency and predictability of sanction and level of sanction. The potential design and implementation of such a system will be discussed in Chapter 7.

6. Administrative sanctions are not aggravated in the case of recidivism of infringements.

It is possible to take recidivism into account where there are multiple enforcement options available. FPNs may be increased depending on the system in question, and variable monetary penalties can take recidivism into account when determining the level of penalty. Recidivism is also relevant in deciding whether or not to accept an enforcement undertaking or NCA. Where there is recidivism it may be more appropriate to pursue escalated enforcement action. The regulator should provide guidance on the type of recidivism which will be taken into account i.e. repetition of the same breach of sea-fisheries legislation or can other breaches be taken into account. In the case of an FPN, it may be that repetition of the same offence only triggers a higher FPN, whereas, in the case of variable monetary penalties, a different offence than previously committed could be taken into account and may result in a higher penalty being imposed. The seriousness of the subsequent offences would require consideration in deciding whether, and by how much the level penalty would be affected. Both scenarios would require reasons and justification from the imposing body. Consideration would also need to be given to whether the recidivism is such that criminal prosecution is the most appropriate action, which would again require justification.

7. There is little or no social blame associated to administrative sanctions.

Husak notes that even though alternative modes of social control may do a better job reducing the incidence of criminality, they may fail to achieve an indispensable objective of the criminal sanction: expressing censure.¹⁴⁶ The Revenue Powers Group argues that administrative sanctions do have a social blame attached to them in the case of Revenue penalties which are published. This is most likely due to the fact that the taxpayer can still view this as justice being seen to be done.

Administrative sanctions for sea-fisheries may actually increase awareness of the damage caused to the marine environment if sanctions are published. The level of social blame currently attached to fisheries prosecutions is debatable. The low fines imposed not only reduce the deterrent effect of criminal prosecution, but possibly also the moral stigma associated with conviction for a criminal offence. The over-reliance on criminal prosecution for all fisheries offences further diminishes its moral value. If criminal prosecution is reserved for serious offences, the social blame factor becomes more significant. The public perception differs between Irish and foreign fishers, with greater sympathy existing for Irish fishers. Where only conduct worthy of moral censure is prosecuted, i.e. conduct which satisfies the harm focus of the criminal law deserving of punishment, then this should have the effect of increasing the moral blame and deterrence value of criminal prosecution.

8. Most common enforcement measures applied are fines which are usually fixed at a level closer to minimum allowed by the law.

In order for administrative sanctions to be effective, they must be proportionate to the breach. There must be a variety of enforcement options available outside of traditional fines in order to reflect the circumstances of different types of offences.

¹⁴⁶ Husak D., "The Criminal Law As Last Resort" (2004) 24(2) *Oxford Journal of Legal Studies* 207, 222.

Ideally, the majority of enforcement activity should take place at the bottom of the pyramid which would not involve fines but rather, compliance-orientated activities. Similarly, enforcement undertakings do not involve fines. FPNs do not require discretion as to amount unless a doubling of the amount is provided for under the legislation for repetition of offence. Variable monetary penalties should take all factors into account before arriving at a figure. As previously stated, the level of sanction would require explanation of the factors taken into account such as repetition, profit obtained, damage to the environment and any other relevant considerations. If the figure is capped by legislation and the sanction can be confirmed by the High Court, this should alleviate any concerns a panel may have about imposing a substantial monetary penalty. The obligation under EU law to remove the economic benefit derived from the infringement would also provide a guide as to level. However, it should be borne in mind that sanctions do not necessarily have to be set at a punitive level in order to be effective, proportionate and dissuasive.¹⁴⁷

9. There is no systematic obligation to restore the environment whenever damage occurs.¹⁴⁸

In the case of sea-fisheries, it is impossible to restore the damage done by overfishing or misrecording by means of a sanction. The best that can be hoped for is to introduce measures to ensure more damage does not occur, such as an area closure, or by targeting a non-compliant fleet as opposed to individual vessels in addition to more deterrent level sanctions to attempt to prevent future damage.

¹⁴⁷ See generally Ivanov L., Irving J., Rebrov Y. And Tofan C. (eds.) "Effectiveness, Proportionality and Dissuasiveness Provisions on Penalties Related to Industrial Installations Part 1" (2012) 15(2) *Eastern and Central Journal of Environmental Law* 11.

¹⁴⁸ Milieu Report *supra* note 143, 64-65.

However, in 2021 the Commission adopted a proposal for a new EU Directive to set minimum levels for sanctions for environmental crime and additional sanctions including restoration of the environment which may provide a way forward.¹⁴⁹

Looking specifically at effectiveness,¹⁵⁰ the study of administrative sanctions concluded that both criminal and administrative regimes present advantages and disadvantages. Cooperation among competent administrative authorities and the public prosecution service through an improved and more regular exchange of information in combination with the application of a range of coercive and/or interim measures in parallel to the criminal prosecution can prove highly effective.¹⁵¹ Therefore, the two regimes should not be opposed to each other. On the contrary, effectiveness in enforcement can be maximised if prevention and compliance measures operate in tandem with punitive measures¹⁵². The study concluded that in that respect, the social blame associated to criminal sanctions is a key tool for deterrence.¹⁵³ However, as previously discussed this social blame and deterrent value provided by criminal prosecution is dependant on criminal prosecution being reserved for serious offences satisfying the harm focus and indicia of a crime. Over-reliance on criminal prosecution trivialises the criminal sanction and reduces the social blame and deterrence value of criminal prosecution.

The key recommendations of the study were at national level:

¹⁴⁹ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC.

¹⁵⁰ The baseline used for assessing “effectiveness” of non-criminal measures is their deterrent effect. In order to mitigate the danger of gathering subjective views about the effectiveness of measures, indicators of effectiveness were given to national experts to respond to as well as uniform questionnaires. *Ibid* 7 and 59.

¹⁵¹ *Ibid* 65.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

1. Provide more technical, financial and human resources to inspection and enforcement activities;
2. Increase the role of the public in enforcement and in the decision-making process;
3. Raise public awareness on environmental infringement procedures through “name and shame” systems that publish the names of companies (but not individual persons) found to have infringed a regulation;
4. Sanction recidivism with more severity;
5. Better clarification of the enforcement role of each competent authority so as to avoid a fragmented regime of administrative measures and sanctions;
6. Make restoration a priority in administrative enforcement systems;
7. Better coordination of enforcement among competent authorities towards a more integrated enforcement administrative regime so as to avoid duplication and competition;
8. Identify criteria for distinguishing serious offences that the competent authorities should systematically report to the prosecution;
9. Strengthen coordination between the administrative enforcement system and the criminal prosecution system. This should go beyond requiring the administration to systematically forward supporting documents to the prosecutor to become active consultation between the two systems, with a view to arriving at the best informed decision and to maximising synergies between the administrative and the criminal procedures;

10. Make a firm political commitment to enforce environmental legislation.¹⁵⁴

Many of these recommendations can be applied to a potential administrative sanction regime for sea-fisheries to ensure effective, proportionate and dissuasive sanctions can be imposed in an efficient, transparent, consistent manner subject to accountability mechanisms and fair procedures. A potential framework for such a system, which could be applicable across many regulatory contexts is discussed in Chapter 7.

Conclusion

In recent years across all jurisdictions, there has been a move away from traditional command-and-control regulatory regimes which have come to be viewed as ineffective.¹⁵⁵ This trend could also be viewed as the executive being increasingly empowered to dispense “low visibility justice” and encourage citizens to avoid traditional adversarial justice through the use of on-the-spot fines, penalty points and FPNs for certain offences with an emphasis on “bureaucratization” and executive convenience.¹⁵⁶ Greater sanctioning powers have been afforded to administrative bodies, which has consequently involved a break away from the courts, including the procedural protections they offer.

One could also view this trend as a greater move towards innovative, unconventional regulatory methods, which do not reflect orthodox deterrence

¹⁵⁴ *Ibid.*

¹⁵⁵ See OECD, *Alternatives to Traditional Regulation* (2002) 8 <https://www.oecd.org/gov/regulatory-policy/42245468.pdf> accessed 4 April 2022.

¹⁵⁶ Kilcommins S. “Reconfiguring State-Accused Relations in Ireland” (2006) 41(1) *Irish Jurist* 90, 107.

theory.¹⁵⁷ There are cogent reasons for the introduction of a comprehensive administrative sanctioning system for sea-fisheries. Many breaches of sea-fisheries law do not involve conduct which is criminal in nature. Therefore, criminal prosecution is not an appropriate sanctioning method. Where the investigating officer or the DPP is satisfied that a prosecution is not appropriate or possible due to the available evidence, other than an informal warning, there are no other types of sanction available. Therefore, breaches may go unaddressed for evidential reasons, in that they do not satisfy the high burden of proof applicable to criminal prosecution.

The Irish courts are also overloaded with cases.¹⁵⁸ With the exception of the District Court which operates relatively efficiently, cases can be delayed for long periods of time. Fishers may be understandably anxious where a case against them can be delayed for a number of years. Administrative sanctions may be considerably more efficient and are also likely to be more cost-effective given the substantial legal fees in Ireland exacerbated by the delays. Fishers are accustomed to being dealt with by the courts and the courts are correspondingly accustomed to having jurisdiction over sea-fisheries offences. However, an administrative sanctioning system for fisheries would lessen the burden on the courts who have displayed an acceptance of the administrative sanction systems already in place for the Central Bank and Revenue Commissioners. It is likely that their application would be significantly delayed at the outset of such a regime by appeals and judicial reviews, which would also be expensive. However, this may die out as the regulated community becomes

¹⁵⁷ Ogus A. and Abbot C., "Sanctions for Pollution: Do We Have the Right Regime?" (2002) 14(3) *Journal of Environmental Law* 283, 283.

¹⁵⁸ See generally the Report of the Working Group on a Court of Appeal (May, 2009) https://www.courts.ie/mwg-internal/de5fs23hu73ds/progress?id=WSaKwk68AcH_KPKfxu0d-j-HGe4-azaldVkNY148IRE,&dl accessed 4 April 2022.

accustomed to the new system. For example, penalty points for driving offences, as well as FPNs for motoring offences, were challenged initially but would now be considered standard practice by the majority of the public.

Administrative sanctions offer the possibility of a greater variety of sanctions than the standard fine and/or forfeiture imposed by the courts. They are also better suited to regulating the conditions which must be met in order to fish and are also better able to deal with offences committed by companies. The regulator is in a position to make a more informed decision on sanction choice and level than the courts who are constrained in sanction choice and do not possess the same level of technical expertise.

The disadvantages in introducing administrative sanctions for sea-fisheries must also be acknowledged. Many would argue that there is a lack of social blame attached to administrative sanctions. However, in the case of sea-fisheries it is arguable that there is no social blame attached to criminal prosecution in the case of Irish fishing vessels. Due to the difficult and dangerous nature of the job, there is considerable sympathy for the fishing community. The same sympathy does not exist for foreign vessels accused of committing a breach in Irish waters. Greater public participation and publication of administrative sanctions could increase the social blame attached to fisheries offences in the same way it has in relation to environmental damage and tax offences.

The closeness of the relationship between the SFPA and the fishing industry may result in protracted negotiations and bargaining rather than a system which provides a real deterrent punishment. Such negotiations lack transparency, which would be crucial for industry-wide trust in the system. The decision on the type and level of administrative sanctions should not take place behind closed doors as was

the case in the first iteration of the point system. The decision should also be removed from the officer on the ground so as to preserve the relationship with the regulated entity. The individual or company must be given an opportunity to make their case to the decision-maker in line with the principle of *audi alteram partem* and there must be a right of appeal to the courts. Court confirmation of penalty could also avoid potential constitutional challenge.

Administrative sanctions in theory do not escalate in severity due to recidivism, which is a problem in sea-fisheries law. However, if variable monetary penalties were introduced, the level of penalty could reflect the level of recidivism as well as the seriousness of the breach. There must also be a real possibility that, where further breaches are committed, the individual or company faces criminal prosecution with proportionate fines attached.

Therefore, a dual system of administrative sanctions in conjunction with criminal prosecution for serious offences has the potential to provide an effective enforcement approach. Similar to the Central Bank and Revenue systems, the discretion must lie with the regulator as to whether to deal with a breach by means of administrative sanction or by referral for prosecution. Where the competent authority chooses the administrative sanction route, in the opinion of the author, it should be a trade-off with criminal prosecution unless the administrative sanction is not complied with¹⁵⁹. This avoids any issues in relation to double jeopardy. The legislature has also displayed a reluctance to allow both administrative and criminal sanctions to apply to the same offence due to the need for perceived fairness. The level of discretion afforded to the regulator in the implementation of a dual system means that fair procedures and accountability mechanisms are of central importance,

¹⁵⁹ Due to reasons discussed above 252-253.

both from the perspective of the regulated community in building trust in the system and also in ensuring that the regulator implements the system correctly and fairly.

This delicate balance is discussed further in Chapter 7.

Chapter 6 Case Study

Administrative Sanctions in Action

Lessons from Scotland

Introduction

To fully understand the implications of establishing an administrative sanction system for enforcement of sea-fisheries law in Ireland, this case study examines the system introduced by Scotland. Scotland has been chosen as a suitable case study for comparison with the Irish system for sea-fisheries enforcement for a number of reasons. At the time of writing, Scotland is still subject to the requirements of the CFP. Scotland also has a similar legal tradition to Ireland, being a common law country¹. The Scottish government also relied solely on criminal enforcement of sea-fisheries law until 2008 when it introduced administrative sanctions for certain fisheries offences. It is useful to examine how administrative sanctions have operated since their introduction in Scotland in order to determine if, and how they should be introduced into the similar Irish system, avoiding any obstacles to successful implementation which may have arisen in the Scottish context.

Proposal for a New System

The Scottish Executive held a public consultation on a proposed system of FPNs in 2007, which would operate in conjunction with criminal prosecution for more serious offences.² The Scottish Executive noted that prior to the introduction of

¹ Scotland operates a mixed legal system but still traditionally relies on criminal enforcement.

² Marine Directorate, *Consultation on a System of Administrative Penalties for Fisheries Offences in Scotland* (November, 2007).

administrative fines, all fisheries offences had to proceed through the court system. Offences which were minor enough to be heard as a summary case, but still serious in nature, could attract a fine of up to £50,000 on summary conviction and could include additional penalties covering the value of the illegal catch.³ This maximum fine is well in excess of the €5,000 limit which can be imposed in summary cases in Ireland. Any case serious enough to warrant such a high fine would almost certainly be directed as an indictable case under Irish law. It is extremely rare that a summary case in Ireland would result in forfeiture being imposed as it is a discretionary penalty. However, judges have imposed forfeiture of the illegal portion of the catch only. This could be the amount of catch that was not recorded in the logbook or the amount that was over quota.

For more serious cases dealt with on indictment, the Scottish courts can impose an unlimited fine. In Ireland, the Oireachtas normally set a maximum fine in legislation which the judiciary must comply with. However, mirroring the Irish context, the Scottish Executive noted that the courts rarely impose penalties anywhere near the maximum even in summary cases, raising doubts as to their deterrent effect. The Executive Note went on to state that without improved fisheries enforcement and control measures designed to safeguard fish stocks and to ensure their long-term sustainability, certain fish stocks risk collapse and this would have a significant impact on the fishing industry.⁴ Therefore, as is the case in Ireland, the penalties available to the courts are not an issue. It is their application, or lack thereof, which is problematic. As the Scottish experience demonstrates, maximum

³ Scottish Government Marine Directorate, Executive Note to the Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2008- SSI 2008/101, 05 March 2008.

⁴ *Ibid.*

finances do not need to be increased by the Oireachtas, rather alternative sanctions must be considered.

The Scottish Executive estimated that administrative penalties could be applied to 30% of cases currently dealt with by means of the criminal system, thus freeing up court resources for more serious cases.⁵ In general, a person retains the right to decline an administrative penalty and have their case heard in court. Respondents from industry were largely in favour of the proposed new administrative sanction system. The consultation resulted in a recommendation that financial administrative sanctions should be available in appropriate cases as an alternative to criminal prosecution.

The main objectives in introducing the new system were:

- to improve the effectiveness of sanctions and to provide greater deterrence;
- conserve vulnerable fish stocks and promote compliance;
- to divert fisheries offences from the court system where appropriate and so reduce uncertainty for fishermen and perhaps industry (legal) costs (by simplifying and reducing the timescales involved);
- to increase consistency and transparency;
- to protect those who observe the rules and hence protect the communities for whom fishing is an important part of the economic fabric.⁶

The Executive Note listed several potential benefits of administrative sanctions including that such a system would speed up procedures for dealing with

⁵ *Ibid.*

⁶ *Ibid.*

infringements and therefore reduce the administrative burden and costs of legal representation for accused persons. This would include a reduction in the amount of fishing time lost during court appearances, the costs of solicitors' fees through avoiding court appearances, and an anticipated reduction in fines and costs payable if found guilty by the courts.⁷ It is submitted that a new system of administrative sanctions would not lead to a reduction in fines ordered by the courts. If anything, it could lead to an increase in fines where criminal prosecution is reserved for serious offences. Similarly, administrative sanctions may not lead to a reduction in legal costs as it is likely that legal representation would still be engaged by both the State and the regulatee where an administrative sanction is proposed, except perhaps for FPNs which would be more straightforward. However, if a person refuses to pay the FPN and seeks a court hearing, this would again involve legal costs for both sides. On the other hand, administrative procedures are likely to conclude quicker than a criminal case, particularly where the case goes to trial, which may reduce legal costs.

Scotland experiences similar delays in the court process to the Irish system. Fishers commonly encounter delays of several months in waiting to hear whether they will be prosecuted and must also wait for a court date which could be adjourned multiple times over several months or years. The process imposes considerable strain on fishers which could be significantly reduced by the use of administrative sanctions. It would also mean avoidance of a criminal record, with the associated stigma and greater uniformity in penalties for similar offences. This would remove the uncertainty and unpredictability caused by wide variations in penalties imposed

⁷ *Ibid.*

by different courts resulting in a more level playing field, which is one of the main aims of the CFP.

Fixed Penalty Notices

The FPN scheme came into effect on 1 April 2008 under the Aquaculture and Fisheries (Scotland) Act 2007. The level of fines and the number of offences which come under the scheme was then broadened by the Aquaculture and Fisheries (Scotland) Act 2013. The maximum FPN which can be issued is now £10,000 which is equivalent to the statutory maximum fine. The level of FPN can be varied to reflect the financial gain. This is in line with the obligation under EU regulations that the offender should be deprived of any economic benefit derived from the infringement. Should the financial gain exceed the £10,000 maximum, the case must be referred for prosecution if there is sufficient evidence to ground a prosecution.⁸ Similarly, if a number of offences arise from the same event and the total of the proposed FPNs exceeds £10,000, the case is referred for prosecution. Where there is no evidence of financial gain derived from the offence, then the FPN is a set level dependent on the offence in question.⁹ A person can choose to pay the FPN within 28 days in order to forego criminal prosecution but can still choose to have the case heard by the courts. Payment of the FPN does not constitute a criminal conviction or admission of guilt. This would be an essential component to any FPN system in Ireland. However, an administrative record of FPNs is kept by Marine Scotland as

⁸ Marine Scotland, *Fixed Penalty Notices - Guidance for Industry* (August, 2015) 5 <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2020/10/marine-and-fisheries-fixed-penalty-notice-guidance-for-industry/documents/guidance-on-the-introduction-of-an-administrative-penalties-system-for-minor-fisheries-offences/guidance-on-the-introduction-of-an-administrative-penalties-system-for-minor-fisheries-offences/govscot%3Adocument/FPN%2Bguidance.pdf?forceDownload=true> accessed 4 April 2022.

⁹ *Ibid.*

the national enforcement body in order to document repeat offenders which may affect future FPN levels. If the FPN is not paid, the case is automatically sent forward for prosecution.

Offences are grouped by category, with each category assigned a certain number of points based on seriousness. There are also additional penalty levels which allow for a doubling of the penalty for repeat offences.¹⁰

Penalty Level	Category	Seriousness
1	Marketing	Least serious
2	Miscellaneous	↑
3	Technical Conservation Gear Offences	↑
3	Technical Conservation Catch Offences	
3	Recovery and Special Permit Stock Offences	↓
3	Control Order Offences- Logbook, Licence, Satellite	↓
4	Access offences	Most serious

¹⁰ *Ibid* 7.

Penalty Level	Amount
1	£500
2	£1000
3	£2000
4	£4000
5	£5000
6	£8000
7	£10,000

Offences falling within the least serious categories are more likely to be dealt with by having a penalty imposed at Level 1 whereas offences falling within the most serious categories are more likely to be dealt with at the higher levels. However, each case is dealt with on its own facts. Therefore, penalties may vary depending on the circumstances, including for example, financial gain or other exacerbating factors such as vulnerability of species. In 2015 the penalty levels were doubled under the Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2015 in order to increase their deterrent effect and reduce the perception of FPNs as a cost of business.¹¹ Three further penalty levels were also provided for. Penalty levels 1 and 5 may be applied in respect of first offences. Penalty levels 2, 3, 4, 6 and 7 may be applied in respect of first offences where appropriate or for second offences committed by the same person within two years of the first offence. In this case the

¹¹ *Ibid.*

penalty level is double that of the original penalty. Repetition of the offence for a third time results in the case being sent for prosecution. Increasing an FPN for repeat offences would be a novel feature for such a system in Ireland where this would not be the norm and is usually one set amount.

Under the legislation, an FPN may be issued where a fixed penalty officer has reasonable grounds for believing an offence has been committed.¹² The notice must include reasonable information about the alleged offence, the amount and the period for paying. The notice must state that liability to conviction for the offence is discharged if the FPN is paid but that payment does not constitute a conviction and is not recorded as such. It must also explain that no proceedings may be commenced against the person in respect of the offence unless the period for paying has expired and no payment has been made. The person may also intimate in writing that they do not intend to pay.¹³ This is broadly similar to how FPNs already operate in Ireland.

Under the Scottish system, 23 FPNs were issued in 2017, 29 in 2016 and 18 in 2015.¹⁴ To the author's knowledge, the enforcement branch of Marine Scotland must offer an FPN before the case can be referred for criminal prosecution unless it is a third repeat offence. However, as Baldwin and Black have observed, it may not always be appropriate to gradually escalate up the enforcement pyramid.¹⁵ Some breaches may be of such a serious nature as to warrant immediate criminal prosecution. If an FPN does not adequately reflect the circumstances of a breach and

¹² S.25 of the Aquaculture and Fisheries (Scotland) Act 2007.

¹³ *Ibid* s.26.

¹⁴ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2018/02/foi-18-00252/documents/foi-18-00252-fixed-penalty-notice-regime-pdf/foi-18-00252-fixed-penalty-notice-regime-pdf/govscot%3Adocument/Foi-18-00252%2B-%2BFixed%2BPenalty%2BNotice%2Bregime.pdf> accessed 28 January 2020.

¹⁵ Baldwin R. and Black J., "Really Responsive Regulation", (2008) 71(1) *Modern Law Review* 59, 62.

would not be a proportionate sanction in relation to the seriousness of the breach or the economic benefit gained, it should not be utilised as a sanction. The regulator should not be tied to lower tier sanctions where they do not constitute a proportionate response to the offending behaviour. Any administrative sanction system introduced in Ireland should reflect this principle if the system is to be effective.

Fixed and Variable Monetary Penalties

Provision was made for a fixed and variable monetary penalties regime under the Marine (Scotland) Act 2010. This is a separate system to the FPN scheme. Interestingly, however, as of February 2018, there were no fixed monetary penalties or variable monetary penalties issued.¹⁶ The author has been unable to discern from colleagues in Marine Scotland why this is the case. The practice seems to have emerged that the enforcement branch of Marine Scotland only issues FPNs and does not use this section. The licensing branch does make use of variable penalties, but very infrequently.¹⁷ This may be due to the higher burden of proof which applies. FPNs are also usually viewed as a safer option in that the individual is more likely to pay without challenging the notice. A variable penalty is more open to legal challenge due to its discretionary nature.

Variable penalties may only be issued where the Scottish Ministers are satisfied beyond reasonable doubt that a person committed the offence. The person must be served with a notice of intent to apply the penalty. The notice must include the grounds for the proposal to impose the penalty, how to pay including the

¹⁶ <https://www.gov.scot/publications/foi-18-00252/> accessed 28 August 2020.

¹⁷ S.95 of the Marine (Scotland) Act 2010.

timeframe to pay, the effect of payment and information on the right to make representations and objections. Where the person makes representations and objections, the Scottish Ministers must then decide whether or not to impose the penalty. They cannot impose the penalty where they are satisfied that the person would not, by reason of any defence, be liable to be convicted of the offence. Where they decide to impose the penalty then they must issue a final notice. The person may still appeal this notice on the grounds that the decision was based on an error of fact, that the decision was wrong in law or that the decision was unreasonable. Variable monetary penalties seem to be a wasted opportunity, which may be due to the regulator's unfamiliarity with them as a sanction and reluctance to exercise its discretion at the higher burden of proof. Echoing the experiences of Macrory in the context of UK regulatory enforcement reform, regulators may be somewhat distrustful of measures such as variable monetary penalties which require them to utilise a broad discretion where they have been accustomed to referring cases for prosecution.¹⁸ Therefore, in addition to legislation providing for alternative sanctions, regulatory governance measures are also crucial to their successful implementation.

Conclusion

A number of lessons can be learned from Scotland's approach to introducing administrative sanctions into the enforcement regime for fisheries. First, that it is important to acknowledge why such a step is necessary. Unless enforcement of sea-fisheries law is improved, the sustainability of fish stocks will remain in jeopardy,

¹⁸ Macrory R. "Sanctions and Safeguards: The Brave New World of Regulatory Enforcement" (2013) 66 *Current Legal Problems* 233, 245, 265.

which will not benefit the fishing industry long-term. Administrative sanctions in conjunction with criminal prosecution could provide a more effective enforcement system. These points should be emphasised in any public consultation, which would be essential to ensure industry buy-in. If fishers were supportive of the introduction of administrative sanctions, this would influence political will to pass any bill through the Oireachtas, which has proved challenging in the past in relation to fisheries legislation. The Scottish government highlighted all of the benefits of administrative sanctions to fishers, which would also exist in the Irish context, namely, potential reduction in legal costs and lost fishing time, less uncertainty in waiting to hear if a case will be prosecuted, less delay caused by multiple adjournments over a number of years, less unpredictability in fines, and the removal of the stigma of a criminal record.

There are also obvious benefits to the State in introducing an administrative sanction system similar to the Scottish model. The Scottish model allows the enforcement authority to tailor the FPN so as to ensure the offender does not profit from the offence and avoids the FPN becoming a cost of business. It also provides for increased FPNs for repeat offenders, providing a middle ground between a standard FPN and a variable monetary penalty.

However, such a system must come with a number of provisos. Under an FPN system, fishers must retain the right to have their case referred to court if they so choose. Similarly, payment of an FPN does not constitute an admission of guilt. In contrast to the Scottish system, it must be possible for the regulator to proceed directly to criminal prosecution where the seriousness of the offence warrants such action. There should be no obligation to issue an FPN first unless it would adequately address the breach. It is also absolutely essential to the success of any

new administrative sanction system that regulatory governance measures apply which would help to avoid the major pitfall of non-implementation of alternative sanctions by the regulator as experienced in both Scotland and the UK. The lower burden of proof which applies to administrative decisions in Ireland may also assist in this regard.

Chapter 7

Striking A Balance

Moving to Dual Administrative and Criminal Enforcement

Introduction

This chapter builds upon the findings from previous chapters in relation to defects in the legislation, the enforcement strategy which could be employed by the regulator and the potential for greater use of administrative sanctions due to difficulties surrounding the exclusive reliance on criminal prosecution as the sole means of enforcement. These findings are analysed and the implications considered before proceeding to recommendations for how dual administrative and criminal enforcement of sea-fisheries law could operate in practice. The proposed dual system of administrative and criminal enforcement could also be applied more widely to a vast array of regulatory agencies in Ireland, the majority of which rely to a great extent on criminal prosecution without many available alternatives.

Deficiencies and Gaps in Sea-Fisheries Legislation

Sea-fisheries law has historically been enforced by means of the criminal law in Ireland. There is no tradition of dealing with fisheries offences by means of any type of administrative sanction. Most prosecutions were taken by the Department of the Marine through the Attorney General's office under the 1959 Act. However, this practice had to change following Case C-317/02 *Commission v Ireland* in 2004. The CJEU held that Ireland had failed to meet its obligations under EU fisheries law. The Court stated that Ireland had failed to comply with community rules on conservation and that there was inadequate monitoring of fishing activity. The court was also

highly critical of Ireland's inspection and enforcement regime, citing failures to initiate either criminal or administrative proceedings in incidences of over quota fishing. In response to this case, Ireland introduced the Sea-Fisheries and Maritime Jurisdiction Act 2006 and a dedicated enforcement agency for sea-fisheries, the SFPA.

The 2006 Act provides for high penalties of up to €100,000 for certain offences. However, no administrative sanctions were provided for under the Act. While administrative sanctions are not required under EU legislation, penalties must be effective, proportionate and dissuasive. In addition, they must deprive the offender of the economic benefit of the infringement. In theory, penalties under the 2006 Act satisfy this requirement. However, there is a gap between the potential penalties provided for under the 2006 Act and the penalties actually imposed by the courts. This is a common occurrence in the operation of Irish regulatory legislation in practice, as regulatory breaches may not be regarded as real crime by the courts.

A number of other gaps have also emerged between sea-fisheries legislation and practice. In the case of detentions, the bond imposed on the vessel must be set at an amount which covers the cost of the catch, gear and the amount of any potential fines and court proceedings.¹ However, the amount of the bond in practice is much lower. In the case of foreign vessels or foreign masters, it is set at the level required by legislation as agreed between the prosecution and defence solicitor, although it may be lower than the market value of the catch where a plea is indicated. The judge then generally imposes the bond suggested by them. In the case of Irish vessels, often a bond is not imposed at all. The Master may undertake a personal bond to

¹ S.21(2) of the 2006 Act.

appear in court again for trial. This practice is based on the fact that a foreign master constitutes a greater flight risk than an Irish master. However, it is completely at odds with the legislation which provides for one procedure for bonds regardless of the nationality of the Master.

There are also more specific defects in the Act which adversely affect enforcement. A drafting flaw involving an incorrect section reference means that it is not possible to take prosecutions on indictment under the 2006 Act for fishing without a licence. Unlicensed fishing is considered a serious offence at EU level. In fact a special regulation, the IUU Regulation, was introduced to tackle illegal, unreported and unregulated fishing. Fishing without a licence would fall into this category. Currently, only summary prosecutions for fishing without a licence can be taken under the 2006 Act as the aforementioned drafting error refers to penalties on indictment. A prosecution on indictment for fishing without a licence can only be taken under the equivalent EU provision. A maximum fine of €75,000 was intended to apply under the 2006 Act. However, by using the alternative section a maximum fine of €35,000 applies, which represents a considerable reduction. It would be very simple to correct the reference by means of an amendment to the 2006 Act. To date, it has not been corrected, demonstrating the lack of priority afforded to sea-fisheries law at a political level.

Serious breaches of licence conditions are also adversely affected by the drafting error which confines such cases to summary prosecution only as there is no EU provision which can be used to take a case on indictment. Although the 2006 Act empowers the Licensing Authority to suspend or revoke the licence, to the author's knowledge this has never occurred. This leaves a significant gap in enforcement given that there are no other means of addressing serious breaches of licence

conditions, which could have potentially damaging effects to the marine environment. For example, it is a condition of some licences for larger vessels that they cannot fish inside the six mile limit in order to protect the more vulnerable marine environment around the coast of Ireland. Although some vessels can be seen on satellite positioning systems in the area and have even recorded fishing inside the area, the SFPA can only put forward a case to the DPP for summary prosecution. For serious cases summary prosecution is not appropriate given the maximum fine available in the District Court is €5,000, which in any event is rarely imposed. It is plainly an undesirable situation for the SFPA and the Naval Service to be impotent in enforcing serious breaches, particularly when the action could cause severe damage to a vulnerable area.

An amendment should also address the forfeiture provisions under the 2006 Act which have caused unending confusion at trial due to a problem of punctuation relating to the placement of a comma. S.28 imposes automatic forfeiture of the value of the catch and gear on conviction on indictment in addition to any fine. The section is badly drafted and could be mistakenly interpreted so that the forfeiture is optional, as in the case of summary conviction. In practice, forfeiture is rarely ordered on summary conviction, although it is provided for under the Act. On very rare occasions the District Court judge may order forfeiture of the value of the illegal portion of the catch. It is submitted that such an order should be made more frequently given that fines imposed in the District Court are low and the benefit derived from the illegal catch should be removed.

Mandatory forfeiture of catch and gear on conviction on indictment has been approved by the High Court as a proportionate penalty which is expressly mandated

by EU law.² However, the section is still frequently challenged by the defence at sentencing and the point is under appeal again to the Court of Appeal which has sent a preliminary reference to the CJEU in relation to the proportionality of automatic forfeiture under national law. A clearly drafted section could avoid some of the legal challenges at least in relation to interpretation, if not regarding the principle. A recent firearms judgment in the Supreme Court has resulted in consensus among the legal community that the case could abolish minimum sentencing in Irish legislation.³ This may result in any type of mandatory forfeiture provisions being deemed unconstitutional, as the Supreme Court determined that the penalty was within the discretion of the judiciary.⁴ Therefore, the position on mandatory forfeiture remains uncertain.

The independence of the SFPA is a fundamental issue which must also be addressed. The SFPA was set up as an independent body responsible for enforcement of sea-fisheries law under the 2006 Act in response to a scathing judgment of the European Court criticising Ireland's sea-fisheries enforcement regime. However, it still falls under the remit of DAFM, meaning it is not truly an independent enforcement body. The independence of the SFPA was questioned in a recent submission to a review board conducting a statutory review of the SFPA.⁵ In carrying out its statutory functions, it may be stymied in certain enforcement actions.

² *Martinez and Ireland v Attorney General and District Judge James McNulty Ex tempore* judgment of O'Neill J delivered on 27th November 2008.

³ *Ellis v Minister for Justice and Equality & Ors* [2019] IESC 30.

⁴ Mandatory sentencing can be controversial in the context of the separation of powers under the Constitution. For example, although a mandatory sentence of ten years applies for a conviction for possession of drugs worth over €13,000, the judge is permitted to depart from the mandatory sentence under the legislation if the interests of justice so require. In 2019 only one person was given the mandatory sentence and in all other cases this provision was invoked by the judge to give a lesser sentence. See Garreth MacNamee "Just one person was handed the minimum 10-year sentence for possessing €13k of drugs last year" *The Journal* (5 December 2019).

⁵ Michael Brennan "Plebs in the ports' lash out" *The Business Post* (8 December 2019).

For example, in seeking to invoke the provisions of EU regulations in ordering a vessel to port for suspected illegal, unreported and unregulated fishing, it is reliant on Department action.⁶ The Minister is obliged to consider the advice of the Authority but is not obliged to act on it. However, the SFPA is subject to policy directions issued by DAFM. Similarly, in response to widespread suspected misreporting of catches in a particular area with low quota designed to protect prawn stocks, the SFPA could merely report on the suspected over-fishing. It has no power to impose area closures or to redesign regulation of areas in order to protect stocks and is completely reliant on Ministerial support.

Therefore, the SFPA should have a greater role in policy-making if it is to be an effective enforcement agency. In line with a really responsive strategy discussed below, the regulator should continuously assess the effectiveness of its enforcement actions and have the ability to adapt its strategies and tools to meet new challenges. The SFPA is confined to a single course of action in the shape of criminal prosecution and is reliant on Department and Ministerial support to take any other type of action. The SFPA must have more enforcement options at its disposal which suit different regulatory challenges if it is to enforce sea-fisheries law effectively. The author is not suggesting that the SFPA be given a *carte blanche* to utilise any tools it deems appropriate as there must be robust oversight of all enforcement actions taken by a regulator to ensure consistency, fairness and transparency. Legislation is required to provide for alternative sanctions, as well as the procedures and appeal processes which would apply as safeguards. Both the SFPA and the industry should be engaged in a consultation process for the creation of such a

⁶ Art. 43(g) of the IUU Regulation.

system. Proposals for the design and operation of a dual criminal and administrative system are discussed below.

Of particular significance in terms of enforcement is that the CJEU has consistently held that a Member State cannot rely on practical difficulties in order to justify its failure to adopt appropriate control measures and thus avoid its obligations under EU law.⁷ Therefore, where penalties imposed by the national courts do not satisfy EU sanction standards, the State cannot abdicate responsibility. The reasoning provided by the Minister during the debate of the 2006 Act at the Bill stage that only criminal sanctions could be used to satisfy this obligation is not sound. It is possible to impose effective, proportionate and dissuasive sanctions administratively without trespassing on the exclusive role of the courts under the Constitution, as long as certain safeguards are put in place, which are proposed below.

Therefore, the State must examine the sustainability of the current enforcement model and explore potential alternatives. The EU Commission has instructed Ireland to conduct an administrative inquiry into its control and enforcement in the pelagic industry, in which the Commission found serious failings. Ireland could also be the subject of infringement proceedings for its failure to implement the point system for masters and is leaving itself exposed to further proceedings against it for systematic non-compliance with EU fisheries law if the current enforcement strategy is retained.⁸ This brings with it the likelihood of high

⁷ See for example, Case 128/78 *Commission v UK (Re Tachographs)* [1979] ECR 419 and Case 56/90 *Commission v UK (Bathing Water)* [1993] ECJ 1-4109.

⁸ The concept of systematic breaches originates in *Commission v Ireland* Case C-494/01 *Commission v Ireland* [2005] ECR I-333 which concerned Ireland's persistent failure to comply with the Waste Framework Directive. See further Jack B., "Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties" (211) 23(1) *Environmental Law Journal* 73, 78.

fines which could be avoided by implementing a more effective enforcement model.⁹ However, proceedings may deliver the push required for meaningful change to occur in enforcement.

Recommendations

The author recommends that the State should undertake a review of the 2006 Act. The provisions contained therein should be reflected in practice, otherwise the sections of the Act are effectively meaningless. Flaws in the Act should be rectified and the forfeiture provision should be simplified. The position on the constitutionality of mandatory forfeiture also requires clarification. Consideration should also be given to the independence of the SFPA if effective enforcement is to be prioritised.

Rather than introducing an amendment to the existing 2006 Act to address these issues, a new act would be preferable as it could also create alternative sanctioning methods as set out below and implement the point system for both masters and licence holders. It must be acknowledged that such an act would be extremely challenging to pass in the Oireachtas. Therefore, meaningful consultation with industry, NGOs and other stakeholders is essential in order to at least attempt to avoid the sustained opposition which is still ongoing in relation to the point system. The introduction of the 2006 Act also faced intense debate but was passed due to the necessity to comply with Ireland's EU obligations. Now a similar situation is occurring once again, where Ireland is coming under increasing criticism from the EU in relation to the ineffectiveness of Ireland's enforcement of the CFP, and in

⁹ In Case C-304/02 *Commission v France*, the Court imposed a periodic penalty payment as well as a lump sum payment against France for being in systematic breach with fisheries legislation.

particular its failure to fully implement the point system. The proportionality of sanctions imposed by the courts has also come under fire in successive EU audits, as well as Ireland's control of the pelagic industry. As a reasoned opinion has already been issued by the EU Commission and an administrative inquiry ordered, action is required by the State in order to avoid proceedings being instituted against Ireland. This should be viewed as a rare and precious opportunity to step back and consider the enforcement regime overall and how it may be improved, rather than simply introducing reactionary legislation to respond to EU criticism.

Enforcement Strategy for Sea-Fisheries - Which Arrow to Select from the Quiver¹⁰

In general, enforcement agencies tend to rely to a large degree on education, advice and persuasion to secure compliance with regulatory rules, reserving formal and more stringent sanctions to egregious and persistent breaches.¹¹ Indeed in the case of the SFPA, it has no option but to rely on advice, education and persuasion as there are no alternative tools available other than criminal prosecution. The lack of enforcement options means that breaches are referred for criminal prosecution which are neither egregious nor persistent but do require some type of action which is more serious than advice or education.

The widely cited Ayres and Braithwaite enforcement pyramid illustrating responsive regulation tends to dominate the enforcement strategy of most

¹⁰ Gunningham N., "Enforcement and Compliance Strategies" in Baldwin R., Cave M. and Lodge M. (eds.) *The Oxford Handbook of Regulation* (Oxford: OUP, 2010) 217.

¹¹ See generally Grabosky P. and Braithwaite J., *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, (Melbourne: Oxford University Press, 1986).

regulators.¹² The theory of responsive regulation suggests that regulators should start at the base of the pyramid with education and advice and escalate up the pyramid when there is non-compliance, with licence revocation or criminal prosecution sitting at the apex of the pyramid for persistent serious non-compliance. This allows regulators to encourage and coax regulatees to comply, but also to impose stringent sanctions where necessary in a tit-for-tat escalated response.¹³ The gradual approach should promote compliance by working with regulatees in a fair and transparent manner.

However, as Scott notes, the concept of the enforcement pyramid presumes that regulators have a range of sanctions available to them,¹⁴ which the SFPA does not. Often ‘sanctions’ at the base of the pyramid are frequently not referred to in legislation or even conceived of as formal sanctions at all.¹⁵ Formal sanctions only exist at the higher levels of the pyramid. Therefore, regulators have a good deal of discretion in relation to the extent that regulators who lack formal enforcement powers may, nonetheless, be able to construct a form of enforcement pyramid.¹⁶ The SFPA and Naval Service, recognising that in many circumstances criminal prosecution was not warranted, had issued formal warning letters in an attempt to address minor breaches. However, the Attorney General advised that as warning letters were not provided for by law, the issuing of warning letters should be discontinued as a practice, resulting in a paucity of sanction options.

¹² Ayres I. and Braithwaite J., *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). See further Mascini P., “Why Was the Enforcement Pyramid So Influential? And What Was the Price Paid?” (2013) 7(1) *Regulation and Governance* 48.

¹³ *Ibid* Ayres and Braithwaite, 35.

¹⁴ Scott C., “The Regulatory State and Beyond” in Drahos P. (eds.) *Regulation, Institutions and Networks*, (Australia: Australian University Press, 2017) 271.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

Ideally, a regulator should have the power to invoke both lower tier and higher tier sanctions. A regulator with the capacity to escalate to more stringent sanctions is better able to “speak softly” because they “carry a big stick”.¹⁷ In other words, the powers at either end of the pyramid enhance the effectiveness of each other. They do not operate effectively in isolation from one another. As Ayres and Braithwaite put it, “the trick of successful regulation is to establish a synergy between punishment and persuasion”.¹⁸ It is precisely this synergy between punishment and persuasion which the SFPA lacks, having no options outside of criminal prosecution.

A regulatory regime in which the formal enforcement powers comprise only the most draconian measures and nothing else, will struggle to establish a credible enforcement pyramid.¹⁹ This is because draconian measures can only be used for the most persistent, wilful or egregious breaches.²⁰ Most breaches do not fall into this category and, accordingly, the threat of formal sanctions will not be credible if the sanctions ladder is bare of all but the most stringent sanctions.²¹ The pyramid with a large gap between the warnings level and the next level is a ‘broken pyramid’ and possibly not much better than the pyramid built by the regulator with no formal sanctions, and arguably even worse.²² The dearth of mid-pyramid sanctions available to the SFPA must be addressed in order to confine the role of criminal prosecution to sanctioning egregious conduct requiring an apex level response. There must be

¹⁷ *Ibid* 272. See further Braithwaite J., “On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers” (1997) 47(3) *University of Toronto Law Journal* 305.

¹⁸ *Supra* note 12, 25.

¹⁹ Scott *supra* note 14, 5.

²⁰ *Ibid* 5-6.

²¹ *Ibid* 6.

²² Scott C., “Regulatory Crime: History, Functions, Problems, Solutions”, in Kilcommins S. and Kilkelly U. (eds.) *Regulatory Crime in Ireland* (Dublin: First Law, 2010) 15.

alternative sanction options for conduct which does not reach this threshold and for which criminal prosecution is inappropriate.

A number of commentators have criticised responsive regulation as a violation of the rule of law precept requiring that regulation operate through rules which apply generally.²³ Responsive regulation, and indeed “really responsive regulation”,²⁴ is based on the notion that sanctions should be tailored to address the particular breach and the particular offender.²⁵ This tailoring of sanction may create uncertainty and unpredictability in the application of sanctions, which may violate the rule of law. However, McDonald argues that there is no reason why a principled use of the enforcement pyramid would undermine rule of law values.²⁶ If regulatees can understand the enforcement practices and can rely upon them, and there are adequate institutional checks against arbitrariness, then the problem that discretion poses for the rule of law may too easily be exaggerated.²⁷ Scott argues that the challenges in relation to discretion can be addressed by requiring regulators to publish details of their enforcement policies, practices and activities.²⁸ The State should also place restrictions on the regulator in the form of maximum sanction levels and judicial oversight, which would also seem to be a requirement to ensure the constitutionality of such powers. It is in the interests of both the regulator and the

²³ Freigang J., “Is Responsive Regulation Compatible With the Rule of Law?” (2002) 8 *European Public Law* 463, 466-7.

²⁴ Baldwin R. and Black J., “Really Responsive Regulation”, (2008) 71(1) *Modern Law Review* 59.

²⁵ Kagan R. and Scholz J., “The ‘Criminology of the Corporation’ and Regulatory Enforcement Strategies”, in Hawkins K. and Thomas J. (eds.) *Enforcing Regulation* (Boston: Kluwer-Nijhoff, 1984).

²⁶ McDonald L., “The Rule of Law in the ‘New Regulatory State’” (2004) 33(3) *Common Law World Review* 197, 216.

²⁷ *Ibid.*

²⁸ Scott *supra* note 22, 274. This view is shared by Macrory and Kilcommins *et al.*

regulated community that regulatory enforcement is predictable, as this promotes compliance for the regulator, and creates a stable environment for regulatees.²⁹

Recommendations

The author suggests that really responsive regulation would be the most appropriate strategy to apply to enforcement of sea-fisheries law and indeed could also be applied to other areas of regulation in Ireland. This theory provides a greater level of guidance on how to operate the regulatory pyramid, which can prove challenging in practice and also provides a fuller picture of compliance than risk-based regulation as currently utilised by the SFPA. It allows the regulator to identify the attitude of the regulatee, detect non-compliance and respond in a manner which is appropriate to both the type of regulatee and the type of non-compliant behaviour. The requirement to constantly assess whether the enforcement approach is effective and adapt accordingly to meet enforcement objectives is reliant on the SFPA having more enforcement options at its disposal and also the independence to implement enforcement actions. In many ways, really responsive regulation reflects the Macrory principles³⁰ in that it represents a more nuanced approach than the traditional enforcement pyramid, which is more responsive to the changing regulatory landscape and the new challenges presented by such change.

The provision of more tools and strategies is essential to enable the SFPA to impose sanctions tailored to the offender and to the breach which satisfy EU standards for sanctions. This does not mean that criminal prosecution should become redundant, rather that it should be reserved for conduct which is serious enough to

²⁹ *Ibid.*

³⁰ Macrory R., *Regulatory Justice: Making Sanctions Effective*, Final Report (November 2006) 10.

satisfy the harm focus of the criminal law and is deserving of penal sanctions and moral censure. Where breaches which do not meet the indicia of a crime³¹ are referred for criminal prosecution, a criminal court cannot impose a criminal sanction which is effective, proportionate and dissuasive to conduct which is not criminal in nature. McGrath argues that in defining crime, the Irish courts have focused on conventional real crime, so attempting to make conventional crime indicia fit into regulatory contexts is inappropriate.³² He opines that this jurisprudence must be re-evaluated, and a new approach found.

As the majority of regulatory breaches do not fit into the indicia of crime, in the opinion of the author, they should not be dealt with as crimes. The traditional lack of a mens rea requirement in regulatory strict liability offences has operated as the doctrinal marker of these defendants less than fully criminal status from a social point of view.³³ If the breach does not carry full criminal status then it cannot be dealt with effectively by a criminal court and, therefore, should not be sanctioned by means of criminal prosecution. Rather than attempting to force regulatory breaches into a criminal system which is designed to deal with real crime, administrative sanctions should address the majority of regulatory breaches. Criminal prosecution should be reserved for serious, egregious regulatory breaches only, which by their nature fall under the conception of “crime” and so can be effectively dealt with through the criminal system. This affirms a more appropriate role for the courts as a

³¹ *Melling v Ó Mathghamhna* [1963] 97 ILTR 60.

³² McGrath J., “The Colonisation of Real Crime in the Name of All Crime” in Kilcommins S. and Kilkelly U., *Regulatory Crime in Ireland* (Dublin: First Law, 2010) 60-61.

³³ Lacey N., “Criminalization and Regulation: The Role of Criminal Law in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 144, 161.

top tier sanction possessing a moral force which reinforces the effectiveness of all other sanctions.

As previously discussed, the independence of the SFPA must be addressed and a range of sanctions provided by legislation if the SFPA is to implement a really responsive strategy effectively. Successful implementation of really responsive regulation depends both on the SFPA being provided with more enforcement options under the legislation and also the discretion to propose the most appropriate sanction, independently of political or public pressure. Although the regulator is likely to come under political and public pressure, it should be independent from it in the sense that it does not influence the regulator's enforcement decision, which should be an objective one based on the available facts and circumstances of the breach. Where the regulator is given this level of discretion, it should be accompanied by regulatory governance measures. A really responsive strategy would help to support accountability mechanisms in justifying enforcement and sanction decisions. The decision between imposing an administrative sanction and referring the case for prosecution would likely come under particular scrutiny. A transparent decision-making process which complies with fair procedures is essential to the implementation of a really responsive strategy and also to the constitutionality of any alternative sanctioning regime. Potential regulatory governance and accountability mechanisms are discussed below as part of an overall proposed framework for sea-fisheries enforcement.

Problems with the Current Use of Criminal Prosecution in Sea-Fisheries

Enforcement

The courts have already given signals that fisheries cases could be dealt with by means of an administrative system as long as appropriate procedural safeguards are put in place.³⁴ Criminal enforcement of sea-fisheries law with no other real alternatives is extremely challenging. Minor cases often do not satisfy the public interest test when the DPP is considering whether prosecution is appropriate. This leaves a gap in enforcement which may have a cumulative detrimental effect. The DPP may also direct no prosecution due to too much time passing, or due to gaps in the chain of evidence meaning the case would not satisfy the strict rules of evidence of a criminal trial.

Where the DPP does direct a prosecution there can be significant delay in the case coming to court. Initially, it usually takes a number of months for the case to appear in the court list. The next step is to wait for a date for hearing, which can be adjourned indefinitely where custody cases or traditional crime gain priority in the list. It is difficult to argue that sea-fisheries cases should be afforded greater priority in the court lists when other areas of law, such as child care proceedings, are frequently put back in the list in the same manner.

The actual logistics of criminal prosecution also present problems. Sometimes the accused enters a plea unexpectedly and witnesses are not present to read in the evidence. This means that the State Solicitor, or sometimes a stand-in where the State Solicitor is unavailable, reads in the evidence and often will not have the expertise to counter claims made by the defence in mitigation, which may have

³⁴ *O'Sullivan v Sea Fisheries Protection Authority & ors* [2017] IESC 75, 36 & 51.

impact on the level of fine imposed. Where the State Solicitor has no experience in fisheries cases, or more often where another solicitor or barrister is standing in for the State Solicitor, he/she may be unfamiliar with the penalties which apply under the legislation. Judges are guided by the prosecution in plea cases as to what penalty to apply. If a judge is not made aware of the forfeiture provision, he/she will merely impose a fine, often requesting guidance on the relevant fine parameters. Where forfeiture is not ordered, then the accused is not deprived of the economic benefit of the infringement and a profit is still made even where a fine is ordered.

The majority of sea-fisheries cases are dealt with on a plea. Despite the issues raised above, forfeiture is normally imposed in plea cases without any substantial difficulty. However, as the forfeiture amount is agreed at a lower value than the true amount between the prosecution and defence, the accused is still not fully deprived of the economic benefit derived from the infringement. The accused is entitled to benefit from the plea, but the profit derived due to the lower forfeiture amount may not comply with EU sanction obligations. In many cases, when the judge is made aware of the mandatory nature of the forfeiture, he/she will impose a nominal fine as the forfeiture is considered part of the penalty. Fines and forfeitures are imposed with great inconsistency depending on the attitudes and opinions of the trial judge hearing the case.

Where no plea is entered and a full hearing is required, then the burden rests with the prosecution to prove the case beyond reasonable doubt. In some cases, the regulator and the legal team have not had a full pre-trial consultation. Therefore, counsel may not be fully aware of all the relevant law in the area and are usually not familiar with the subject matter. This is confounded by the fact that the judge and jury are also not familiar with the law and subject matter, which weakens the ability

of the prosecution to prove the case. Strict rules of evidence must also be complied with. Regulatory cases in general face similar difficulties in proving a case to a criminal standard for what is a regulatory investigation and regulatory offence. The protection of the presumption of innocence is at the core of the criminal trial. The burden of proof and all strict rules of evidence and procedural safeguards are centred around this protection, which are simply not appropriate for many regulatory offences where the conduct is not criminal.

In the dual system proposed by the author, the investigating officer should not make the decision as to whether a breach is dealt with by means of administrative sanction or referral for criminal prosecution. Therefore, all investigations must still be conducted to the criminal standard, particularly where more serious non-compliance may emerge during the investigation which may not have been apparent at the outset. The *Fitzpatrick* case³⁵ highlights the need for regulatory officers to be properly trained to conduct investigations which satisfy the high standards of the criminal trial. It is incumbent on investigators to ensure transparency and procedural fairness in all aspects of the investigation. The requirements of fair procedures at criminal trial are indeed onerous and investigators must receive adequate and ongoing training to meet these requirements.

The role of criminal prosecution in the enforcement of regulatory breaches must be reconsidered. A large body of empirical, sociological and psychological research converges on the finding that non-coercive and informal alternatives are likely to be more effective than coercive law in achieving long-term compliance with

³⁵ *DPP v Fitzpatrick* (Dublin Circuit Court, 23rd May 2017).

norms, and coercive law is most effective when it is in reserve as a last resort.³⁶ Over-reliance on criminal prosecution devalues and trivialises it as a sanction, reducing its deterrent effect and the moral stigma attached. The availability of alternative sanctions in itself should reinforce a more appropriate role for the courts³⁷ in enforcement of sea-fisheries law by making it clear that it is to be used as an apex level sanction for serious offending behaviour. The confinement of criminal prosecution to conduct which is criminal in nature should result in more proportionate fines being imposed. The imposition of higher fines increases the deterrent effect and moral force of criminal prosecution, which in turn increases the effectiveness of administrative sanctions.

Recommendations

It is a long-acknowledged fact that the court system in Ireland is completely overburdened and in need of an overhaul to alleviate court lists and get cases moving through the system in a more expeditious manner. It is beyond the scope of this study to suggest a comprehensive set of proposals to improve the efficiency of the court system as a whole. However, in relation to sea-fisheries prosecutions, the author makes the following recommendations:

As previously discussed, prosecution through the criminal courts should be reserved for serious offences, with less serious offences being dealt with by an administrative sanction system. Each system should complement and reinforce the effectiveness of the other. The moral stigma associated with criminal prosecution is still valuable for serious cases, while less serious cases could be dealt with

³⁶ Braithwaite J., *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002) 106.

³⁷ Macrory *supra* note 30, 3.4.

expeditiously and effectively by an administrative sanction system with a right of appeal to the courts as a strong procedural safeguard. The threat of criminal prosecution creates a deterrent effect which improves the effectiveness of an administrative system. Similarly, an effective administrative sanction system frees up the courts to deal with only serious offences meaning that criminal prosecution becomes a more realistic threat. Less volume coupled with a higher level of seriousness may alleviate some of the difficulties with priority for sea-fisheries cases in court lists, although this is likely to be a perennial problem where the courts are overburdened.

Where a fisheries case necessitates criminal prosecution, then the prosecutor must focus on the detrimental effects of the offence to emphasise that the conduct is criminal in nature. The obligation under EU law to impose effective, proportionate and dissuasive sanctions and to also deprive the offender of the economic benefit of the infringement should be raised before the trial judge. Any financial gain as a result of the offence should be quantified and presented to the court. The scale of the offence should be illustrated so that the court can have an understanding of the offence. For example, in under recording cases it is important to paint a picture of the quantities involved and the impact of under recording, where a judge and jury have no concept of the volume of fish or the adverse impact. It may be useful to make easily comprehensible comparisons, such as the number of containers the relevant amount of fish might fill, whilst also emphasising the value of the fish. This approach should be coupled with an explanation of the reasons why the law exists. The importance of sustainability and the overall aim to conserve fish stocks cannot be overemphasised to the judge and jury. What is often described as a trivial regulatory offence should be categorised as an environmental offence with serious

consequences for the sustainability of fish stocks in Irish waters. Particularly in the case of retention of prohibited species, the risk of extinction should be emphasised. If the subject matter is thoroughly explained, this may influence both the verdict of the jury and the sentence imposed by the judge.

The potential detrimental effect on compliant fishers should also be raised, including the knock-on effect in reduction of the next year's quota. Where a certain figure is reported in the logbook as the amount which has been caught, then this is the figure which goes to the EU to inform scientific stock assessments which are the basis for the next year's quota. Where a vessel has in fact fished far in excess of that figure, and where a number of vessels are consistently engaging in this practice, this can quickly add up to a gross under-estimation of the amount that has been fished and results in a completely incorrect figure being used as the basis for future quota. This could have a devastating effect on sustainability of stocks. This background information can get lost at trial and should be more thoroughly explained. However, counsel must be mindful not to overstep the boundary of what is appropriate to raise before the judge and jury in that they should not prejudice the accused in any way. It is very much a matter of professional judgement as to where this boundary lies in each case.

Prosecutions could be taken in a specialist regulatory court or environmental court. A specialist regulatory court already sits in Dublin but if more were to be established around the country they could hear regulatory cases which would free up court lists. Judges build up expertise in the area of regulatory law and are more likely to impose proportionate penalties for regulatory non-compliance where this is the court's sole focus. Cases could be heard in a timelier manner since there would be no custody cases to take priority.

However, more recent developments in case law have demonstrated a greater appreciation by the judiciary of environmental cases.³⁸ Therefore, it is quite possible that serious fisheries cases could be dealt with more than competently by the existing criminal courts. Judicial training is not common in this jurisdiction due to the enshrinement of the independence of the judiciary in the Constitution. Sentencing guidelines for judges are progressing at a slow pace. Therefore, it is highly unlikely that the judiciary would accept sentencing guidelines specifically in the area of sea-fisheries. However, there is scope to give talks on the seriousness of breaches of sea-fisheries law and their implications at annual meetings of the judiciary. In the author's experience, the vast majority of the judiciary are genuinely intrigued by the complexities of sea-fisheries law and are keen to comply with Ireland's EU obligations. If serious breaches of sea-fisheries law were to come before the criminal courts and this is properly illustrated to the judge in question, then the case should be dealt with like any other serious breach of environmental law, where the courts have displayed a willingness to impose high sanctions.³⁹

Administrative Sanctions for Fisheries: A Potential Framework

“Not all lawyers are concerned with doctrine, and not all regulationists are concerned with effectiveness, coherence, and responsiveness.”⁴⁰

In their 2018 report, the Law Reform Commission (LRC) noted that “[o]f the tools available to a regulator to secure regulatory compliance, the power to impose

³⁸ *Friends of the Irish Environment v Minister for Communications, Climate Action and Environment* [2019] IEHC 646.

³⁹ For example, in *DPP v Jenzsoph Ltd* (Dublin Circuit Court, 27 October 2015) a €20 million fine was imposed for breaches of the Waste Management Act 1996. In *DPP v TN* [2020] IESC 26 the Supreme Court held that the manager could also be held personally liable.

⁴⁰ Black J. in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 40.

administrative financial sanctions is one of the most effective.”⁴¹ Although Braithwaite views the ability to impose administrative financial sanctions as a crucial element of the enforcement pyramid,⁴² administrative financial sanctions are notably absent from the SFPA’s regulatory toolkit. Some regulators have already stated their view that administrative financial sanctions are an appropriate mechanism to deal with a type of breach where criminal prosecution would be unduly harsh.⁴³ While criminal sanctions would remain appropriate for certain serious cases, in many instances administrative financial sanctions would be a more effective and efficient means of addressing a breach of compliance. They should not be viewed merely as a means of dealing with more minor breaches, but also as a more appropriate and effective approach for certain breaches which may be serious but may not be so egregious as to require criminal prosecution. Administrative sanctions would also be useful for serious cases where there are evidential issues meaning that the case does not satisfy the criminal burden of proof. Currently, there are no other options in this scenario and, therefore, serious breaches may go unaddressed. Administrative sanctions could provide a solution in such circumstances.

There are a number of advantages to administrative sanctions, which may include alternative sanctions such as enforcement undertakings, as well as financial sanctions. First, they are easier, cheaper and quicker to impose than criminal

⁴¹ LRC, *Regulatory Powers and Corporate Offences* (Report, 2018) 99 https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf accessed 4 April 2022.

⁴² Braithwaite J., “The Essence of Responsive Regulation”, lecture Delivered at University of British Columbia, 21 September 2010.

⁴³ Commission for Communications Regulation, the Broadcasting Authority of Ireland, the Competition and Consumer Protection Commission, the Health Products Regulatory Authority, the Commission for Regulation of Utilities in Ireland, *Submission to the Law Reform Commission, Enforcement of Competition of Regulatory Law, the Case for Reform* (January, 2019) 19 <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/S-12-007-Submission-to-Law-Reform-Commission.pdf> accessed 4 April 2022.

prosecution which may not be practical or appropriate due to the evidential requirements, the complex analysis required and the criminal standard of proof that is necessary.⁴⁴ The relevant regulatory authority can potentially take a measure that is immediately applicable, so that the infringement can be tackled in the shortest timeframe, even though the regulated entity would retain the right to challenge such a decision before a court, or on appeal.⁴⁵

Interestingly, in *Purcell v Central Bank of Ireland*,⁴⁶ evidence was given and accepted by the court that maintaining the integrity of the financial regulation system could never be served by criminal prosecution and that proper regulation and enforcement could not be left to the courts. Although a breach of sea-fisheries law does not have the same grave economic consequences as a major breach of financial regulations, enforcement of sea-fisheries law should also not be left to the courts. As previously discussed, where a breach of sea-fisheries law, or any other regulatory breach do not satisfy the indicia of a crime, criminal prosecution cannot provide a suitable response.

Administrative sanctions may also constitute a realistic threat. In the context of sea-fisheries cases, the industry is likely aware that the probability of an offence being detected, prosecuted and a deterrent level sanction being applied is currently low.⁴⁷ Therefore, they may make a rational choice that the benefits of non-

⁴⁴ LRC *supra* note 41, 101.

⁴⁵ *Ibid.* 101-102.

⁴⁶ [2016] 7 JIC 2941.

⁴⁷ The EU has noted the low detection of infringements (about 1%) in Ireland and even fewer, almost negligible cases of convictions. See Blomeyer & Sanz: Sanz M., Stobberup K. and Blomeyer R. Implementation of the Current EU Fisheries Control System by Member States (2014-19) (European Union, 2020) 50 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU\(2020\)652205_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652205/IPOL_STU(2020)652205_EN.pdf) accessed 1 April 2022.

compliance outweigh any risk associated with the breach.⁴⁸ Therefore, the risk of prosecution is currently not a realistic deterrent. In fact, some commentators argue that criminal law rarely acts as a deterrent.⁴⁹ Proportionate administrative sanctions may constitute a greater deterrent in the majority of sea-fisheries cases due to the greater likelihood of proceeding and a higher sanction being imposed. The availability of alternative sanctions increases the deterrence value of criminal prosecution where it is reserved for serious breaches more likely to result in significant fines.

Administrative sanctions have the potential to constitute a more tailored, proportionate response than can be achieved by a fine imposed by a court. The application of administrative sanctions enables the regulator's expertise to be fully utilised, for example, in relation to conservation status, stock implications and analysis of fishing patterns. The decision on the type and level of sanction can be made on the basis of the regulator's expert knowledge whereas a judge is guided by the DPP in what level of fine to impose. The judge usually has no expert knowledge in the field, nor do counsel for the DPP advising the judge on the level of fine. An administrative sanction can be calculated by the regulator to be proportionate to the harm caused and to deprive the person of the economic benefit of the infringement, as required by EU law. The deterrence value of administrative sanctions is further increased where the amount incorporates both the value of the profit obtained, as well as a punitive element, although this may not be necessary in every case. This

⁴⁸ See Sutinen J.G., Rieser A., and Gauvin J.R. "Measuring and Explaining Noncompliance in Federally Managed Fisheries" (1990) *Ocean Development and International Law* 21(3) 335, 337 and 339.

⁴⁹ Robinson P.H. *Distributive Principles of Criminal Law: Who Should Be Punished How Much* (Oxford: Oxford University Press, 2009) 21-22.

means that administrative sanctions do not become a cost of business to regulatees but a realistic, effective deterrent.

As the decision to impose an administrative sanction is usually removed from the inspector on the ground, administrative sanctions may facilitate the preservation of a good working relationship between the regulator and regulatee. In the author's experience, criminal prosecution does not necessarily damage this relationship. This may be due to the fact that the industry acknowledges that the SFPA must fulfil its role and the actual decision to prosecute rests with the DPP and not the inspecting officer. The objectivity and transparency of the process involved in criminal prosecution means that both sides can remain amicable. The low fines imposed also mean that criminal prosecution may have little detrimental financial impact on the accused, although legal costs must also be considered. It is possible that a good relationship could be preserved where a low level administrative sanction is imposed. However, where a larger financial sanction is imposed, this has just as much potential, if not more, than criminal prosecution to damage the relationship. This would be somewhat mitigated by an independent adjudicative panel making the decision rather than the inspecting officer.

There are of course some potential disadvantages to the use of administrative sanctions. In order to act as an effective deterrent, administrative financial sanctions must be pitched at a sufficiently high level, which generates two potential problems. First, a large monetary sanction being imposed by a body other than a court arguably raises constitutional issues. However, the High Court decision in *Purcell* illustrated that, provided certain safeguards are in place, administrative financial sanctions are constitutionally permissible. A punitive sanction imposed by an administrative body as part of the administration of justice would be unconstitutional. However, where

there is no administration of justice prior to the imposition of sanction, then administrative sanctions are possible under the Constitution. In order to insulate an administrative system as much as possible from constitutional challenge, there should be no finding of guilt and the sanction should be confirmed by a court before it can take effect. This inability to impose and enforce administrative financial sanctions directly potentially hampers their effectiveness, given the delays involved. However, such judicial oversight is likely to be a requirement in order to ensure that the system does not amount to an unconstitutional administration of justice.

The second issue is the fact that some legislatures, including the Oireachtas, have been reluctant to grant regulators the power to issue such sanctions. This has meant that, in certain instances, when regulators are given financial sanctioning powers, they are pitched so low as to render them ineffective.⁵⁰ Therefore, it is important that, where administrative financial sanctioning powers are provided, they are set at a level which allows the regulator to impose sanctions with sufficient deterrent effect, whilst remaining proportionate and with procedural safeguards in place. If the regulator is not empowered to impose proportionate sanctions, there is a danger that administrative financial sanctions may simply become a cost of doing business for regulatees and they may choose not to comply, rendering the system completely ineffective.

To be effective, therefore, sanctions need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance. This must be reflected in the maximum sanction level provided by statute. However, sanctions must also be simultaneously proportionate to the non-compliance. The

⁵⁰ LRC *supra* note 41, 103.

LRC opines that an administrative financial sanction should only be imposed at the maximum statutory level in the gravest of circumstances.⁵¹ According to the *Anderson* case, an administrative sanction which is excessive and disproportionate to the administrative objective may even amount to a criminal sanction.⁵²

Much of the literature argues that administrative sanctions may not carry any reputational damage in the eyes of the public and that criminal conviction is likely to have a greater social stigma, which results in criminal prosecution having a greater deterrent effect.⁵³ Reduced social stigma can pose a particular issue in situations where the conduct that attracts the administrative sanction does not include any intention to cause harm,⁵⁴ which would likely be the case for the majority of sea-fisheries infringements. However, as fisheries cases are often viewed as victimless crimes, the stigma attached to criminal prosecution of the average fisheries case may be overstated. Social stigma may not be necessary in all cases if the breach is addressed by an effective, proportionate and dissuasive administrative sanction. The moral weight of criminal prosecution can still be employed for serious offences, thereby increasing and emphasising the stigma and reputational damage associated with criminal prosecution.

The Macrory Review made a number of recommendations for successful sanctions. According to Macrory's "Six Penalties Principles", a sanction should:

1. Aim to change the behaviour of the offender;

⁵¹ LRC, *Issues Paper Regulatory Enforcement and Corporate Offences* (2016) 24 https://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Regulatory%20Enforcement%20and%20Corporate%20Offences%20final.pdf accessed 1 April 2022.

⁵² *Registrar of Companies v Anderson* [2004] IESC 103, 26.

⁵³ See for example, Kahan D., "What Do Alternative Sanctions Mean?" (1996) 63 *University of Chicago Law Review* 591 and Brown D., "Street Crime, Corporate Crime and the Contingency of Criminal Liability" (2001) 149 *University of Pennsylvania Law Review* 1295, 1335.

⁵⁴ LRC *supra* note 51, 104.

2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance.⁵⁵

Based on Macrory's findings, the LRC recommended that in order to constitute an effective regulatory power or tool in Ireland, administrative financial sanctions should be based on the following principles:

1. Deter non-compliance.

The first goal of administrative financial sanctions, like any other enforcement mechanism, is to deter regulated entities from violating the law. It should deter both the person who has committed the breach from future non-compliance and also deter others generally. It must be sufficiently high so as to outweigh any perceived cost benefit of non-compliance.⁵⁶

2. Impose a proportionate sanction.

The sanction should be proportionate to the breach in question, and should therefore reflect a "gravity component" that reflects the nature of the contravention and the

⁵⁵ *Supra* note 30.

⁵⁶ LRC *supra* note 41, 104-105.

harm caused. The more serious the breach, the higher the sanction and conversely the less serious the breach, the lower the sanction.⁵⁷

3. Prevent financial benefit: “disgorgement”.

The administrative financial sanction should eliminate any financial benefit arising from non-compliance. This is sometimes referred to as “disgorgement”. In other words “crime doesn’t (or shouldn’t) pay.” It reflects the long-established legal principle that persons should not benefit from their wrongdoing.⁵⁸

4. The sanction should be responsive to the regulated entity.

The sanction should be responsive in that it should be appropriate for the particular regulated entity, taking into account, for example, whether it is a large or small company. It should also take account of recidivism versus a good compliance history and tailor the sanction appropriately.⁵⁹

In the opinion of the author, the Macrory review and the LRC report represents a common sense approach that should be applied to any potential administrative sanction regime for sea-fisheries and indeed any other regulatory field in Ireland where appropriate. As was the case when drink driving penalties and penalty points for driving offences were introduced, the legislation implementing alternative sanctions for sea-fisheries would likely face multiple judicial reviews which may expose failings in the system requiring rectification by means of changes to procedure or policy. This would impose an onerous cost burden on the State which could potentially stretch out over a number of years. However, as the recent

⁵⁷ *Ibid* 105.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*. See further Macrory *supra* note 30, 29-30 and Braithwaite J., *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008) 88.

Purcell case demonstrated, it is possible to design an extremely robust administrative sanction system which passes all constitutional tests.

The author proposes a system which mirrors the Central Bank powers and reflects lessons learned from the judicial review of the point system, the Scottish experience of introducing administrative sanctions and also the Macrory Review. Therefore, although a proposed new system comprising warning letters, FPNs and variable monetary penalties would very likely be challenged by way of several judicial reviews, if the system is set up and implemented to reflect existing principles as set out in the case law, the system should stand up to scrutiny. Furthermore, it seeks to avoid the many pitfalls which can occur in the implementation phase, as transpired in Scotland and the UK. The introduction of a more comprehensive, responsive sanctioning system is essential to strengthen Ireland's enforcement regime if Ireland is to comply with its EU obligations and ensure sustainability of stocks into the future. Such a system may also be applied to other areas of regulation in Ireland, where criminal prosecution is also an inappropriate response for the majority of regulatory breaches.

Recommendations

As O'Donnell J opined in the *O'Sullivan* case:

the requirement of fair procedures can differ depending on the issue to be determined, and it is a mistake to assume that a single one size fits all procedure must be applied, and perhaps a serious error, to which lawyers are prone, to approach any such case on the tacit assumption that only procedures

which approximate to a criminal trial are fair, and anything which departs from that is somehow dubious.⁶⁰

The author recommends that the State should introduce a number of measures to bridge the current gap in the middle of the enforcement pyramid, developing a more graduated, responsive approach to enforcement of sea-fisheries law, while also retaining the ability to escalate directly to higher level sanctions when necessary. The importance of adherence to fair procedures in the application of such measures cannot be overstated, although they need not amount to that of a criminal trial as noted by O'Donnell J. In particular, the *O'Sullivan* case emphasises that the regulatee must be able to make submissions before a decision is made on the proposed sanction and must also be provided with a robust appeals mechanism. As Hildebrandt observes, if the punishment of regulatory offences is to achieve its target of compliance, the punishment must entail a process of communication that includes the possibility of the accused contesting the wrongfulness of her action or the lawfulness of the violated rule.⁶¹

It is also important to note that where an administrative sanction is imposed, all other enforcement actions are suspended or stayed. If an administrative sanction is not complied with, other enforcement action may commence. For example, if a warning letter is ignored and the non-compliant behaviour continues, the regulator may escalate to a more serious sanction. Similarly, if an FPN is not paid, the regulator may pursue criminal prosecution. The author does not propose to follow the UK system whereby, for certain environmental offences, the regulator is

⁶⁰ *Supra* note 34, 46.

⁶¹ Hildebrandt M., "Justice and Police: Regulatory Offences and the Criminal Law" (2009) 12 *New Criminal Law Review* 43, 68.

empowered to take simultaneous enforcement action in the form of criminal prosecution in conjunction with an administrative financial sanction. Despite an Oireachtas Report suggesting that this would not be unconstitutional, the report goes on to note that the need for perceived fairness means that this approach has not been favoured by the legislature.⁶² The double jeopardy principle must also be considered. Although the Revenue is empowered to take a criminal prosecution after a civil sanction has already been imposed, the civil sanction is taken into account by the court, and a lower fine imposed. As a result, the Revenue tends to elect to follow one route or the other, calling the utility of having the power to take simultaneous administrative and criminal proceedings into question. Therefore, it is advisable that the regulator only pursues either an administrative sanction or criminal prosecution.

Warning Letters

The reintroduction of warning letters for minor infractions is recommended and has been highlighted by previous EU audits of Ireland's enforcement and sanction regime. A record of warning letters should be kept by the SFPA to build a compliance picture of the Master or operator. Where the Master or operator fails to address an issue or repeats the infraction, the regulator may elect to propose a more serious sanction. There should always be scope to apply the most appropriate sanction to the offence rather than being tied to a scaled approach where the regulator must proceed up the enforcement pyramid. A warning letter should not be a prerequisite to escalate to more serious sanctions. Warning letters would improve lower level enforcement as currently more minor infractions which do not meet the

⁶² Keyes F., *Administrative Financial Sanctions* (Oireachtas Library and Research Service, November 2019) 15 https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf accessed 1 April 2022..

threshold for prosecution go unaddressed, possibly resulting in a cumulative impact. Warning letters would also allow for enhanced follow-up, giving masters and operators an opportunity to amend their behaviour before any punitive sanction is applied. In this regard, warning letters may add an extra level of fairness to the enforcement process.

Fixed Penalty Notices

FPNs should be utilised for breaches which require a response above the level of a warning letter but which are still minor in nature. The author recommends that such a scheme should be applicable to the Master and/or the licence holder of the vessel where appropriate. An FPN scale should be set out in legislation similar to the Scottish model. This would involve setting the monetary penalty for each category of offence and also setting higher penalties by category for repeat offences. Macrory also advocates differentiating between small and large firms.⁶³ This would require certain expertise to assess financial status but would be a fair approach. However, it may not be practical in the context of FPNs and may be more appropriate for variable monetary penalties.

Any new FPN model should mirror similar systems in Irish law as much as possible so as to provide precedent and insulate the system from challenge. It may also result in greater acceptance of the system early on due to its familiarity. For this reason, the author does not recommend that Ireland follows one particular aspect of the Scottish model which allows the amount of the FPN to be varied to reflect the financial gain. This would be a significant departure from similar FPN models in the Irish jurisdiction. It is more appropriate to only allow for this type of discretion as to

⁶³ *Supra* note 30, 44.

penalty amount in the context of variable monetary penalties which can provide a more robust penalty application and appeal system. FPNs are usually used for more minor offences and therefore, the amounts set out in legislation could adequately address the breach, while also limiting the discretion of the body issuing the FPN. Where there is a need to reflect the economic gain, it may be more appropriate to propose a variable monetary penalty.

A panel within the SFPA should be formed to assess cases appropriate for FPN in order to ensure transparency, accountability and consistency in application. Officers should forward minor cases to the panel for assessment. This would preserve the relationship of the officers on the ground with industry as much as possible. It would also avoid FPNs being issued by some officers and not others for the same offence. Where the panel considers on the balance of probabilities that an offence has occurred and that an FPN is appropriate, the notice must be sent in writing to the person who is subject to the FPN. This must inform them of their option to pay the amount contained therein or alternatively to have the case sent forward for prosecution. A record should be kept of FPNs issued in order to initiate more serious enforcement action where necessary, for example, where an offence is repeated following an earlier FPN. Such action may be in the form of a higher FPN for repetition or the case may be sent forward for a variable monetary penalty or criminal prosecution if warranted. This decision must be at the discretion of the regulator. Similar to warning letters, it should not be a prerequisite that an individual or company is offered an FPN before more severe action is taken. FPNs should only apply to minor offences or repetition of minor offences to which an FPN can provide a proportionate response.

A regulatory impact analysis was conducted in 2014 on the possibility of introducing FPNs for minor offences.⁶⁴ The proposals broadly follow the system suggested by the author, with a few main differences. It proposed listing mitigating factors which would distinguish a criminal offence as a minor offence and thus be suitable for the application of an FPN. It also proposed creating a list of minor offences, but in the opinion of the author, this would very much limit the scope of the application of FPNs. It would be more appropriate to list categories of offences in the legislation to be combined with factors which make the offence suitable for the application of an FPN. The impact analysis also proposed limiting the number of times which a person can be offered an FPN, as repetition of an offence may mean that an FPN is not appropriate. The author proposes a system whereby an FPN can be doubled for repetition but if the offence is repeated a third time then an FPN is not suitable and should be considered for a variable monetary penalty or criminal prosecution. The impact analysis also proposed that FPNs could be in the form of “on the spot” fines issued by officers. This is a common feature of similar schemes in Ireland.⁶⁵ However, if officers could issue FPNs without any oversight from a central SFPA panel, this would inevitably lead to inconsistency in application. Individual officers may also be unaware of repetition of offence which may mean the FPN should be increased, or indeed an FPN may not be suitable and an alternative penalty should be considered. Therefore, it is more appropriate for officers to inform the person that they will be forwarding details of the incident to the SFPA for

⁶⁴ Department of Agriculture, Food and the Marine, “Screening Regulatory Impact Analysis of the Proposal for a Bill to amend the Sea Fisheries and Maritime Jurisdiction Act 2006 to provide for Fixed Penalties for minor offences, a Points System for Masters of Fishing Vessels for serious offences and Quota Management Policy” (19 November 2014) <https://assets.gov.ie/132663/4d766256-fce2-44af-85b9-2517ba65efba.pdf> accessed 1 April 2022..

⁶⁵ For example, driving offences, parking violations and litter offences.

consideration of an FPN where a fuller picture of the overall compliance record of the person and an objective assessment of the incident can be undertaken.

Inconsistency in application was a major concern cited by respondents to the consultation paper on the proposed introduction of FPNs.⁶⁶ Erosion of constitutional rights and the presumption of innocence were also raised in objection to the introduction of such a system. Other submissions welcomed the possibility of decriminalising fishers by introducing FPNs but demanded greater clarity on what offences would be considered minor. However, in the opinion of the author, this is a fundamental misunderstanding of the nature of FPNs. FPNs provide an alternative to criminal prosecution, but the person can still elect to have a court adjudicate on the offence rather than paying the FPN. Therefore, payment is not an admission of guilt but it also does not decriminalise certain offences. As previously stated, in the opinion of the author it is not possible to give a definitive list of minor offences to be dealt with by FPNs as to do so would limit the scope of their application to such an extent as to make them almost redundant. Greater consultation with the industry on how the FPN would operate would be welcome in order to secure buy-in to the system.

Variable Administrative Financial Sanctions

A more complicated procedure would need to apply to variable administrative financial sanctions. It is essential that such a scheme would comply

⁶⁶ Department of Agriculture, Food and the Marine, *Responses to the Consultation on Proposed Amendments to the Sea Fisheries and Maritime Jurisdiction Act 2006* (February, 2015) <https://www.agriculture.gov.ie/seafood/sea-fisheriespolicymanagementdivision/completedpublicconsultations/> accessed 4 April 2022.

with the Six Penalties Principles and seven characteristics recommended by the Macrory Review. The proposed system is set out as follows:

1. Adjudicative Panel

Similar to the Central Bank system, the author proposes that where the SFPA has reasonable grounds for believing that a breach of legislation has occurred which is suitable for the application of a variable monetary penalty, the case should be sent to an adjudicative panel who would decide whether the breach occurred on the balance of probabilities. Using an approach comparable to the Medical Council, a panel from the SFPA should present the case to an external, independent adjudicative panel.

This adjudicative panel, while externally sourced, would be internal to the SFPA as is the case for disciplinary committees in the Medical Council and Law Society. This would ensure there would be no accusations of bias but the panel could still use SFPA facilities and powers. It would also reflect a criticism in the point system cases that SFPA was acting as judge, jury and executioner and is line with fair procedures. There should be a roster established from which a three-person adjudicative panel could be selected when required. This would avoid any delay if members are incapacitated or resign. Should any conflict of interest arise, an alternative member could be chosen so as to vindicate *nemo iudex in causa sua*.⁶⁷ In the case of the Appeals Officer for points, a backlog of cases built up while a new Appeals Officer had to be hired after the previous one resigned. Delay in the hearing of a case could potentially provide grounds for challenge. The panel should be made up of 3 people so as to establish a majority decision. One member should be legally qualified with experience of a set number of years which is usually set at 10 years in other similar

⁶⁷ Loosely translated this Latin maxim means “no man shall be a judge in his own cause”. It could also be referred to as the rule against bias on the part of the decision-maker.

panels. The other two members should be suitably qualified, preferably including an accountant to deal with any financial records which may be presented.

2. Oral Hearing

When a public body is making decisions with the potential to adversely affect private individuals or companies, it must provide fair procedures in any decision-making process. The more severe the potential consequences, the greater the level of fair procedures required.⁶⁸ On the basis of the Supreme Court decisions in *O'Sullivan* and *Crayden*, the author recommends that an oral hearing should be available to a regulated entity before any administrative financial sanction is imposed in order to vindicate the right to *audi alteram partem*. The regulatee should be given notice in writing of the proposed hearing including details of the alleged breach, the option to make written submissions to the panel in advance of the hearing and their right to legal representation.⁶⁹ In practice the regulatee's legal representative then requests full disclosure of all material relating to the case to facilitate written submissions and preparation of the defence. This means that the SFPA would need to have the full case ready to present in advance. There should also be an option for the regulatee to elect to have the panel base its decision on written documents without a full oral hearing which would be considerably more time-consuming and expensive. However, given that the financial sanction may be quite onerous in some cases, there should be an option for an oral hearing.

⁶⁸ Hogan G. and Morgan D.G., *Administrative Law in Ireland* (Dublin: Round Hall, 2010) Chapter 12.

⁶⁹ There may be a need to consider the application of the legal aid scheme. In *O'Brien v Personal Injuries Board* [2009] 3 IR 243 the Supreme Court held that legislation need only be concerned with a person's right to legal representation before an administrative body in situations where the right to make the best possible case is being restricted.

Based on the author's experience of the points appeal system, the oral hearing would function in a manner similar to a court hearing, entailing all of the rights to fair procedure, but less strict rules of evidence due to the lower burden of proof, i.e. on the balance of probabilities. Ideally, the oral hearing should be less formal and more easily understood by people outside of the legal community. It is essential that the legislation is carefully worded ensuring the burden of proof clearly rests with the regulator, which was a failing of the point system. Both sides usually have legal representatives present who engage in cross-examination of oral evidence. It is also possible to submit affidavit evidence. The procedures which would apply to the conduct of the oral hearing should be publicly available.

On the basis of the *Purcell* case, the oral hearing should function as an inquiry which determines what happened as distinct from a criminal trial which determines guilt. Although the panel may find that certain conduct constitutes an infringement which may also constitute a criminal offence, this does not automatically transform the hearing into a criminal process. There is no finding of guilt as a result of the hearing and the author suggests providing a statutory appeal mechanism to dispute the finding of the panel in court. Furthermore, the author proposes that the panel should not be able to enforce a sanction which should remain a function of the courts.

3. Level of administrative financial sanction

Any administrative financial sanction imposed must have a sufficient deterrent effect to be considered effective.⁷⁰ It cannot be too low or regulatees may choose not to comply where the benefits of non-compliance outweigh the cost of sanction. A

⁷⁰ LRC *supra* note 41, 159.

balance must be struck between the need for a sanction that is sufficiently severe, which at the same time remains within constitutionally permissible boundaries. It is difficult to anticipate where exactly these boundaries lie. Judicial decisions have not provided any guidance on this issue. Cases involving the imposition of administrative financial sanctions by public bodies have tended to focus on the legality of the powers of the public body to impose a civil sanction and have not specifically considered in detail the level of the sanction to be imposed.⁷¹

Therefore, the simplest option is for legislation to set a statutory maximum for penalties, to avoid violating Article 15.2.1° of the Constitution. The Macrory Review opposed the use of upper limits of administrative financial sanctions in order to ensure that regulators have the flexibility and ability to capture the financial benefit that businesses may have acquired through a regulatory breach.⁷² However, there is a significant risk that an administrative system would be challenged on the basis of being unconstitutional if an upper limit is not set. It may also be appropriate for the legislation to set out a non-exhaustive list of factors to be considered by the panel in calculating the sanction level for the same reason.

A guidance document should be published by the panel to ensure transparency in the process. The guidance document should set out how the panel will make its decision as well as the burden of proof which it applies to the decision. Interestingly, in the UK, the Environment Agency applies different burdens of proof to various administrative sanctions. The agency must be satisfied beyond reasonable doubt that an offence has occurred before it can apply a civil sanction for an environmental offence, but only on the balance of probabilities to impose a climate

⁷¹ *Ibid* 160.

⁷² Macrory *supra* note 30, 48.

change or mercury civil sanction. The agency need only have reasonable grounds for believing an offence has taken place to enter into an enforcement undertaking. Macrory continues to advocate that the criminal standard of proof should be applied both to the investigative stage and to the decision on whether to apply an administrative sanction.⁷³ However, it is submitted that in the Irish context, the appropriate burden which should be applied to the decision to impose an administrative sanction is on the balance of probabilities as the higher standard, beyond reasonable doubt, only applies to criminal cases. It would not be appropriate for an administrative body to apply this standard. However, as previously discussed, the operation of a dual system requires officers to conduct all investigations to the criminal standard, including adherence to chain of custody and fair procedures, as the decision on whether the case is administrative or criminal will not have yet been made.

The guidance document must also contain details of how it will calculate the level of sanction where appropriate, including the criteria used having regard to the circumstances of the case and the need to ensure proportionality, fairness, consistency and predictability of sanction. Reference should also be made to the requirements under EU law for sanctions to be effective, proportionate and dissuasive and to deprive the offender of the benefit derived from the infringement. In addition, the list of considerations which apply to the gravity of the infringement under the IUU Regulation are useful, namely the nature of the damage, its value, the economic situation of the offender and the extent of the infringement or its

⁷³ Macrory R. "Sanctions and Safeguards: The Brave New World of Regulatory Enforcement" (2013) 66 *Current Legal Problems* 233, 243.

repetition. A comprehensive guidance document is essential to transparency in the process and would help to build trust and confidence within industry.

Guidance can also be drawn from the UK, where regulators may consider a list of non-exhaustive aggravating and mitigating factors in determining the level of penalty. The regulator may consider the seriousness of the breach, compliance history, financial gain, whether the breach was reported voluntarily and the conduct of the regulated entity since the discovery of the breach including any action taken to remedy the breach and co-operation with the regulator.⁷⁴ It is important that the guidance document provides a detailed list of potential considerations which may be taken into account in setting the level of penalty but it is also that the panel is not tied to a set list and is free to take all appropriate factors into consideration, which may vary between cases.

In considering the history of the operator, specific guidance is required in the case of recidivism. One of the criticisms of administrative sanctions has been that they do not adequately take account of and reflect recidivism, which is crucial to their effectiveness. The guidance document must clearly state what type of recidivism will be taken into account, i.e. repetition of the same infringement only, or whether other previous infringements be taken into account. The seriousness of any previous infringements would also need to be assessed to determine if they should affect the penalty under consideration and if so, by how much.

⁷⁴ Department for Business Enterprise and Regulatory Reform, *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (July, 2008) 47
<https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.berr.gov.uk/files/file47135.pdf>
accessed 1 April 2022.

It is also essential that the level of sanction is consistent with the principle of proportionality and sentencing principles generally. The Supreme Court has recognised that criminal sentences must be proportionate to the severity of the offence and also the circumstances of the offender.⁷⁵ The concept of proportionality in sanctioning is already helpfully enshrined in the EU regulations, namely, the sanction imposed should be proportionate to the gravity of the infringement. Gravity may include an assessment of the economic situation of the offender which is a further consideration when calculating a proportionate sanction.

O'Malley notes that a difficulty with imposing fines on corporate offenders is the “spillover” that this can have on other persons who were not responsible for the breach. The heavier the financial sanction the greater potential negative effects. He suggests that capping fines at a specified percentage of annual turnover would ensure that a company or individual would not become insolvent as a result of a financial sanction.⁷⁶ Therefore, a delicate balance must be struck in deciding the level of sanction. A middle ground must be found in setting a monetary sanction that constitutes a genuine deterrent, but which allows the company to remain in business.

Another possible option is to allow the financial sanction to be paid over a number of years to minimise the adverse effects on third parties.⁷⁷ In *DPP v Kilsaran Concrete Ltd*⁷⁸ the Court of Appeal held that the financial hardship imposed on the respondent could be a relevant factor in mitigating the severity of a fine in the interests of proportionality. In assessing the proportionality of the sentence, the Court considered the gravity of the offence and the resources of the firm. The Court

⁷⁵ *The People (DPP) v M* [1994] 3 IR 306.

⁷⁶ O'Malley T., *Sentencing Law and Practice* (Dublin: Round Hall, 2000).

⁷⁷ *DPP v Roadteam Logistic Solutions* [2016] IECA 38.

⁷⁸ [2017] IECA 112.

concluded that because the offending conduct was particularly severe and the firm had adequate resources to meet the fine, no mitigation was appropriate. The Court acknowledged that a substantial fine would cause the company hardship. However, it noted that a certain level of hardship would be required for there to be meaningful deterrence, both general and specific. The Court also observed that there was no suggestion that a very large fine would threaten the viability of the company.

The principles of this case should be borne in mind in assessing proportionality of sanction. It is likely that the proportionality of financial sanctions would be ripe for challenge. The requirement for proportionality is even more pronounced in the context of an administrative sanction rather than a criminal sanction as the same level of safeguards do not apply to the decision. By its nature, a criminal offence should also be more deserving of a punitive level fine imposed by a court, whereas an administrative body imposes the sanction at a lower burden of proof. The capping of sanctions under legislation coupled with confirmation of sanction by the High Court would alleviate this issue.

4. Confirmation by the High Court

Once the panel has determined that a breach has occurred and decided on an appropriate sanction level, this should be confirmed by the High Court. Although this step will undoubtedly introduce extra delay into the process, it is a necessary step in order to ensure the panel is not usurping the judicial function under the Constitution. Therefore, the penalty will not be imposed until the High Court confirms it. Court confirmation of sanction is a feature of other administrative sanction systems and was an essential feature in the High Court's finding that the administrative sanction regime of the Central Bank was constitutional. The High

Court may either approve the decision of the panel subject to a right of appeal, or it may not approve the decision, in which case the High Court sends the case back to the panel with instructions.

5. Appeal from the High Court

It is important that the regulatee would be able to appeal the decision of the High Court to the Court of Appeal. Similar legislation provides that such a right of appeal would be only on a point of law of general public importance, or where the interest of justice so require.⁷⁹ This is in order to mitigate the phenomenon of regulatory gaming by reducing the opportunity for well-resourced regulated entities to take appeals as a delaying or frustrating tactic.⁸⁰ The author is not proposing the introduction of any form of appeal tribunal which would increase delay and would likely still result in an appeal to the courts in many cases. As an independent panel rather than the regulator decides on the level of sanction, this mitigates the need for a further independent entity to adjudicate on the case in question. However, the introduction of a new appeal body would of course be an option to further strengthen the rights of appeal of regulatees.

6. Publicity of Sanctions

Once the process is concluded, a widespread practice exists whereby regulators publish details of administrative sanctions, usually on the regulator's website. Publication presents a number of advantages. First, where other regulatees can see that breaches of the law are punished by significant sanctions it will affect their own behaviour. A common statement from fishers is that in order to induce deterrence,

⁷⁹ Article 34.5.3° of the Constitution.

⁸⁰ LRC *supra* note 41, 145.

the enforcement agencies must take immediate action when discovering illegal activities, particularly in the case of chronic violators. If the latter can get away with non-compliance, this builds up incentives for others to violate regulations.⁸¹ Therefore, publication of administrative financial sanctions can have a significant deterrent effect on other regulatees by highlighting the punitive amount of the sanction and also the likelihood of the regulator imposing a sanction. It can result in the modification of the behaviour of other regulated entities as well as the entity receiving the sanction.

It may also have a deterrent effect in terms of reputational damage. It is debatable how much of an influence reputation has on a fishing company's profitability. Vessels sell directly to factories rather than members of the public who may be more concerned with buying from environmentally friendly companies. However, imposition of sanctions may prevent vessels from accessing EU funding. Most importantly, publication of sanctions provides transparency by ensuring the regulator is exercising its powers appropriately and so operates as an accountability mechanism. This may create support for the system in addition to satisfying compliant members of industry that the regulator is doing its job.

Licence Suspension and Revocation

Although the power to revoke fishing licences already exists, this power is not utilised by the Licensing Authority and therefore requires some reassessment. It may be advantageous to introduce a test similar to the "fit and proper person" test when the decision is being taken whether to grant a licence to an applicant which

⁸¹ Raakjaer Nielsen J. and Mathiesen C., "Important factors influencing rule compliance in fisheries lessons from Denmark" (2003) 27(5) *Marine Policy* 409.

could be subject to review. This test is used in a number of situations including in the appointment of directors and managers of financial entities and in the granting of waste licences. In the case of directors, fitness is determined by examining the individual's competence and capability, honesty, integrity, fairness and ethical behaviour, and financial soundness.⁸² Under s. 40 of the Waste Management Act 1996, a “fit and proper person” is defined as a person with no convictions for offences under the Act, has the appropriate technical competence and is likely to be in a position to meet any financial commitments or liabilities.⁸³ Applicants with previous convictions for waste or environmental offences are not precluded from being granted a waste facility permit. The local authority may take a number of factors into account in making the decision to grant or refuse the permit including the circumstances, frequency and severity of the offence.⁸⁴

Similar factors to those which apply to waste could be considered by the Licensing Authority in deciding whether an applicant is a “fit and proper person” to

⁸² Central Bank of Ireland, *Fitness and Probity Standards* (Central Bank of Ireland, 2014) <https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/fitness-probity/regulated-financial-service-providers/fitness-and-probity-standards.pdf?sfvrsn=6> accessed 4 April 2022.

⁸³ S.40 of the Waste Management Act 1996 provides: For the purpose of this Part, a person shall be regarded as a fit and proper person if—
 (a) neither that person nor any other relevant person has been convicted of an offence under this Act prescribed for the purposes of this subsection,
 (b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him or her to direct or control the carrying on of the activity to which the waste licence will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the licence and the other requirements of this Act,
 (c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers will be entered into or incurred by him or her in carrying on the activity to which the waste licence will relate in accordance with the terms thereof or in consequence of ceasing to carry on that activity.
 (8) The Agency may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person is not a person to whom subsection (7) (a) applies.

⁸⁴ See further National Waste Permit Collection Office, *Waste Collection Permit Regulations Guidance Manual* (2012) 51 <https://www.epa.ie/publications/licensing--permitting/waste/WCPManualweb.pdf> accessed 4 April 2022.

hold a fishing licence, which may help to improve compliance with sea-fisheries law. Where the applicant subsequently commits a breach, the applicant's status as a "fit and proper person" should be reviewed and, where appropriate, the licence should be suspended or revoked in a process which complies with fair procedures.

A similar model to the one proposed in the context of variable monetary penalties could possibly be applied to licence suspension and revocation as a top tier sanction. However, as this level of sanction could have such a detrimental impact, it would require significant safeguards and its constitutionality as an administrative measure would very likely be challenged. As previously discussed, the Licensing Authority is already empowered under the legislation to revoke licences for non-compliance with licence conditions.⁸⁵ There is potentially a myriad of reasons why this power is not utilised. It could be due to the traditional view of fishing as a right and also the right to earn a livelihood. It is also possible that as the Licensing Authority performs an essentially administrative function, the Authority may be reluctant to engage in an enforcement role by deciding to suspend or revoke a licence. Where licences were suspended under the point system, the Licensing Authority only suspended the licence once advised by the SFPA and had no role in the decision itself.

In *Oxygen Environmental Ltd v Environmental Protection Agency*,⁸⁶ the company was granted an injunction against the EPA's decision to suspend its licence because the company was not notified that an investigation was underway or that such a determination was taking place. The company argued it was entitled to make submissions prior to the decision being made. The parties settled the case after the

⁸⁵ S. 4(8)(c) of the Fisheries (Amendment) Act 2003 as inserted by s.97 of the 2006 Act.

⁸⁶ High Court, 24th October 2016.

injunction was granted meaning there was no final hearing which would have elaborated on the law to a greater extent. However, coupled with the Supreme Court decisions in *O'Sullivan* and *Crayden*, it would seem reasonable to conclude that fair procedures must apply before a determination on licence suspension or revocation takes place. Therefore, it is not enough to only provide an appeal mechanism after the initial decision has been made. There must be an opportunity to make submissions to the decision-making body prior to any determination on the issue.

There is a notable absence of procedures around the decision to suspend or revoke a fishing licence in the legislation, whereas, in the *Oxigen* case, the legislation would suggest that the licence holder should have been entitled to make representations once the EPA proposed to suspend the licence.⁸⁷ The Licensing Authority may be reluctant to make a decision with such serious consequences without legislative guidance on the procedures which should apply. Although there is provision to challenge the suspension or revocation in the District Court, there is no provision to make representations to the Licensing Authority prior to its decision, which would seem essential based on the case law.

If licence suspension and revocation is to be used as a sanction for serious breaches, more comprehensive procedures must be set out under the legislation. A formal process encompassing an independent panel, oral hearing and appeal mechanism to the High Court may encourage use of this sanction which could potentially have more severe consequences than criminal prosecution. It should be reserved for the most egregious breaches with detrimental impact to the environment and would most likely require an element of recidivism. Therefore, it may be more

⁸⁷ See s.48A of the Waste Management Act 1996 as inserted by Protection of the Environment Act 2003.

appropriate that the sanction could be proposed by the SFPA as the enforcement body to an independent panel, as discussed above, with the administrative process of the actual suspension or revocation of the licence resting with the Licensing Authority similar to the point system once the adjudication and appeal process has concluded.

On the basis of *O'Reilly v Wicklow County Council*,⁸⁸ it appears to be possible for an administrative body to make a decision to suspend or revoke a licence as long as fair procedures are complied with. In this case, the High Court upheld the revocation by the county council of a waste permit which is analogous to a licence. The case underlines the importance of adherence to fair procedures in the decision-making process to ensure the lawfulness of the enforcement action. However, the permit was revoked due to the applicant's failure to provide information as part of a review of the permit as opposed to any serious breach which caused the local authority to decide to revoke the licence. The applicants also did not make submissions on the constitutionality of an administrative body having the power to revoke a permit. Submissions were confined to alleged breach of fair procedures amongst other issues. Therefore, it may be argued that where an administrative body alleges that a licence holder has committed a serious breach and proposes to suspend or revoke the fishing licence, this is straying into the exclusive role of the courts. The significant evidence of wrongdoing required to justify the seriousness of the sanction may trespass on the criminal sphere. The author has proposed a system whereby the High Court must confirm the sanction which may satisfy such an argument. However, it may be more appropriate to refer the case for criminal prosecution

⁸⁸ [2014] IEHC 537.

where the conduct is criminal in nature and therefore, requires the full procedural rights of a criminal trial. If the legislature were to provide the courts with the power to suspend or revoke licences, the courts may consider licence suspension or revocation as an appropriate sanction where criminal prosecution is reserved for serious cases. This option also has the advantage of bypassing many of the constitutional arguments which might arise if the sanction was imposed administratively.

Enforcement Undertakings/Negotiated Compliance Agreements

A further administrative action which may be a useful addition to fisheries enforcement are enforcement undertakings or negotiated compliance agreements. They may prove particularly useful for dealing with persistent breaches by a particular vessel or fleet of vessels owned by the same person or company. Other administrative sanctions are more suited to addressing breaches detected in a single incident, whereas enforcement undertakings can target a pattern of offending behaviour. They would involve negotiation between the regulator and the offender which could take some time and be highly contentious. However, where a legally binding agreement is reached, which if breached would result in prosecution, this could prove to be more effective in preventing further breaches and be more beneficial to the marine environment than monetary penalties or fines. Therefore, the motivation must be to prevent further damage rather than to punish for damage already done. In this context, an enforcement undertaking is not appropriate in cases of egregious breach which would require sanction. Undertakings or agreements are useful in that they can be specifically designed and tailored to the circumstances of the offender and the breach. They may facilitate the foundation of a new relationship between the regulator and the offender due to the ongoing follow-up required to

ensure compliance with the agreement. This follow-up enhances the benefits to the marine environment. In the context of monetary penalties and fines, the only option is to initiate further enforcement proceedings which involves delay and does not remedy the situation as quickly as a co-operative, collaborative relationship between the regulator and regulatee. The cause of persistent breaches can be addressed in the long term rather than a monetary penalty or fine which may only provide a short term punishment.

Caution would need to be exercised in ensuring that the negotiation process does not become a delay tactic in initiating other enforcement actions. Therefore, by their nature, enforcement undertakings are less likely to be successful in cases where the offender has acted intentionally in bad faith.⁸⁹ The regulator must exercise discretion in deciding when to attempt to reach an agreement with an offender. The regulator may be reluctant to begin protracted discussions and may fear public backlash for not taking punitive action. It may present an intimidating prospect to a regulator to prioritise agreement and co-operation over sanction, which is the route it is more accustomed to. The regulator may also be justifiably concerned about maintaining consistency in the type of conduct which is sanctioned versus the type of conduct which calls for a more co-operative strategy. The agreement itself may come under scrutiny from the public, including the industry itself, NGOs and community groups. The regulator should be empowered by statute to enter into such agreements to ensure it is not acting *ultra vires*. Effective administrative sanctions and criminal prosecution must be available in order for agreements to be enforceable as, although

⁸⁹ Kellett P., "Balancing the Stick and Carrot in Securing Compliance and Enforcement in England" (Law and Environment Conference, UCC, April 2016).

collaborative by nature, they are nonetheless less likely to be successful where there is no threat of meaningful sanction.

The author does not recommend that Undertakings Plus⁹⁰ be introduced as an addition to enforcement undertakings. This would involve the offender paying a monetary penalty in addition to entering into an agreement to comply with a set of conditions. Although the approach makes sense on paper, it could present a barrier to offenders' willingness to engage in negotiations to secure an agreement. A straightforward monetary penalty might seem to be the easier option, rather than entering into an agreement where they receive a monetary penalty plus the threat of further penalty or criminal prosecution for non-compliance with the agreement. The imposition of a penalty undermines the co-operative spirit of the enforcement undertaking and disincentivises uptake. Therefore, in the opinion of the author, the availability of Undertakings Plus would not improve enforcement of sea-fisheries law. However, enforcement undertakings present a viable option.

Moving to a Dual System

The creation of a dual administrative/criminal system requires a shift in the usual approach of the legislature, although the legislature has already provided a dual system for both the Central Bank and Revenue Commissioners. Macrory notes that in the UK, despite the government's full acceptance of the recommendation for an integrated enforcement system comprising of civil and criminal penalties in a single continuum, the implementation of this principle into legislation was where the "vision unravelled".⁹¹ Legislatures in general have a tendency to designate conduct

⁹⁰ Macrory *supra* note 30, 4.30.

⁹¹ *Supra* note 73.

as a criminal offence rather than introducing other means of sanctioning behaviour through legislation. Handing over responsibility to the courts to adjudicate on behaviour presents an easier, safer option than justifying the vesting of controversial quasi-judicial powers in a regulatory body. Where issues arise in relation to the exercise of these powers by the regulator, then the legislature will likely also come under fire for granting the regulator such powers under the legislation.

It is also a much more onerous task for legislatures to draft and agree upon a comprehensive system of administrative sanctions which satisfies fair procedures and constitutional requirements. Where the system is challenged successfully in the courts, it may require redrafting and may be difficult to pass, as occurred with the numerous point system SIs. Legislatures are vastly more experienced in creating criminal offences where fair procedures and appeal mechanisms are already predefined by criminal procedure. Legislatures also view the criminalisation of conduct as proof that it takes such conduct seriously as there is often a public perception that anything less than criminal prosecution does not provide a satisfactory response.

In Ireland, there exists a somewhat ingrained view that any sanction system other than criminal prosecution is unconstitutional. As previously discussed, the Minister repeatedly stated during the debate of the 2006 Act that the level of penalties required to satisfy the EU obligation for effective, proportionate and dissuasive sanctions could only be imposed by a court and that it would be unconstitutional to impose such penalties administratively. The legislature has already created extensive administrative sanction systems to be implemented by the Central Bank and Revenue Commissioners, which it was perhaps more willing to do because of the disastrous consequences of the financial crash. A similar incentive

may be provided by another EU infringement case against Ireland which could influence the Oireachtas to provide a comparable dual system for sea-fisheries, despite the objections from politicians and industry which would likely be raised.

In the opinion of the author, it would be difficult to attempt to define certain breaches as criminal offences and others as suitable for administrative sanctions under the legislation, which means that the legislature will have to create hybrid offences. It may continue the current system, whereby the national legislation contains a cover-all provision for EU regulations. Provision can be made, similar to the Central Bank and Revenue enforcement systems, where offences can be dealt with either by administrative sanctions or they can be referred for criminal prosecution at the discretion of the regulator. It would be challenging for the legislature to define certain offences as criminal only or administrative only when sea-fisheries offences depend very much on variable factors such as the value, quantity, status of species etc. For example, it may appear that an offence in relation to mesh size would satisfy the characteristics of a minor infringement, which in most cases it would and therefore, could be classified as an administrative offence. However, where the mesh size results in a large quantity of high value undersized fish caught in a protected area which causes environmental damage, it may become criminal in nature. Therefore, it is difficult to categorise offences as either administrative or criminal and attempting to do so may lead to the application of inappropriate sanctions. In order to attain the objective of effective, proportionate and dissuasive sanctions, discretion should be left to the regulator to decide on the appropriate sanction route.

In order for a dual system to operate effectively, the regulator must be given sufficient discretion under the legislation and in any guidance document to select a

sanction which is proportionate to the non-compliance in line with a really responsive approach. As previously discussed, the regulator must not be confined, either by legislation or policy, to offer lower tier sanctions first and to slowly move up the pyramid. Where such a wide discretion is vested in the regulator, accountability mechanisms must also be put in place to ensure consistency, fairness and transparency in the process.

The pressure on regulators to refer the majority of cases for criminal prosecution must be acknowledged in the proposed system. Warning letters and FPNs are in general quite clear cut, in that they apply to minor offences where the stakes are lower in terms of damage done and economic benefit obtained. Therefore, the regulator can, in general, be confident in choosing these courses of action. However, the decision to pursue an enforcement undertaking or a variable monetary penalty over criminal prosecution requires greater justification. Often the default position becomes to refer for criminal prosecution first. Where the DPP decides not to initiate criminal prosecution, then the regulator can pursue an alternative sanction, safe in the knowledge that it has covered itself should any questions arise as to why the case was not prosecuted. This is not a desirable approach in the context of a really responsive strategy as cases which could more effectively be dealt with by an administrative sanction may be prosecuted unnecessarily. This means that the problems associated with prosecution of cases which do not satisfy the harm focus of the criminal law will remain, particularly low fines. Therefore, the regulator must commit to a really responsive strategy by not adopting a default referral to the DPP before considering administrative sanctions.

This position represents a much more challenging approach for regulators where they are accustomed to abdicating responsibility to the court process for

determining sanctions. The regulator is far less accountable where all cases are referred for criminal prosecution. In a dual system, the regulator must justify every step of the enforcement process from investigation, enforcement action, sanction level and fair procedures in the application of sanction. The regulator is more exposed than it would be if it were to simply engage with the more objective, independent court system. The regulator may also be concerned about maintaining consistency and predictability in sanction choice where its actions would be closely scrutinised by the industry, public and media. This is not a comfortable or familiar position for the majority of regulators in Ireland but it is a necessary step to ensure effective enforcement in the context of sea-fisheries law, where the reliance on criminal prosecution as the sole means of enforcement has proved unsatisfactory. A dual system should also be applied to other areas of regulation given their questionable status as criminal offences alongside the well-documented issues with prosecuting regulatory offences in general.

In implementing a dual system, the regulator should have regard to the Seven Characteristics as set out by Macrory. He states that regulators should:

1. Publish an enforcement policy;
2. Measure outcomes not just outputs;
3. Justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament;
4. Follow-up enforcement actions where appropriate;
5. Enforce in a transparent manner;
6. Be transparent in the way in which they apply and determine administrative penalties;

7. Avoid perverse incentives that might influence the choice of sanctioning response.⁹²

These measures are necessary to create good regulatory governance, the importance of which has since been underlined by Macrory to ensure that a dual system is implemented properly by both the legislation and the regulator.⁹³ His recommendations are very much in line with a really responsive approach, which involves a greater focus on assessing the effectiveness of the regulator's actions and changing its approach based on this review. The SFPA already has to justify its enforcement actions through its annual report, parliamentary questions and EU audits. However, scrutiny would certainly increase where the regulator is empowered to impose administrative sanctions in conjunction with an independent panel. Kilcommins *et al.* observe that apart from respective annual reports, there is little in the way of an accountability structure overseeing the policy choices of the various regulatory agencies and the manner in which they invoke their considerable investigative and enforcement powers.⁹⁴ A balance would need to be struck between accountability and the independent exercise of the regulator's discretion as regards enforcement decisions.

It is crucial that the regulator would provide a publically available enforcement policy or guidance note on what practical steps the regulator will take in order to uphold the principles of proportionality, consistency, transparency and

⁹² *Supra* note 30.

⁹³ *Supra* note 73.

⁹⁴ Kilcommins S., Leahy S. And Spain E., "The Absence of Regulatory Crime from the Criminal Law Curriculum" in Gledhill K. and Livings B. (eds) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Oxon: Routledge, 2017) 11.

accountability in its enforcement decisions and actions.⁹⁵ It should be made clear that the regulator will not retain the monies where an administrative financial penalty is imposed by a panel, but rather the exchequer will benefit from same. This avoids incentivising the regulator to impose sanctions and is vital to regulatees' perception of fairness.⁹⁶ As previously discussed, where the regulator decides to propose a sanction which requires the adjudication of a panel, i.e. an FPN or variable monetary penalty, then the panel must produce its own guidance document with details of its procedures and appeal options.

It is easy, in theory, to suggest the publication of a guidance document on the factors which the regulator will consider in deciding which type of sanction is most appropriate in the circumstances. However, in practice, such a document is extremely challenging to produce where the regulator must be able to stand over the document which may be scrutinised by the Dáil, NGOs, industry and in any judicial review proceedings. If the proposed system is being properly administered by the regulator, more cases should be referred for administrative sanctions than criminal prosecution.⁹⁷ Such a shift will require significant cultural change within both the regulator and the industry.

The guidance document must set out the range of sanction options and the factors which will influence the regulator's decision on sanction choice. The basis of the decision, as previously discussed in the context of the independent panel, should

⁹⁵ Considerable guidance can be drawn from the UK Environment Agency enforcement and sanction policy see Environment Agency, *Enforcement and Sanctions Policy* (20 December 2019) <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy> accessed 30 March 2022.

⁹⁶ A point consistently emphasised by Macrory.

⁹⁷ See generally Welsh M., "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" (2009) 33 *Melbourne University Law Review* 908.

be the EU criteria for assessing gravity of infringement i.e. the extent of the infringement, its value, repetition, damage done, the economic benefit derived and the economic situation of the offender. As this is a non-exhaustive list, the guidance document may include a list of aggravating and mitigating factors which the regulator will also take into account based on the circumstances of the infringement. Each of the EU criterion and aggravating or mitigating factors must be described further in order to provide the greatest possible clarity and transparency in the process. For example, the regulator may provide monetary scales which will guide its assessment of the value of infringement and economic benefit derived from it. In considering damage done, it may include factors such as conservation status of the species or of the area in question. The regulator must give reasons for its choice of sanction based on the criteria and factors.

Of particular importance in any guidance document, would be the types of breach which justify criminal prosecution. The same criteria and factors as above should apply in the decision-making process in addition to further considerations which apply before commencing a prosecution case against an individual:

- Whether sufficient admissible evidence is or will be available to prove beyond reasonable doubt that the accused committed the alleged offence;
- The length of time since discovery of the alleged offence and any damage which may be a consequence of a delay in initiating proceedings;
- The culpability, responsibility and experience of the accused;
- The need for deterrence, both personal and general, in relation to particular offences;

- Whether full disclosure has been made, whether co-operation has been given.⁹⁸
- Whether it is in the public interest to prosecute the case, or conversely, a public interest not to prosecute the case, which may include the availability of alternative enforcement options.⁹⁹

In some cases, it may be more apparent that a case should be referred for criminal prosecution. For example, Case Study One discussed in Chapter 5 involved extremely high values and Case Study Two involved alleged large scale fraud. Therefore, those cases would clearly require referral to the DPP. Other examples where criminal prosecution may be necessary include cases of recidivism indicating that previous administrative sanctions have not had the desired deterrent effect. Similarly, where an FPN has not been paid, it must be enforced by a court. However, many cases may not be as clear-cut and additional factors for consideration may be required.

Where application of the criteria and factors indicate that the infringement is at the higher end of the scale in terms of seriousness and harm caused, then referral to the DPP should be considered. The regulator must assess, based on the available evidence, whether there is a *prima facie* case. It may be more appropriate to refer the case for an administrative sanction if there are issues with the quality of the evidence which would mean the DPP would direct no prosecution. The guidance document

⁹⁸ See Revenue Commissioners, *Code of Practice for Revenue Audit and other Compliance Interventions* (July, 2020) 85 <https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-revenue-audit.pdf>.

⁹⁹ This was a factor to be considered under previous Revenue guidelines but has since been removed under updated 2020 guidelines *ibid*. See Revenue Commissioners, *Code of Practice for Revenue Audit and other Compliance Interventions* (October, 2019) 85 2020 Guidelines *ibid* 85. However, the public interest should still be considered under Director of Public Prosecutions, *Guidelines for Prosecutors*, 5th edition (December, 2019) 12 <https://www.dppireland.ie/app/uploads/2021/01/Guidelines-for-Prosecutors-5th-Edition-eng.pdf> accessed 1 April 2022.

would only inform the decision to send a case to the DPP with the ultimate decision to prosecute still resting with the DPP. The regulator should not confine itself to only referring so-called “slam dunk” cases that it is certain, to the greatest extent possible, will result in a finding of guilt. The regulator should also consider whether the conduct is so egregious that it requires the moral condemnation of the criminal law. Even where there are issues with the evidence, the conduct may require referral to the DPP where the conduct is criminal in nature. Where the conduct does not fall under the conception of criminal behaviour or require moral censure and where a variable monetary penalty or other administrative sanction could address the breach more effectively, then it may not be necessary to refer the case for prosecution. This must be assessed on a case-by-case basis by the regulator.

Conclusion

The challenges of regulatory enforcement in Ireland are numerous and ever-changing. Sea-fisheries law is one such area of regulation which provides an insight into these challenges, particularly the reliance on criminal prosecution to enforce regulatory breaches. Based on the experience of the author, the current regime for enforcement of sea-fisheries in Ireland is ineffective, untenable and unsustainable.¹⁰⁰ Furthermore, the ineffectiveness of the enforcement regime could be endangering the attainment of conservation and sustainability objectives under EU fisheries law in this jurisdiction.¹⁰¹

¹⁰⁰ As evidenced by the adverse findings of the EU in relation to pelagic controls and non-implementation of the point system for masters as well as the findings of the EU study in relation to Ireland’s poor detection and conviction rate. See Blomeyer & Sanz *supra* note 47.

¹⁰¹ As noted in Case C-304/02 *Commission v France* that poor enforcement may jeopardise conservation and management of fishery resources as well as the uniform application of the CFP.

To say that regulatory prosecutions are difficult due to the high burden of proof and strict rules of evidence is to only engage with part of the issue. The core reason why criminal prosecution of regulatory offences proves so challenging lies in attempting to impose criminal liability on conduct which is not criminal in nature. Legislatures seek to use criminal sanctions due to the moral stigma they carry. However, criminal sanctions can only have a moral force where the act itself is blameworthy in the criminal sense.¹⁰² If regulatory breaches do not satisfy the definition and conception of crime, their prosecution as crimes should be reconsidered. Alternatives to criminal prosecution must be provided rather than attempting to force regulatory breaches to fit into the criminal system and expecting penalties imposed to be equivalent to those imposed in real crime cases. Many regulatory cases do not satisfy the definition of a crime or contain a harm element. The criminal courts are not designed to deal with such cases and therefore, fines imposed in fisheries cases often do not satisfy the EU obligation for effective, proportionate and dissuasive sanctions or remove the economic benefit derived from the infringement.

The blanket use of criminal prosecution without any real alternatives has resulted in many minor breaches of sea-fisheries law, which do not meet the threshold for criminal prosecution going unaddressed. The criminal burden of proof also means that cases, or crucial elements of the case may not proceed or may be withdrawn due to evidential issues. Administrative sanctions are more appropriate for conduct which may constitute a significant breach but is not criminal. An

¹⁰² Kadish S.H. "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30(3) *University of Chicago Law Review* 423, 445.

administrative system can impose more appropriate sanctions which satisfy EU standards for this reason.

Conduct which is criminal in nature can still be referred for criminal prosecution. Confining referrals to criminal conduct underlines the seriousness of criminal prosecution and makes it clear that it is a sanction which will only be deployed where moral censure is required, thus emphasising its moral stigma and value rather than referring all cases, which only serves to undermine the criminal law. Effective criminal prosecution correspondingly bolsters the effectiveness of administrative sanctions by functioning as a real deterrent threat. Both the courts and administrative sanctions can perform their function to impose effective, proportionate and dissuasive sanctions if they deal with breaches which are appropriate to their status and function.

Sea-fisheries legislation is highly fragmented and complex, and practice has evolved which differs from the legislation. It is essential that these problems are addressed and that the legislation which creates the regulatory rules and enforcement mechanisms is well drafted and implemented correctly in order for a dual system to operate effectively. Legislation must equip the SFPA with a greater variety of administrative tools and sanctions as part of a dual system which should be implemented by the SFPA in line with a really responsive strategy. The legislation must provide for accountability mechanisms, which simultaneously empower the regulator to exercise its discretion independently in selecting the most appropriate sanction and also function as procedural safeguards ensuring the regulator is exercising its powers correctly and fairly.

Where cases are referred for criminal prosecution, cooperation between the DPP and the regulator should be prioritised for the administrative system and the criminal system to work together effectively. Administrative and criminal law procedures usually operate independently and are badly tuned to one another.¹⁰³ It is essential that such a disconnect is avoided to establish an administrative sanction system which works in tandem with the moral force of the criminal law. Where both systems operate as one cohesive enforcement regime, this can prove to be a highly effective enforcement strategy.¹⁰⁴

Finally, the importance of trust is often lost in the discussion of effective regulation. If regulatees trust regulators as fair umpires who administer and enforce rules that have important substantive objectives, the evidence is that compliance levels will be higher, and resistance and challenges to regulatory action will be low.¹⁰⁵ In contrast, if regulatees feel that regulators treat them as untrustworthy, defiance and resistance build up so that inefficiency and non-compliance both increase.¹⁰⁶ Therefore, trust in a fair, transparent dual system must be built based on consultation with industry. The author echoes the hope of Macrory that a dual system of enforcement should lead to a system where the criminal law is more focused on the truly criminal and where sanctions better reflect the range of circumstances

¹⁰³ Van de Bunt H., Van Erp J. and Van Wingerde K., "How Strong is Actually Braithwaite's Pyramid?" (2007) 49 *Tijdschrift voor criminologie* 386, 394.

¹⁰⁴ Milieu Ltd. and Huglo Lepage Associates, *Study on measures other than criminal ones in cases where environmental Community law has not been respected in the EU Member States Summary Report* (2004) 65 https://ec.europa.eu/environment/legal/crime/pdf/cd_summary_report.pdf accessed 4 April 2022.

¹⁰⁵ Parker C. and Braithwaite J., "Regulating Law" in Parker C., Scott C., Lacey N. and Braithwaite J. (eds.) *Regulating Law* (Oxford: Oxford University Press, 2004) 128, 134.

¹⁰⁶ See Braithwaite V., "Games of Engagement: Postures within the Regulatory Community" 17 *Law and Policy*, 225, 244.

involved in regulatory breaches, encouraging improved compliance in a more sophisticated way than is possible at present.¹⁰⁷

¹⁰⁷ Macrory R., "Reforming Regulatory Sanctions - Designing a Systematic Approach" in Oliver D., Prosser T. and Rawlings R. (eds.), *The Regulatory State* (Oxford: Oxford University Press, 2010) 229, 242.

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