

A WORKING PAPER ON THE MANAGEMENT OF THE UK'S PUBLIC FISHERY: A LARGE SQUATTING CLAIM?

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Abstract

The UK's fishery is a public asset worth in the region of £1,125 million. The free allocation of quota to commercial businesses on the basis of 2 years' track record is a similar process to permitting that public asset to be squatted. The complex and badly drafted regulation which underpins this process has permitted a great deal of uncertainty in the allocation of fishing quota and the opaque mechanisms for the allocation of quota are likely to lead to concentration of quota among a few fishing businesses. This is largely responsibility of the UK authorities rather than Brussels. It will need primary legislation to resolve this issue and establish a proper transparent system according to the practices conducted almost universally elsewhere in government when disposing of public assets to the private sector.

Key Words

Fishing, quota, property, squatting, human rights, possession, marine, valuation.

Introduction

The allocation of UK fishing rights to its fishers is becoming problematic. Small scale fishers in the UK have been raising increasing concerns over the lack of fishing quota for key stocks and what they see as implicit bias against them when it comes to quota allocation.¹ It is not the purpose of this paper to substantiate or refute the claims by small scale fishers, but the calls for reform have highlighted that fishing quota is a public asset in the process of being informally transferred to the private sector on uncertain terms, similar to a very large case of squatting.² The paper explains the background to quota allocation in the UK, explores the allocation of public property in the marine environment, discusses quota allocation in the context of squatting generally, assesses whether the UK quota allocation system meets the requirements for the disposal of public assets and places a value on the UK fishery.

The background to UK quota allocation

Because fish stocks have a tendency to straddle national borders, quotas on stocks are set at an international (EU) level, with the UK's fisheries administration being given access to the resource based on international negotiation. Usually quota is allocated between EU member states on the basis of "relative stability" based on the historic proportions of member

¹ See for instance: Low Impact Fishers of Europe (2016) *Is this the beginning of the end of the UK small boat inshore fleet?* Online Available from: <http://lifeplatform.eu/is-this-the-beginning-of-the-end-of-the-uk-small-boat-inshore-fishing-fleet/> Accessed 3 March 2016

² Appleby, T. (2013) Privatising fishing rights: The way to a fisheries wonderland? *Public Law*. pp. 481-497

states catches under the EU's Common Fisheries Policy.³ Sometimes the EU itself negotiates with third party states, such as Norway, Iceland, and the Faroe Islands over mackerel and other stocks.⁴ The EU wide limit on catch per stock (a conservation tool) is known as the "total allowable catch" (TAC). It is then up to the EU member state (in this case the UK) to distribute its share of the TAC to its fishers.⁵ Fisheries management in the UK is a devolved matter, so quota is administered separately in Scotland, England, Wales and Northern Ireland. The rules are harmonised and the same basic principles apply to all the administrations. Allocation of quota to fishers has been traditionally based on "track record" of catches for individual vessels between the base years for a given stock (usually 1994-96).⁶ The units via which quota are allocated (an economic tool) are known as fixed quota allocation (FQA) units. As time has passed a market has developed in these FQA units (quota). Fishers have needed to acquire more quota (through purchase or lease) if they have landed more of a stock than they have been allocated (thereby reducing the need to *discard* quota species). The continuation of the same quota allocation policy over time combined with quota's tradability has given a sense of permanence and proprietary right to what was initially a discretionary policy⁷ to gift quota to certain individuals / vessels. The right to alter that policy has been challenged in the courts by the United Kingdom Association of Fish Producer Organisations (UKAFPO).⁸ At present the exact legal status of quota remains unknown, the High Court did affirm the administrations' right to reallocate *unused* fishing quota, but this position will be examined in further detail later.

Property Management in the Marine Sector

It is difficult to overstate how unorthodox the UK's quota distribution policy is in terms of the disposal of public assets to the private sector. The traditional approach of public asset management is demonstrated by the operation of the Crown Estate Commissioners in their management of Crown property. The Crown is the largest owner of marine property rights. It owns a significant proportion of the foreshore and the vast majority of the seabed within territorial waters (to the 12 nautical mile limit).⁹ The Crown Estate Commissioners therefore licence and lease a wide range of marine activities from wind farms, to aggregates dredging, to marinas and their approach should be viewed as the standard method of legally disposing of public property in the marine sector.

Their duties in respect of disposal of public assets are set out in the Crown Estate Act 1961 and these mirror the normal process across the public sector generally.¹⁰

Section 1(3) places a duty "*to maintain and enhance*" the *value* of the public assets under their control "*but with due regard to the requirements of good management.*"

³ Churchill, R. and Owen, D. (2012) *The EC Common Fisheries Policy*. Oxford: Oxford University Press, p.149

⁴ BBC (2014) Mackerel quota agreed after dispute. Available from: <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-26554619> Accessed 3 March 2016

⁵ n3, p.154

⁶ UK Fisheries Administrations (2015) *Quota Management Rules*. Online. Available from:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410774/UK_2015_Quota_management_rules.pdf Accessed 3 March 2016

⁷ n3

⁸ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin)

⁹ The Crown Estate (2016) *Coastal*. Online. Available from: <http://www.thecrownestate.co.uk/coastal/> Accessed 29 March 2016

¹⁰ Office of Government Commerce (2005) *Guide for the Disposal of Surplus Property*. Online. Available from:

http://webarchive.nationalarchives.gov.uk/20110822131357/http://www.ogc.gov.uk/documents/Guide_for_disposal_of_surplus_property_PDF.pdf Accessed 29 March 2016

Section 3(1) states requires a disposal of public assets for *the “best consideration in money or money's worth which in their opinion can reasonably be obtained, having regard to all the circumstances of the case but excluding any element of monopoly value attributable to the extent of the Crown's ownership of comparable land.”*

Section 4 permits the disposal of public assets at less than market value for public or charitable purposes.

In practice the Crown Estate Commissioners exercises tight controls on the disposal of Crown assets. In particular the lease or contract which disposes of the asset would have to be on written terms and would be the subject of extensive negotiation to ensure the terms reflected proper market value and safeguarded the public asset.

The public fishery as a property right

From a public property management perspective the marine fishery should be treated akin to a form of land-based property asset. This approach has been long established for freshwater fisheries, where fisheries are recognised as *profits a prendre*, a proprietary right which permits its holder to take something from another's land¹¹ - in this case fish (which themselves are wild animals and therefore ownerless until captured). In marine waters the right to fish is public¹² and therefore exercisable (and therefore owned) by the whole public. Officially there are only two circumstances where the right to fish in marine waters can be privatised. Firstly, by Crown grant, but only if the private fishery predated the Magna Carta.¹³ Secondly, for shellfish only, in the event of a “several order” under the Shellfish Acts¹⁴ in which case there is a process for ensuring the public are not unduly disadvantaged by the private fishery which can lead to public inquiry. The direct creation of a private fishery by the Crown is therefore not an option for most quota under current legislative framework, and so the UK authorities have struggled to implement a quota system from a fundamentally inadequate legal framework.

Instead of direct grant, quota was introduced by conservation legislation and conditions on fishing vessel licences under the Sea Fish (Conservation) Act 1967.¹⁵ These conditions could limit fishing vessels to catching certain amounts and certain species of fish. No provision was made in the Act for these licences to be tradeable in their own right or for the quota itself to be tradeable. There were none of the normal statutory checks and balances put in place for a public body effecting a privatisation. However the policy to allocate quota on the basis of a two year track record permits that ‘entitlement’ of the vessel owner to be sold (or leased); this has the effect of creating a *quasi*-property right. The mechanism caused huge confusion among the fishing industry. During an investigation by the UK Parliament in 1998 Mr MacSween of the Scottish Fishermen's Organisation described this as:

"a very odd situation", adding "I keep saying to the lawyers who draw [the quota sale agreements] up 'How can you draw up a legal agreement to sell something that does

¹¹ Gray, K. and Gray, S. (2009) *Elements of Land Law*. 5th Ed. Oxford: Oxford University Press, p.598-601.

¹² *Ibid*, p.1361.

¹³ *Malcolmson v O'Dea* (1863)

¹⁴ Section 1(3) Sea Fisheries (Shellfish) Act 1967

¹⁵ Section 4(5)

not belong to you? How do you advise clients to buy something from somebody who has no proper legal title?’ There is a genuine concern here.”¹⁶

The quota system continues to raise concerns nearly twenty years later. Moreover as the allocation continues along this informal basis, so property rights start to be allocated by default along a process similar to “squatters rights” either through the process of “legitimate expectation” or because the quota starts to be treated as a “possession” under the European convention on Human Rights¹⁷. Once quota is treated as a possession this can cause significant problems as the state can normally only reacquire or redistribute a possession if compensation at full market value is paid.¹⁸ What started life as a discretionary policy is in danger of hardening into an immutable policy for the benefit of the quota holder at the expense of the public.

The squatting of the UK’s fishery

The *UKAFPO v Secretary of State for the Environment* case was inconclusive. It did both confirm the Secretary of State’s right to reallocate quota and that quota itself was a possession, it also confirmed the fish as a public resource. The case did not impact on current practice however because the subject at issue was only *unused* quota, so while confirming that quota could be a possession (and therefore require compensation for interference with it) Mr Justice Cranston justified no compensation on the (rather thin basis) that it was unused and therefore had no value. If the quota in question had a history of being used, the outcome may have been different. The *UKAFPO* case is a significant milestone in the propertisation of the UK’s quota and the establishment of what might be called “squatters’ rights” over the UK fishery.

To put this in context; a normal squatters’ rights claim (known in as adverse possession) would require 12 years’ ownership, and be used “without force, without secrecy and without permission”.¹⁹ The requirement for use of force means that stolen property cannot be the subject of squatters rights, the requirement for absence of secrecy means the right would need to be acquired openly (so a clear act of ownership is required such as fencing or leasing the property out would be needed) and the requirement for absence of permission means the squatter cannot acknowledge the superior right of the owner. Table 1 shows the differences between criteria for the traditional squatters’ rights and the potential transfer of ownership of quota to the private sector. It is plain that a far lower hurdle is claimed for quota to establish it as a possession than is used for traditional squatters. Furthermore, with the passing of the Land Registration Act 2002, registered owners of land can now defeat squatters more easily as there is a requirement for the squatter to serve notice on the registered owner before they can perfect their claim²⁰ and squatting has been prohibited for residential premises.²¹

¹⁶ Agriculture Select Committee (1999) *Eighth Report – Sea Fishing*. London: UK Parliament, para 88.

¹⁷ Article 1 of the First Protocol of the European Convention on Human Rights

¹⁸ n11, p.100.

¹⁹ *Ibid*, p.1180.

²⁰ HM Land Registry (2016) *Practice guide 4: adverse possession of registered land*. Online. Available from:

<https://www.gov.uk/government/publications/adverse-possession-of-registered-land/practice-guide-4-adverse-possession-of-registered-land> Accessed 29 March.

²¹ s144 Legal Aid, Sentencing and Punishment of Offenders Act 2012

Table 1: Traditional squatters' rights verses possession claimed by quota holders

Type	Time period	Force used	Secrecy	Permission
Traditional squatters' rights	12 years' "adverse possession"	None permitted	Openly used	Landowner must not consent
Fishers' rights to quota	2 years' "track record"	None permitted	Openly used	Granted by public authority

Implications of quota allocation on the public fishery

Any value which attaches to quota must by necessity reduce the value to the public of the fishery since there has been a *de facto* privatisation of part of it. As a result the fisheries administrations should have undertaken a proper valuation of both the fishery itself and the value of any quota before it was allocated to fishers, only then could an assessment have been made as to whether the policy adequately protected the public asset. To put this in context, if quota had managed by the Crown Estate Commissioners it would have been impossible for vessel owners to receive quota directly unless they paid full market value, or demonstrated in each individual case some tangible public benefit; the "track record" system would have been illegal. Indeed whether the current system of attaching quota to vessel licences is legal at all has never been directly addressed by the courts, although it has been questioned since its inception.²²

The problem is compounded by a lack of proper written terms and conditions (beyond the discretion of the Minister). The professional creation of property rights requires properly drafted contractual terms such as length of term, the terms of any tradability (known as alienation) and rent. These are standard terms for the allocation of property rights across all other areas²³ and the absence of such terms and conditions has given rise to a predictable set of complaints:

- Fishers who were not vessel owners have automatically been disenfranchised;
- The quota system acts as a barrier to new entrants to the fishing industry²⁴
- Windfall benefits to vessel owners have harmed the integrity of coastal communities and increased inequality,²⁵
- Quota has concentrated into fewer and fewer hands,²⁶ while still being gifted by the public to the quota 'holders';
- Perhaps most importantly, a failure to adequately to account for (and compensate) the public for the disposal of a valuable public asset.

²² The Economist (1998) *Financial Trawling* Available from: <http://www.economist.com/node/176971> Accessed 29 March 2016

²³ Royal Institute of Chartered Surveyors (2014) *Real Estate Management 2nd Ed.* Available from: <http://www.rics.org/uk/knowledge/professional-guidance/practice-statements/real-estate-management-2nd-edition/> Accessed 24 March 2016.

²⁴ *Haraldsson and Sveinsson v Iceland*, Merits, Communication No 1306/2004 UN Doc CCPR/C/91/D/1306/2004, IHRL 2745 (UNHRC 2007), 24th October 2007, Human Rights Committee [UNHRC]

²⁵ Cardwell, E. and Gear, R. (2013) Transferable quotas, efficiency and crew ownership in Whalsay, Shetland. *Marine Policy*, 40, pp.160-166.

²⁶ Greenpeace (2014) *Foreign businesses use nearly half of UK fishing quota*. Online. Available from <http://www.greenpeace.org.uk/media/press-releases/foreign-businesses-use-nearly-half-england%E2%80%99s-fishing-quota-20141104> Accessed 29 March 2016

The absence of any formal written terms and conditions makes it exceptionally difficult for fisheries officials to alter the system without facing time consuming and expensive court action, to attempt to set out terms, which should have been in place at the start.

The position has been even further exacerbated because the introduction of a discard ban as a result of the 2013 reform of the European Common Fisheries Policy (the Basic Regulation)²⁷ which requires quota to apply to all fish caught rather than landed, removing the option of simply throwing fish away if quota was too expensive or unavailable. Quota is now the most important legal device for managing fisheries.

Continued failure to recognise the requirements of privatisation

However UK fisheries managers and the courts have not recognised yet that there is a significant difference in UK law between the creation of a property right in a resource and other policy options. Property rights create permanent interests and therefore the disposal of public assets has more stringent criteria (hence the statutory requirements around the Crown Estate), particularly in respect of valuation to prevent the public from being defrauded. A good example of this lack of recognition is the recent case of *R (ex parte Greenpeace) v Secretary of State for the Environment Food and Rural Affairs and another*.²⁸ The case concerned the lack of “transparent and objective” effective environmental criteria in the allocation of fishing quota, which were required under Article 17 of the Basic Regulation of the CFP. Mrs Justice Andrews appears to attach great weight to the following argument by Defra’s lawyers:

“Mr Segan and Ms Blackmore both placed reliance on the [European] Commission’s acceptance that a system of transferable fishing concessions would be a desirable means of achieving the objectives of the CFP – in the Regulation they are defined as a revocable user entitlement to a specific part of the fishing opportunities. They submitted that the FQA unit system is analogous to a system using transferable fishing concessions. FQA units can be traded, and are treated as possessions under Article 1 of Protocol 1 to the European Convention on Human Rights (although the Government has a free rein in respect of realignment, as the UKAPFO case established). They create a degree of certainty and stability, which incentivises investment. It would be highly surprising if such a methodology were to be outlawed under the new CFP.”²⁹

This statement contains a contradiction: if the Government has ‘free reign’ to realign all quota the quota *cannot* be a possession, since the status of being a possession implicitly requires compensation for ‘realignment’. The *UKAFPO* case only concerned *unused* quota and so was permissible without compensation. A government which had to pay compensation can hardly be said to have ‘free reign’, so with such a central point at issue the UK system cannot be treated as certain or stable.

Implications of current policy

The creation of a system of ‘transferable fishing concessions’ or quota is the competence of the member state and there is a huge amount literature on the desirability and the pitfalls

²⁷ Article 15, EU Regulation No. 1380/2013

²⁸ [2016] EWHC 55 (Admin)

²⁹ *Ibid*, at 78

inherent in such systems.³⁰ For the purposes of this paper (and as should have been raised in Mrs Justice Andrews' judgment) that literature is irrelevant because the UK has not created a proper system of transferable fishing concessions. The system has arisen informally through what is tantamount to a squatting claim. No reasonable authority³¹ could have disposed of the public fishery without: a valuation of the public fishery, a proper legal basis for the creation of fishing concessions, detailed written terms and conditions for the concessions being created and a valuation of the specific quota being created to give a fair idea of the value of the rights being created. If a rent was not to be charged (which would be very unusual) then there would need to be a firm idea of the public benefit which was accruing in lieu and even greater attention would be needed to ensure that the rights created were adequately framed in contract law to secure the public interest. It is interesting to note that in the United States, the Magnuson-Stevens Fishery Conservation and Management Act 2006 which creates limited access privileges (a right akin to quota) specifically precludes them becoming a property right and tightly controls the legal parameters of the system of concessions.³²

It would be unsurprising for such a poorly executed system for the allocation quota rights to create problems within the industry and fishing communities, however a key issue for the public is the cost to the tax payer of the privatisation of a public resource without adequate compensation. The next section of this paper places a value on the public fishery in an effort to understand this potential cost.

Valuation Methodology

Fishing quota takes the form of an indefinite asset, since it is the quota itself that ensures there will always be enough fish to catch. The income from fishing quotas can therefore be seen as a genuine potentially perpetual income. One of the valuation methods, frequently used in the valuation of property rights is the profits method, where the rental value of a property, i.e. the right to fish, is derived from the annual turnover of a company or a sector. This is the method adopted by the Crown Estate Commissioners in calculating the appropriate rent for marinas for instance.³³ By taking away operating costs made by reasonable operators, the 'rent' that could be paid by that reasonable operator to the owner of the fishing right can be calculated. This annual 'rental' value of fishing quota can also be expressed as a percentage of the fishing turnover. Ideally this should be done on a species level, but since this paper seeks to find the overall capital value of the fishing rights this paper has taken a macro or sectoral approach. A low percentage of turnover has been used as this allows the fishers to operate a business with reasonable profits. It is acknowledged that there will be years where profits will be low and years with exceptionally high profits. This will be at the risk of the operators. By choosing a relatively low percentage of profit, the sustainability of the process should be ensured and as a result the 'rental' income stream can be seen as a relative risk free (net) cash flow.

³⁰ Chambers, C. and Carothers, C. (2016) Thirty years after privatization: A survey of Icelandic small-boat fishermen, *Marine Policy* (in press) <http://dx.doi.org/10.1016/j.marpol.2016.02.026>
and Pinkerton, E. and Edwards D. (2009) The elephant in the room: The hidden costs of leasing individual transferable fishing quotas *Marine Policy* 33(4) 707-713 [doi:10.1016/j.marpol.2009.02.004](http://dx.doi.org/10.1016/j.marpol.2009.02.004)

³¹ *Ibid*, at 40

³² Section 303A(b)(4)

³³ The Crown Estate (2016) *Moorings and Marinas*. Online. Available from: <http://www.thecrownestate.co.uk/coastal/moorings-and-marinas/> Accessed 24 March 2016

Economists³⁴ have shown that the capital value of a perpetual income stream can be derived through the next formula:

$$\text{Capital Value} = \frac{\text{Income}}{\text{Yield}}$$

Applying that same principle to property the capital value of a property right can be established by dividing the rental income by a yield that reflects the risks attached to that rental income.

Armatys *et al.*³⁵ argue that in the case of a constant rental income in nominal terms, the yield should compensate for inflation and should therefore be a real target rate of return for the prospective investor (i.e. investing in fishing rights). However if the rental income is constant in real terms (adjusted for inflation) the yield should be lower since the income stream is inflation proof. This paper has applied a low percentage of turnover as rent, and assumed that the asset will be comparable with government bonds.

Data

Turnover figures for fishing are not easy to derive. According to the European Commission³⁶ the turnover of the UK fishing for the 2009-2014 period is as follows (figure 1).

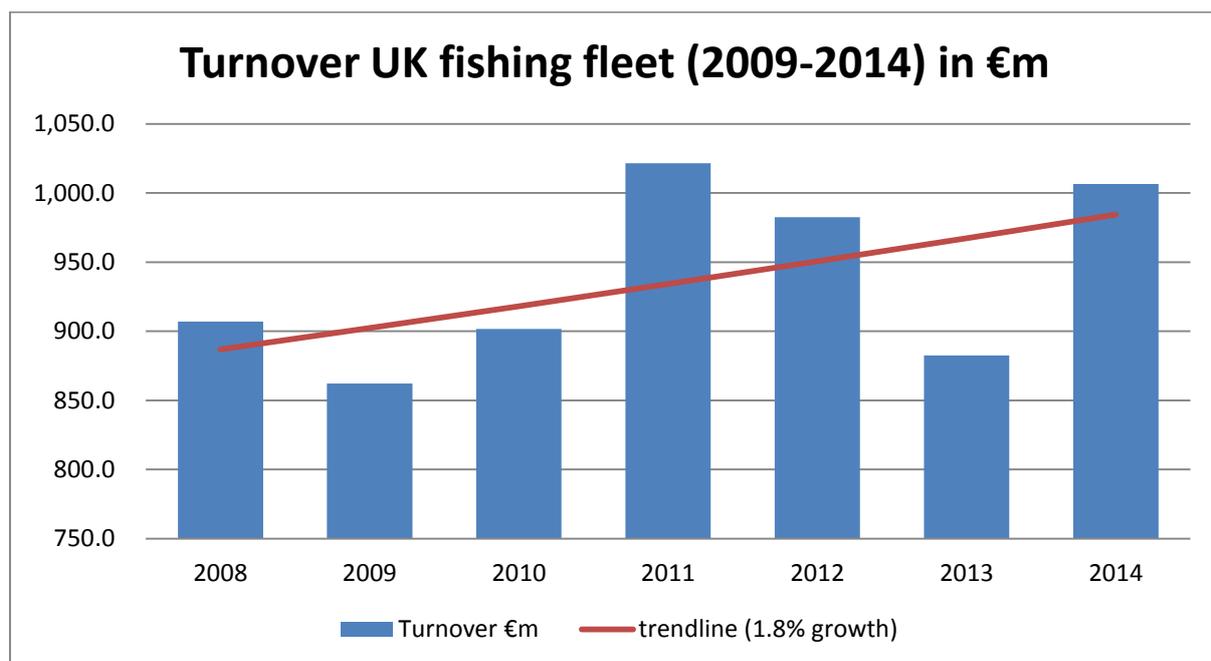


Figure 1: UK Fishing fleet turnover (2009-2014) in €m (ECJRC³⁷)

Analysis of the annual turnover over this period shows average of €937 million per year and an average increase of 1.8% per annum. Based on those figures the 2016 turnover should be around €1,020 million. Using an exchange rate of €1.30 to a Pound this equals £785m. However, the original figures incorporate the (volatile) currency exchange rate between the

³⁴ Brueggeman, W.B. and Fisher, J.D. (2006) *Real Estate Finance and Investments*. 12th ed. New York; London: McGraw-Hill Irwin.

³⁵ Aramatys, J., Askham, P. and Green, M. (2009) *Principles of Valuation*, London: EG Books.

³⁶ European Commission Joint Research Centre (2015), *The 2015 Annual Economic Report on the EU Fishing Fleet (STECF 15-07)* p.386-397

³⁷ n13

Euro and the Pound Sterling and it is more appropriate to take a complete UK stance without any currency risk. Similar figures are available from the Marine Management Organisation³⁸ in Pound Sterling for the years 2005-2014 and the average of that turnover is about £700m with a trend of growth of nearly 4% per annum. Moreover, Seafish³⁹ reports figures for 2012-2014 with an average of £796m and a growth of 6%, therefore even stronger than MMO reported. Since MMO covers the longer period this report adapts MMO data and based on those figures the turnover in 2016 should be around £ 915m. Moreover, the £915m figure avoids the currency risk and is presented as a conservative estimate.

Profit versus rent

UK fishing businesses are currently generally in a healthy situation. Net profit appeared to be around 19% of total turnover for the year 2013⁴⁰ and this figure has risen to nearly 30% in 2014 according to the European Commission.⁴¹ These profit margins already include a fair contribution towards fishing rights since some fishers (those excluded from the initial gifting of quota based on track records which only certain vessel owners had) do not hold the initial fishing quota, but lease them from the right holders: private individuals or collective bodies known as Producer Organisations (POs).⁴² Gross profit margins before this contribution are therefore potentially even higher. Profit methods theory⁴³ dictates that the gross profit before the payment of rent could be shared between the operators (the fishers) in the form of net profit and 'the landlord' (i.e. the original owner of the fishing rights - in this case the public) in the form of rent. The profit could be shared evenly between the two parties but does not necessarily have to be since the operator mainly takes most of the risk. For some sectors there are average numbers available that indicate the percentage of turnover that could be paid in rent. For instance in *Thorn EMI Cinemas Ltd v Harrison (VO)*⁴⁴ the courts ruled that a percentage of 8.5% of the gross receipts (gross turnover) could be applied in the case of cinema's and theatres. Taking a moderate viewpoint an average rent of 5%-6% of the turnover has been used and in case of fishing therefore a range of £45.8-54.9 million seems appropriate.

Yield

Since the rent presented above (Avg £50.35 million per annum) is expected to be constant in real terms instead of nominal terms, the yield that could be applied is a yield related to index-linked gilts⁴⁵. These index linked-gilts were introduced in the UK in 1981⁴⁶ and provide the investors with a constant income stream in real terms. Yields on these government issued, index linked gilts are usually very low. The first one in 1981 had a 2% yield for instance and in the current climate yields as low as 0.5% might be possible. Taking a moderate view (on

³⁸ Marine Management Organisation (2014), *UK Sea Fisheries Statistics 2013*, London: Marine Management Organisation

³⁹ Seafish (2016) *Fleet statistics*, available from <http://www.seafish.org/research-economics/industry-economics/fleet-statistics> Accessed 11 May 2016

⁴⁰ Ibid

⁴¹ n36

⁴² Though the mechanics of this 'leasing' are opaque

⁴³ Wyatt, P (2013) *Property Valuation*. 2nd ed. Chichester : John Wiley & Sons

⁴⁴ [1986] 2 EGLR 223

⁴⁵ Sayce, S., (2006) *Real Estate Appraisal: from value to worth.*, Oxford: Wiley-Blackwell

⁴⁶ UK Treasury (1981) *Economic Progress Report*. London: HM Treasury

the basis that fishing quota is riskier than government bonds) currently a 4-5% yield is justifiable, based on standard investor expectations.⁴⁷

Capital value

The range of capital values can be ascertained by applying the capital value formula outlined in the methodology section to the range of rents and yields mentioned above. Based on 2016 figures, the capital value of the UK fishery is estimated at between £915 million and £1,373 million with an expected average of £1,125 million.

Conclusion

There is an inadequate legal basis for the UK's quota management system which has been evident since the creation of the system in the 1990s. If the UK is to adopt a proper system of transferable fishing concessions then the right to fish should be vested in an identifiable Crown entity, empowered to dispose of the fishing concessions on an arm's length, professional basis. Primary legislation is probably required to rectify this position because of the limitations on privatisation of the public as a result of the Magna Carta. The absence of written terms and conditions (particularly on key issues such as rent, term length and tradability) make it very difficult to understand whether the public is receiving fair return for the use of its resource and it is not surprising that there is significant criticism from within the fishing community and academic commentators, nor is it remarkable that the mechanism has been the subject of judicial review twice in three years.

There has been a fundamental failure by UK's fisheries administration to understand the mechanics of the creation of property rights; both the administration and the courts have failed distinguish between the adoption of a discretionary policy and the effectively irreversible (without compensation) creation of a possession. In particular a property manager would not consider the UK's system of quota management to have been professionally or even adequately established. As a result The UK's fishery is in real danger of being squatted on criteria which are even less favourable than a traditional squatting claim. This counters the trend exhibited in other areas where rules against squatters' rights are consistently being tightened. Specifically, the UK situation differs from the US fisheries administration where the creation of their limited access privileges scheme expressly prohibits the creation of property rights and thus (in UK legal terms) the progress of any human rights "possession" claims.

The potential loss to the UK public is estimated at £1,125 million. By any measure this is a considerable amount of public money to lose to a squatting claim - one unprecedented in modern British history. It should also be emphasised, given the current political context of fisheries and the forthcoming referendum on EU membership, that this potentially far-reaching and fundamental problem in British fisheries management is a UK rather than EU competence and is firmly the responsibility of domestic fisheries management.

⁴⁷ Fama, E. and French, K. (1993) Common risk factors in the returns of stocks and bonds *Journal of Financial Economics* 33, pp. 3-56