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# ClientEarth's written contribution to the revision process of the EU Fisheries Control System

ClientEarth is a public interest European environmental law organisation founded in 2006 with offices in London, Brussels and Warsaw. We aim to create practical solutions to key environmental challenges by supporting and promoting the development, implementation and enforcement of effective European Union (EU), and where appropriate, international, regional or local environmental law and policy.

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This document is a written contribution to the revision process of the EU Fisheries Control System. It can be directly published with organisation's information.

## Introduction

ClientEarth welcomes the opportunity to provide comments on the three policy options on the revision of the European Union (EU) Fisheries Control System presented by the European Commission during the workshop it organised on the subject on 16 November 2017.

We would nevertheless like to reiterate that this process cannot be a substitute to the formal consultation procedure that the European Commission has the obligation to organise. Indeed, according to Article 11 of the Treaty on the European Union, *"the European Commission shall carry out broad consultation with parties concerned in order to ensure that the Union's actions are coherent and transparent"*. Protocol No. 2 on the application of the principles of subsidiarity and proportionality further states that *"before proposing legislative acts, the Commission shall consult widely"*.

These principles are further operationalised in the Better Regulation Guidelines,<sup>1</sup> in which it is clearly explained that for all legislative initiatives accompanied by an Impact Assessment, the European Commission should prepare a consultation strategy, including a mandatory 12 week internet-based public consultation and that this strategy should ensure that stakeholders' views are sought on all key impact assessment questions.

The argument of the European Commission that the public consultation carried out at the end of 2015 and beginning of 2016 on the evaluation of the implementation of the EU fisheries Control Regulation<sup>2</sup> was sufficient enough to fulfil its public consultation obligation is not valid. The questions raised on this occasion were related to the implementation of this regulation, at a time when, officially, the decision to revise the Control Regulation had still not been adopted. In addition, the scope of the consultation was limited to the Control Regulation only - whereas, now, targeted consultations are conducted by the Commission on the revision of this piece of legislation, but also on the revision of the EU Regulation aimed at fighting Illegal, Unreported and Unregulated (IUU) fishing<sup>3</sup> and of the European Fisheries Control Agency (EFCA) founding Regulation.<sup>4</sup>

Not only is the consultation procedure for this file problematic; but also, as explained before, NGOs fear that the rushed process the Commission has engaged into to revise the EU Fisheries Control System will not allow its services to collect and analyse all the relevant evidence, scientific advice, expert views and stakeholders inputs it has the obligation to collect under the Better Regulation Guidelines to prepare a sound proposal.<sup>5</sup>

This situation is of serious concern for ClientEarth, as the Control Regulation is key to ensure the success of the Common Fisheries Policy (CFP) and of the anti-IUU policy of the EU. Any revision process of the regulations underpinning the EU Fisheries Control System must be conducted with extreme care, following due process and without any unnecessary haste. For these reasons, we would like to further reiterate that a clear explanation of the reasons why this process has been rushed would be welcome.

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<sup>1</sup> Commission Staff Working Document SWD 2017 (350) of 7 July 2017.

<sup>2</sup> 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.

<sup>3</sup> Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

<sup>4</sup> Council Regulation No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency.

<sup>5</sup> See the joint NGOs submission on the subject at: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-4808152/feedback/F7437\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-4808152/feedback/F7437_en).

The Commission should come back to the normal law-making process, take the time to consult citizens on this important topic (including through a public consultation) and gather all relevant evidence and advice it needs to prepare its impact assessment and proposal.

We acknowledge that some shortcomings exist in the current Control Regulation, which could be tackled through a revision process. But it must also be underlined that the biggest gap which currently exists is one of implementation of the current rules. All the research we conducted on the subject shows that Member States have so far failed to implement all their obligations under the Control Regulation.<sup>6</sup> For example:

- The number of inspections has decreased these past years in several EU Member States, like France<sup>7</sup> or Spain.<sup>8</sup> This behaviour is in violation of Article 5 (3) of the Control Regulation which makes it an obligation for Member States to allocate adequate financial, human and technical resources to the control of fishing activities;
- Not all Member States have in place a penalty point system, as required by Article 92 of the Control Regulation; and when it is in place, there is no direct link between the fact that a serious infringement was committed and the administration of penalty points, contrary to what is required by the Control Regulation;
- Serious infringements are not always sanctioned by fines set at a level high enough to be effective, proportionate and dissuasive, as required under Article 90 (2) of the Control Regulation; and
- Not all Member States are implementing the obligation to carry out physical verifications of the engine power of the fishing vessels foreseen in Article 41 of the Control Regulation.

The Control Regulation entered into force in 2010. So far, and despite all the shortcomings in implementation mentioned here, no infringement proceedings have been opened by the European Commission against the Member States which have repeatedly failed, over the past eight years, to implement their obligations under the Regulation.

Any revision process which will aim to strengthen the rules will be useless if it is not accompanied by a strong enforcement policy. Under these circumstances, it will only add new rules to existing ones whose level of implementation is already low, and for which we could expect a further lack of implementation and, therefore, a minimal impact. Moreover, any revision process should not be used as an excuse by the competent authorities to delay the necessary work on the implementation of the current rules and principles. These two actions go hand-in-hand, and a revision of the EU Fisheries Control System could, in our views, only be supported if it is accompanied by a strong commitment to implement the rules and to take action against those who failed to do so.

This position paper will further focus on several of the key challenges of this revision process and present ClientEarth's position on these topics.

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<sup>6</sup> See: <https://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-france-ireland-the-netherlands-poland-spain-and-the-uk-england/>.

<sup>7</sup> The number of inspections has decreased by 24.7% in the last four years in France. Several stakeholders interviewed to prepare our reports have stated that "*France has given up on inspections at sea*".

<sup>8</sup> It fell by 12.35% between 2015 and 2016.

## 1 Avoid regionalisation

The distribution of roles when it comes to the control of fisheries in the EU is pretty clear: it is a competence of the Member States and *"the role of the Commission is not to control directly the behaviour of fishermen but to monitor the way Member States fulfil their obligations to enforce the policy under their own responsibility"*.<sup>9</sup> The general rules that all actors have to follow are adopted at EU level (and are currently contained in the Control Regulation), implemented by national authorities and their application by Member States is controlled by the Commission.

The fact that general control rules are adopted at the European level may have given rise to comments on the need to move away from a prescriptive, top-down approach driven by the European Commission to a regionalised approach to fisheries controls. On wider fisheries issues, this approach has been supported by the European Commission itself amidst fears of being accused of micromanagement in a political context where eurosceptical opinions appear to have increased amongst fishers. Indeed, in 2013, the new CFP Regulation introduced this concept in its Article 18 on regional cooperation on conservation measures.<sup>10</sup> According to this provision, Member States having a direct management interest on a conservation measure can submit joint recommendations on the subject to the Commission, which will adopt these recommendations by ways of a delegated or implementing act. The possibility of using the regionalisation process was also introduced in the proposal issued by the Commission in 2016 on the conservation of fishery resources and the protection of marine ecosystems through technical measures.<sup>11</sup> However, recognising the importance of having a solid technical and conservation framework throughout EU waters, regionalisation in the proposal is introduced with some safeguards and maintains general technical measures at EU level as well as baseline technical measures that can only be changed through the regionalisation process if it is proven that the general objectives and targets are achieved.

The idea is now also floating for the Control Regulation. It has been noted for example that *"the question is therefore whether it would be possible to consider control obligations that could differ for different regions and fisheries, so as to also adapt the control itself to the regional characteristics of the fisheries. (...) One can certainly wonder whether the future control policy could not also be based on a more regionalised, results-based approach where control instruments would also be adapted to local conditions in a context of harmonised objectives and standards"*.<sup>12</sup>

Before discussing further whether this would be, or not, a suitable path for the future, the first question to ask is *"what would it mean to regionalise the fisheries control policy"*? This point is not always clear, even for the ones who are promoting this solution. For example, the European Court of Auditors (ECA) noted in its 2017 Special Report on Fisheries Controls that *"particularly in France and Spain, the professional fisheries organisations required their members to comply with additional technical and control measures beyond those required by the EU regulatory framework (...). These measures were more tailored to the specificities of the regions concerned and therefore easier for fishermen to understand and apply. There is scope for capitalising on this awareness and commitment at regional level, particularly in the framework of the future regional*

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<sup>9</sup> Penas Lado E. (2016), *The Common Fisheries Policy - The quest for sustainability*, Wiley Blackwell, p.189.

<sup>10</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, Article 18.

<sup>11</sup> COM (2016) 134 final, Proposal for a regulation of the European Parliament and of the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures, Chapter III.

<sup>12</sup> Penas Lado E. (2016), *The Common Fisheries Policy - The quest for sustainability*, Wiley Blackwell, p. 200.

*decision-making process*".<sup>13</sup> Here, the Court is saying that decisions adopted by local professional organisations were more accepted by the fishers and, as a result, more effective. ECA further suggests to use this experience in the future. But shifting decision-making process to local professional organisations is not something the CFP can do. Indeed, EU law allows only the possibility, for Member States, to submit joint recommendations to the Commission on some aspects of fisheries management. This point should be further emphasised in order to avoid any misunderstanding on the true meaning of regionalisation: under the current rules, regionalisation means that Member States having a direct management interest on the issue can submit joint recommendations for adoption to the European Commission.<sup>14</sup> This type of regionalisation would not necessarily lead to more adapted rules at the local level, but would rather mean that the decision-makers would be the regional Member States. There is not guarantee that they will have a better understanding of the rules needed in a particular fishery at the local level.

The regionalisation of some aspects of the CFP is a relatively new trend and it is too soon to assess its effects (whether positives or negatives) on the overall objectives of this policy. But some points can already be underlined. Whereas it seems to be a good idea, on paper, to bring the decision-making process a level closer to those the most directly affected by the rules adopted, it also makes it easier for pressure groups to have access to these decision-makers and influence the process in a direction which will not necessarily help to reach the objectives of the CFP. It also means that other Member States, perhaps less directly affected, could no longer play the role of honest brokers and block or help to adopt a decision which would be in the general public interest and not solely in the interest of those States having a direct management interest in the region. Fish stocks, being a common resource, should be managed in the interest of all, and not in the interest of the few who will have a right to sit around the negotiations table because they exploit them. Finally, the joint recommendations adopted by the Member States in the context of the CFP are discussed in a regional process which clearly lacks transparency and whose outcome is only made public once it reaches the Commission's level.

On the potential regionalisation of EU fisheries control measures, one additional point of concern which was noted several times was the need to create a level playing field for all operators across the EU and to ensure that the application of the rules was, as much as possible, homogenized in the various EU Member States. For example, a 2016 report of the European Parliament focused on "How to make fisheries controls in Europe uniform" and on this occasion, the co-legislator noted that it considers that *"a sound and harmonised control system is needed for the regionalisation envisaged in the new CFP"* and added that it is *"firmly opposed to the 'Control' Regulation being weakened, and believes that Member States can already use the flexibility provided by the existing framework"*.<sup>15</sup>

But, most importantly, the question to ask is *"do we need a regionalisation of the EU fisheries control policy?"*. Here, two aspects must be taken into consideration: (i) to which extent existing instruments allow enough flexibility to adapt control requirements to the specificities of sea basins/regions or of fisheries and (ii) what parts of the current Control Regulation could potentially be regionalised without weakening the current existing framework?

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<sup>13</sup> European Court of Auditors (2017), Special Report No 08/2017, EU fisheries controls: more efforts needed, §41.

<sup>14</sup> In addition, what ECA appears to suggest in its report - that professional organisations are empowered with the right to adopt some control rules and to sanction their non-compliant members - already happens in several Member States, like Spain and France, but is an issue of national relevance, not a European one.

<sup>15</sup> European Parliament, Report 2015/2093 (INI), How to make fisheries controls in Europe uniform, §26.

As for the first question, it must be underlined that to a large extent, control rules can be adapted to the regional characteristics of a sea basin or to the one of a fishery. In accordance with Article 94 of the Control Regulation, Member States may carry out among themselves and on their initiative, common control programmes. These actions are also completed by the adoption, foreseen in Article 95, of Specific Control and Inspection Programmes (SCIPs) which apply mostly to areas and species covered by MAPs.

The implementation of these SCIPs is coordinated by the European Fisheries Control Agency (EFCA) by means of Joint Deployment Plans (JDPs). The JDPs apply in sea basin or geographical areas (Baltic Sea, North Sea, Western Waters, Mediterranean Sea, Black Sea, international waters) and Member States whose fleets are active there are cooperating, with the assistance of EFCA, to reach the control objectives of the various SCIPs.

If Member States can cooperate together to establish common control programmes and if specific control plans can be adopted for each region, the question of what could be regionalised during a revision process needs to be raised and examined carefully. What parts of the Control Regulation could potentially be regionalised without weakening the current existing framework? Is there a true need to do this, if the regulation already allows for the flexibility to take into consideration regional specificities and encourages Member States to cooperate together under the auspices of EFCA? May it even be counterproductive to regionalise control rules given the fact that the same rules applying to everyone to ensure a level playing field are a pre-requisite for fishers to have trust in the system and for the establishment of a culture of compliance? For example, when it comes to enforcement, there is no doubt that there will be discontent amongst the fishing community if EU rules applicable to sanctions were to vary from one region to another. In addition, if any regionalisation process leads to a situation where a group of Member States adopts some rules less stringent than the ones existing in other regions, this could potentially create a situation where the other Member States, lamenting the lack of level-playing field, adopt themselves weaker rules and then start a "race to the bottom" which will not help to reach the objectives of the Control Regulation.

Concerns over the transparency and inclusiveness of the current regionalisation process, existence of other tools to adapt control rules to regional specificities and non-negligible risks of creating non-homogeneous and weaker control standards across regions are some of the reasons why regionalisation, as foreseen in the 2013 CFP, does not appear to be a suitable option for the revision of the Control Regulation. Ensuring the homogenization of EU fisheries control rules should be one of the priorities of this revision process and this cannot be achieved by multiplying regulations on and exemptions to a set of general baseline articles. This would also severely undermine the simplification and rationalisation effort undertaken already in 2009 by the Commission with the adoption of the Control Regulation.

But this does not mean that a more efficient use of the existing provisions shall not be made to allow for a better consideration of the specificities of fisheries and sea basins. For example, what could be proposed could be a deepening of the existing role that EFCA is playing in the operational coordination of JDPs. This would mean enlarging the scope of SCIPs and JDPs to cover additional species; and reinforcing the role of EFCA so as to give to the Agency the legal and technical means to play its role of "honest broker" in the operationalisation of EU control objectives for a given region. The possibility to adopt more stringent rules for fish stocks which are exploited at levels which are not sustainable could also be studied.

## Recommendations

- Avoid any regionalisation of the EU fisheries control policy in the meaning of Article 18 of the CFP Basic Regulation.
- Deepen the role of EFCA by enlarging the scope of SCIPs and JDPs.
- Maintain Article 3 (2) of the Control Regulation.

## 2 Remove exemptions

One of the objectives of the Control Regulation was the introduction of a *"comprehensive monitoring of catches with a view to ensuring a level playing field for the fishing sector that takes into account the differences across the segments of the fleet"*.<sup>16</sup> To this end, the obligations contained in the regulation differed from one fishing vessel to another, depending on its size. For example, only masters of vessels of 10 metres' length overall or more have the obligation to keep a fishing logbook of their operations;<sup>17</sup> or only fishing vessels of 12 metres' length overall or more shall be equipped with a Vessel Monitoring System (VMS).<sup>18</sup>

This situation is complicated by the fact that these obligations are subject to further exemptions. Indeed, vessels between 12 and 15 metres' length overall operating exclusively within the territorial seas of their flag Member State or which never spend more than 24 hours at sea from the time of departure to the return to port can be exempted by their Member State from the obligation to:

- Be equipped with and operate a VMS;<sup>19</sup>
- Record and transmit electronically their fishing logbook data;<sup>20</sup>
- Record and transmit electronically their transshipment declaration data;<sup>21</sup>
- Record and transmit electronically their landing declaration data.<sup>22</sup>

In addition, fishing vessels of less than 12 metres' length overall can also be exempted on the same ground from the obligation to have equipment on board to retrieve lost gears.<sup>23</sup>

As it is for the Member States to decide if they grant these exemptions, it is clear that there is no homogenization in this respect and that situations vary from one Member State to another. The UK, for example, has required all vessels between 12 and 15 metres to be equipped with VMS by 31 December 2015 and is looking at the development of "inshore VMS" for smaller vessels.<sup>24</sup> On the other hand, in Spain for example, in 2014, 559 vessels were exempted from this obligation, or, that same year, 1,893 in Italy.<sup>25</sup> In its 2017 report on EU fisheries controls, ECA noted that *"most of the vessels between 12 and 15 metres long (79%) were exempted from the VMS"*

<sup>16</sup> 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, Recital 9.

<sup>17</sup> Article 14 of the Control Regulation.

<sup>18</sup> Article 9 of the Control Regulation.

<sup>19</sup> Article 9 (5) of the Control Regulation.

<sup>20</sup> Article 15 (4) of the Control Regulation.

<sup>21</sup> Article 22 (3) of the Control Regulation.

<sup>22</sup> Article 24 (3) of the Control Regulation.

<sup>23</sup> Article 48 (5) of the Control Regulation.

<sup>24</sup> UK 5 years report on the implementation of the Control Regulation, available at:

[https://www.asktheeu.org/en/request/member\\_state\\_reports\\_under\\_artic](https://www.asktheeu.org/en/request/member_state_reports_under_artic).

<sup>25</sup> Spanish and Italian five-year reports on the implementation of the Control Regulation, available at:

[https://www.asktheeu.org/en/request/member\\_state\\_reports\\_under\\_artic](https://www.asktheeu.org/en/request/member_state_reports_under_artic).

*obligation by Member States" and further underlined that without VMS, the conditions that these vessels have to fulfil in order to be exempted from this obligation "can only be checked with difficulty, unless the port authorities require vessels to inform them when entering and leaving the port, as it is the case in Italy".<sup>26</sup>*

There is no public data regarding the exemptions granted to Articles 15, 24 and 48 of the Control Regulation, as Member States do not have to report on those to the Commission. On the obligation to record and transmit electronically the transshipment declaration, only Marine Scotland reported that it granted, in 2015, 103 exemptions to fishing vessels under its flag - other Member States either report no exemptions or do not report anything. It seems therefore safe to assume that this provision does not appear to be relevant and shall be removed from the text of the revised Control Regulation.

The other exemptions, granted on a case by case basis by Member States shall also be removed, in the spirit of simplification and to ensure that a true level-playing field is maintained for all fishing fleets across the EU.

## Recommendations

- Remove the exemptions granted to vessels operating exclusively within the territorial seas of their flag Member State or which never spend more than 24 hours at sea from the time of departure to the return to port (Articles 9(5); 15 (4); 22 (3); 24 (3) and 48 (5) of the Control Regulation).

## 3 Better monitor small-scale fisheries

Small-scale vessels are, to a large extent, exempted from some of the obligations of the Control Regulation. Generally speaking, fishing vessels below 12 meters are not required to be equipped with VMS<sup>27</sup> and do not have to transmit data once every 30 minutes and respect several conditions when they enter and transit through a fishing restricted area.<sup>28</sup> Fishing vessels below 10 metres are not required to report their activities in fishing logbooks<sup>29</sup> or to complete and submit transshipment and landing declarations.<sup>30</sup> Vessels between 10 and 12 metres have to do so, but are not required to use electronic means to complete and submit this information.<sup>31</sup> Finally, these vessels are de facto excluded from the obligation to submit a prior notification at least four hours before the estimated time of arrival at port for species subject to a MAP, as this requirement only concerns vessels already obliged to submit their fishing logbook data electronically.<sup>32</sup>

<sup>26</sup> European Court of Auditors (2017), Special Report No 08/2017, EU fisheries controls: more efforts needed, §31.

<sup>27</sup> Article 9 of the Control Regulation.

<sup>28</sup> Article 50 of the Control Regulation.

<sup>29</sup> Article 14 of the Control Regulation.

<sup>30</sup> Articles 21 and 23 of the Control Regulation.

<sup>31</sup> Articles 15, 22 and 24 of the Control Regulation.

<sup>32</sup> Article 17 of the Control Regulation.

It must be noted, indeed, that a very large part of the EU fishing fleet currently escapes modern monitoring, recording and reporting requirements. On VMS, the ECA noted in its 2017 report that *"Due to the limited requirements of the Control Regulation, at 31 December 2015, 89% of EU fishing vessels included in the EU register did not have VMS equipment on board (...). Of these, 95% were vessels under 12 metres long which are not required to have VMS under the Control Regulation"*.<sup>33</sup>

In addition, the number of vessels using either paper logbooks or monitored by sales notes has been estimated to be around 21,500 in 2014.<sup>34</sup> If vessels are not using paper logbooks or are not monitored by sales notes, they shall be controlled by ways of sampling plans established by their flag Member States.<sup>35</sup> As of 31 December 2014, there were 83,493 active fishing vessels registered in the EU fleet register. After deducing the 21,500 which have to submit paper logbooks or are monitored through sales notes and the 4,800 which are using an electronic recording and reporting system, this leaves approximately 57,193 vessels subject to sampling plans as the only way to monitor their activity at sea. Even if these vessels are small-scale ones and may not represent an important share of the total of the catches by EU vessels, this is a significant gap which means that these fisheries will also be data deficient if compared to other segments of the EU fleet.

These exemptions were, to some extent, understandable in 2009, at the time when the Control Regulation was discussed and adopted. Almost 8 years after, technology has progressed and now offers potential solutions to be studied to ensure that small-scale fishing vessels are equipped with modern recording and reporting instruments without making this obligation too burdensome and expensive for them.

Several technology-based and cheap recording and reporting solutions are already tested by small-scale fishers across the EU and could serve as an inspiration for further replication in all Member States. This is the case for example of:

- SMS messages which are transmitted to a website that translates this message into data to inform potential customers or shore-based organisations on the catch composition;
- Commercial or free of charges applications like Télécâpêche in France<sup>36</sup> or CatchApp developed by Succorfish in the UK.<sup>37</sup> These applications allow for the recording of the same type of information as the one which, according to Article 14 of the Control Regulation, has to be entered in "traditional" fishing logbooks. These data, once recorded, can be shared with or sent to others, including auctions, potential buyers, national competent authorities or scientists.<sup>38</sup>

With regards to the lack of VMS, it should be noted that the logging of data into an application can be linked to GPS devices, which would in turn provide information on where the data was entered. Such devices can also be fixed to the gear and send signals to stations on the shore to inform on when and where the gear was set and hauled. Further devices, which could be fitted to the vessels

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<sup>33</sup> European Court of Auditors (2017), Special Report No 08/2017, EU fisheries controls: more efforts needed, §31.

<sup>34</sup> Synthesis report of the first five years report of Member States according to Article 118, p. 14.

<sup>35</sup> Article 16 of the Control Regulation.

<sup>36</sup> See: <https://vimeo.com/145372377>.

<sup>37</sup> See: <https://succorfish.com/catch-app/>.

<sup>38</sup> See for example: <http://abalobi.info/app-suite/#fisher>.

and adapted to the realities and constraints of small-scale fisheries are being developed by commercial companies.<sup>39</sup>

If these monitoring and reporting techniques exist and are cheap, affordable and adapted to small-scale fisheries, it would be a nonsense to witness their parallel development whilst at the same time continue to rely on paper-based declarations and sampling plans to control this segment of the EU fleet. Making use of them would also ensure that traceability is further improved and controls throughout the supply chain more efficient. For all these reasons, it is suggested that, when appropriate, fishing vessels between 10 and 12 metres are equipped with electronic logbooks and that all vessels not equipped make use of either SMS or applications to report their catches to their national competent authorities. In addition, vessels below 12 metres shall be equipped with GPS devices to monitor their activity.

On these points, the European Commission launched in 2017 a call for tenders entitled "*Monitoring small-scale fisheries*" whose objective was, amongst others, to propose the design of a system that would be suitable for future developments.<sup>40</sup> In June 2017, on the occasion of a meeting of the Expert Group on Fisheries Control, the Commission indicated that the outcomes of that study were "*anticipated to inform the expected revision of the CR*".<sup>41</sup> The meeting report of this expert group has, since then, been removed from the website of the European Commission, as it also contained detailed information regarding the original revision process of the Control Regulation and related timeline.<sup>42</sup> Since the decision to fast-track the revision process of the Control Regulation has been made, the Commission has stated that the outcomes of this study will be used to prepare the implementing rules of the Control Regulation, but not to inform the revision process itself. We would like to further reiterate our concerns regarding the rushed process and the fact that the Commission will not take the time to gather all the data and evidence it needs to prepare a sound proposal, especially on this important topic which will affect the daily lives of thousands of fishers.

## Recommendations

- Introduce a requirement for vessels between 10 and 12 meters to use electronic recording and reporting systems instead of paper-based fishing logbooks and declarations in Articles 15, 22 and 24 of the Control Regulation.
- Introduce the obligation, for vessels below 12 meters, to be equipped with adapted geo-tracking devices.
- Introduce modern electronic reporting and monitoring requirements for small-scale vessels below 10 meters through Article 16 of the Control Regulation.
- Introduce an obligation, for Member States, to set up systems to collect electronic data sent by small-scale vessels and to ensure that this data can be shared with other Member States, EFCA or the Commission whenever appropriate.

<sup>39</sup> See for example the website of the company CLS (Collecte Localisation Satellites): <https://www.cls.fr/gestion-durable-peches/>.

<sup>40</sup> Call for tenders, Monitoring small-scale fisheries, EASME/EMFF/2017/011, Tender specifications, p.6

<sup>41</sup> Report of the Expert Group on Fisheries Control, 7 June 2017, ARES (2017) 3335193.

<sup>42</sup> The removal of this document is in clear contradiction with the rules governing the functioning of this expert group, which state that the reports of the meetings shall be made public.

## 4 Improve the control of gross tonnage and engine power

To ensure that the EU fishing fleet is not in a situation of overcapacity which could lead to overfishing, compulsory fleet capacity ceilings are set up through the CFP for each Member State. These ceilings are expressed in kilowatts (kW) and gross tonnage (GT) of vessels. According to the Control Regulation Implementing Regulation,<sup>43</sup> it is mandatory to include in the fishing licences information on engine power and tonnage. The Control Regulation further makes it an obligation for the Member States to carry out the necessary checks *"to ensure that the total capacity corresponding to the fishing licences issued by a Member State, in GT and in kW"* are not higher than the maximum capacity levels for that Member State established in accordance with EU regulations.<sup>44</sup>

The first problem with that obligation is that there are no detailed rules in the Control Regulation on the methodology and frequency of the controls on the gross tonnage. This was underlined by ECA in its 2017 report, in which the Court noted that *"however, although provided for in the Control Regulation, no detailed rules for the fleets' gross tonnage were adopted so far. As a result, Member States did not carry out full measurement of their vessels"*.<sup>45</sup> The Court went further and recommended to the Commission to include in its proposal for a revised Control Regulation detailed rules for the regular documentary and on-the-spot verification of gross tonnage.<sup>46</sup>

The second issue is that, although more detailed rules exist on the control of the engine power of the fishing vessels, they have not been well and consistently implemented. Articles 39 to 41 of the Regulation set up the general obligations that Member States have to fulfil to monitor, certify and verify engine power. According to those rules, they have to certify the engine power of fishing vessels flying their flag, and then ensure that the certified engine power is not exceeded. To do so, they must establish a sampling plan of the consistency of engine power and, if after the verifications conducted in the context of the plan, they find indications that the engine power of a fishing vessel is greater than the power stated in the fishing licence, they must proceed to physical verifications. The manipulation of the engine of the vessel with the aim of increasing its power beyond the maximum continuous engine power according to the engine certificate is a serious infringement of the rules of the CFP, which must be punished by effective, proportionate and dissuasive sanctions.<sup>47</sup>

As noted by ECA, there is a loophole in the Control Regulation, which does not establish the required frequency of the verifications carried out in the context of the sampling plan.<sup>48</sup> In addition, there is evidence that during the first years of implementation of the Control Regulation, Member States rarely conducted such documentary and physical verifications. Some Member States, like Denmark or France, conducted no verifications during the period 2010-2014.<sup>49</sup> Other reports some verifications, but in very small numbers and, based on the five-years reports of the Member States on the implementation of the Control Regulation, it seems that Italy conducted 578 of the 684 verifications of engine power reported for the year 2014. This statistic is really disturbing as, in the meantime, in its 2017 report, ECA underlines that Italy has not started yet the process to verify

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<sup>43</sup> Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, Annex II.

<sup>44</sup> Control Regulation, Article 38.

<sup>45</sup> European Court of Auditors (2017), Special Report No 08/2017, *EU fisheries controls: more efforts needed*, §16.

<sup>46</sup> *Ibid.* p.52.

<sup>47</sup> Article 90 of the Control Regulation.

<sup>48</sup> European Court of Auditors (2017), Special Report No 08/2017, *EU fisheries controls: more efforts needed*, §16.

<sup>49</sup> See the five-years reports of the Member States on the implementation of the Control Regulation, available at: [https://www.asktheeu.org/en/request/member\\_state\\_reports\\_under\\_artic](https://www.asktheeu.org/en/request/member_state_reports_under_artic).

engine power. If this is true and if the numbers reported by Italy in 2014 correspond to another type of verifications, it means that, that year, only 106 verifications took place for the entire EU fleet - and therefore concerned only 0.12% of the EU fleet.

This very low level of verifications of engine power is a problem as, in the meantime, several stakeholders interviewed to prepare ClientEarth's Slipping Through the Net case studies<sup>50</sup> have indicated that frauds consisting of indicating false numbers in the engine certificate or of de-rating the engine after the certification took place were frequent practices. As a result, numbers upon which the capacity of the EU fleet in kW is calculated are not reliable and a non-negligible risk exists that capacity is not adequately balanced with fishing opportunities.

It is therefore necessary to introduce more stringent rules on the certification and verification of engine power, notably to oblige Member States to carry out checks on a representative number of vessels and at sufficient intervals to ensure that the national fleet ceilings are complied with. To that end, we welcome the idea described by the Commission, in its document developed in light of the seminar organised on 16 November 2017, to mandate a continuous monitoring system and transmission of the maximum power developed by the engines when the vessels are active. It shall further be underlined that not only adequate rules must be developed; but that a strong focus should also be made on the further implementation and enforcement of the rules by the Member States.

## Recommendations

- Introduce detailed rules for the control of the gross tonnage of the EU fleet in Chapter II of the Control Regulation.
- Modify Article 41 of the Control Regulation to ensure that certification and verification of engine power is reliable.
- Further focus on the implementation and enforcement of the rules at the national level.

## 5 Control recreational fisheries

Recreational fisheries, defined as *"non-commercial fishing activities exploiting marine living aquatic resources for recreation, tourism and sport"*<sup>51</sup> are to a large extent outside the scope of the CFP and its control regime, despite growing concerns regarding the impacts they have on stocks.<sup>52</sup> Indeed, the obligations contained in Article 55 of the Control Regulation on recreational fisheries are too weak and not detailed enough to allow for an efficient monitoring of this practice. They merely state that:

- Member States have the obligation to ensure that these fisheries are conducted in a manner compatible with the objectives and rules of the CFP;
- The marketing of catches from recreational fisheries is prohibited;
- The recreational catches of stocks subject to recovery plans shall be monitored by Member States on the basis of sampling plans;

<sup>50</sup> See: <https://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland/>.

<sup>51</sup> Control Regulation, Article 4.

<sup>52</sup> For more details on the subject, see ClientEarth's legal memo Recreational fishing in the European Union, written in July 2017.

- If, for stocks subject to recovery plans, a recreational fishery is found to have a significant impact, the Council may submit it to specific management measures such as fishing authorisations or catch declarations.

In the synthesis report of the first five years reports of Member States on the implementation of the Control Regulation, it was noted that many Member States reported to the Commission that they already implement specific rules with respect to recreational fisheries. The Member States further added that, although the prohibition of marketing of recreational fish is a useful tool, more tools need to be used in order to obtain control over recreational fisheries - an indication that they believe that this activity is not sufficiently monitored. Finally, the authors of the report underline that the number of infringements for illegal marketing of recreational catches remained stable over the years - there was 2,717 reported infringements in the EU in 2014, with Lithuania reporting 2,491 of them.<sup>53</sup>

In its 2008 original proposal for a Control Regulation, the Commission was much more ambitious when it came to the control of recreational fisheries.<sup>54</sup> It actually proposed that recreational fisheries on stocks subject to a multiannual plan (MAP) are subject to an authorisation for the vessels carrying out these fisheries. It also made it an obligation for Member States to register the recreational catches of stocks subject to a MAP and to count them against their relevant quotas. To that end, Member States would have to establish a share of these quotas to be used exclusively for the purpose of recreational fisheries. This proposal was eventually dismissed, but did indeed go in the right direction.

We agree with the European Commission that there is a lack of control measures for recreational fisheries despite their possible significant impact on fish resources and that more needs to be done to address this problem.

## Recommendations

- Maintain the general obligation for Member States to ensure that all recreational fisheries, whether subject to a MAP or not, are conducted in a manner compatible with the objectives and rules of the CFP.
- Maintain the prohibition of the marketing of catches from recreational fisheries.
- Introduce the obligation, for recreational fisheries on stocks subject to a recovery plan, a MAP or to the landing obligation, to obtain a licence to fish and for recreational fishers subject to that licencing obligation, to report their catches electronically.
- Introduce the obligation for Member States to register the recreational catches of stocks subject to the licencing and reporting obligations and to count them against their quotas.
- Maintain the possibility, when a recreational fishery is found to have a significant impact, to adopt more stringent control and management measures.

<sup>53</sup> See: <https://publications.europa.eu/en/publication-detail/-/publication/0edfa926-d328-11e6-ad7c-01aa75ed71a1/language-en>, p.15.

<sup>54</sup> COM (2008) 721 final, Proposal for a Council Regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, Article 47).

## 6 Improve data quality and availability

In order to improve the quality of the data upon which national and European competent authorities will base their decisions, it is important to ensure that exemptions to catch data collection are removed from the Control Regulation. In particular, the exemption contained in Article 14 (1) and (4), according to which only catches and discards above 50 kilogrammes shall be recorded in the fishing logbook shall be deleted. There are no scientific justification to that exemption and, whereas for one fishing trip, 50 kilogrammes may not appear to be important, the total of all the catches and discards which go unrecorded every year because of this exemption is likely to be significant.

The other exemptions which should be removed from the Control Regulation are the ones contained in Article 60, which deals with the weighing of fishery products. We agree with the statement of the European Commission according to which the current rules do not guarantee that *"each quantity of each species landed are correctly accounted for by weighing"*.<sup>55</sup> In the spirit of simplification, there should be only one rule applicable to weighing across the EU. This rule should be the one foreseen in Article 60 of the Control Regulation, with all the exemptions removed: weighing shall take place on landing, and Member States shall ensure that this takes place on systems approved by the competent authorities.

In addition, the exemption granted under Article 59 (3) of the Control Regulation, according to which *"a buyer acquiring fisheries products up to an amount of 30 kg which are not thereafter placed on the market, but used only for private consumption"* does not have to be a registered buyer, auction centre or producer organisation shall be reconsidered. The 30 kilogrammes threshold is too high to justify that fishery products sold in this context are only for private consumption and concretely, this means that a large amount of fishery products which are currently sold in the EU escapes elementary traceability requirements. We also support the proposal from the European Commission to ensure that *"all quantities sold/dispensed for private consumption, to non-registered buyers, are recorded in landing declarations"*.<sup>56</sup>

### Recommendations:

- Remove the 50 kilogrammes exemption contained in Article 14 of the Control Regulation.
- Remove the exemptions contained in Article 60 of the Control Regulation to ensure that weighing takes place on landing, on systems approved by the competent authorities.
- Reduce the 30 kilogrammes threshold of Article 59 (3) of the Control Regulation, and further ensure that all quantities sold or dispensed for private consumption, to non-registered buyers, are recorded in landing declarations.

## 7 Further homogenize sanctions and ensure that they are a real deterrent

<sup>55</sup> Document "Workshop on the EU Fisheries Control System - Stakeholders consultation", p. 3.

<sup>56</sup> Ibid., p. 3.

Title VIII of the Control Regulation deals with enforcement and it is largely recognised that the provisions it contains have only been partially implemented.<sup>57</sup> Therefore, we only partially agree with the description of the problem provided by the Commission in its document, that: *"The whole enforcement system is very complex with provisions scattered between the Control Regulation and the IUU Regulation, creating confusion for its application. The levels of sanctions are very different from one Member State to another. The current point system for serious infringements is not applied by Member States with even criteria."*<sup>58</sup>

Indeed, whilst we acknowledge that the current rules could be further clarified in order to enhance their implementation, the problem is not only related to the complexity of the legislation. The continuous lack of political will from Member States to implement the enforcement provisions of the IUU and Control Regulations as well as the absence of strong action from the Commission to address this lack of implementation constitute also the grassroots of the problem. New enforcement rules will be of little help to improve the current state of play if the Member States do not implement them and if the Commission continues to shy away from taking action against them, as it has the duty to do in its role as Guardian of the Treaties. Therefore, any decision to revise these rules must be accompanied by a clear and strong commitment from all competent authorities to implement them, or it will be of little use.

We would also like to underline that we are not currently in a position to provide detailed comments on the policy option 3 presented by the Commission in as much as it relates to enforcement. Our general comment on this issue will be that any attempt to reduce or weaken the list of serious infringements or the criteria which serve to determine whether an infringement is, or not, a serious one should be strongly opposed. As regards the specific proposals from the Commission, more time needs to be devoted to properly assess the costs/benefits balance of re-opening the enforcement provisions of the IUU Regulation. Such provisions were clearly not included in the evaluation of the Control Regulation, and stakeholders have been advised that the Commission was looking at this option only on the occasion of the 16 November workshop on the revision of the EU Fisheries Control System. As the deadline to submit written comments on the revision was set for 15 December 2017, this did not leave enough time to many stakeholders to properly assess the implications of such an important decision.

As a result, we will mostly provide comments on the enforcement title of the Control Regulation.

According to this Title, Member States have the following obligations:

- To take systematic and appropriate measures, including administrative action or criminal proceedings, against the natural or legal persons suspected of a breach of any of the rules of the CFP. The overall level of sanctions and accompanying sanctions shall be calculated 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;<sup>59</sup>
- To ensure that natural or legal persons who committed a serious infringement of the rules of the CFP are punished by effective, proportionate and dissuasive sanctions, whether criminal or administrative. Member States shall also take into account the value of the

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<sup>57</sup> See ClientEarth (2016), *Slipping Through The Net - The control and enforcement of fisheries in England, France, Ireland and Poland*, 11p. Available at: <https://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland/>.

<sup>58</sup> Document "Workshop on the EU Fisheries Control System - Stakeholders consultation", p. 2.

<sup>59</sup> Article 89 of the Control Regulation.

prejudice to the fishing resources and the marine environment concerned when fixing the sanction.<sup>60</sup> The list of infringements which can be considered as serious ones depending on the national criteria adopted by each Member State are found in Article 90 of the Control Regulation and in Article 3 of Council Regulation (EC) No 1005/2008 on the fight against Illegal, Unreported and Unregulated (IUU) fishing - the IUU Regulation;<sup>61</sup>

- To take immediate enforcement measures to prevent the natural or legal persons caught in the act of committing a serious infringement from continuing to do so;<sup>62</sup>
- To establish a point system for serious infringements to the rules of the CFP for licence holders and masters of fishing vessels.<sup>63</sup> This point system will be further discussed in the next section; and
- To establish a national register in which they will enter all infringements to the rules of the CFP committed by vessels flying their flag and by their nationals. This information shall be kept for a minimum time of three years.<sup>64</sup>

According to the IUU Regulation, the criteria to be *inter alia* taken into consideration by Member States when they are determining if an infringement is, or not, a serious one are the following:

- The damage done;
- Its value;
- The extent of the infringement; and
- The repetition of the infringement.<sup>65</sup>

In Article 90 (1) of the Control Regulation, an additional criteria was added to this list: the economic situation of the offender. This is a nonsense which should be removed from the regulation. Indeed, it specifies an additional criteria to be taken into consideration for the three serious infringements defined in the Control Regulation - creating a separate category of infringements, as this criteria will only apply to those infringements, and not to the ones defined in Article 3 of the IUU Regulation. This does not fit well with the spirit of simplification that was invoked by several stakeholders during the evaluation of the Control Regulation. It is not further explained in the regulation or in its implementing rules how to define the *economic situation of the offender* and it is likely that there could be many national or even local interpretations of the meaning of this sentence. In addition, and even more importantly, this criteria has nothing to do with the determination of the gravity of an offence. According to their own national legal frameworks, this is a criteria Member States may wish to consider to adopt a decision on the level of the sanction to be applied if a serious infringement is committed but not one upon which they could make a decision on whether an infringement is serious or not.

In addition, we support the proposal from the Commission to lay down unequivocal criteria to define the gravity of the infringement. If the event that only the Control Regulation is revised and that these criteria only apply to the serious infringements listed in this piece of legislation, further guidance and training could also be developed and provided to ensure that these criteria are taken into consideration for the serious infringements defined in the IUU Regulation.

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<sup>60</sup> Article 90 of the Control Regulation.

<sup>61</sup> Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

<sup>62</sup> Article 91 of the Control Regulation.

<sup>63</sup> Article 92 of the Control Regulation.

<sup>64</sup> Article 93 of the Control Regulation.

<sup>65</sup> Article 3 (2) of the IUU Regulation.

If only the Control Regulation is revised, guidance should also be provided to sentencing authorities at the national level on how to take into account the value of the prejudice to the fishing resources and the marine environment when fixing the sanction, as they are required to do under Article 90 (4) of the Control Regulation.

As suggested by the Commission in the paper presenting its policy options, a cross-reference could be made in Article 91 of the Control Regulation on immediate enforcement measures to Article 43 of the IUU Regulation. This would clarify the list of measures which have to be taken by the Member States in order to prevent the continuation of a serious infringement and to allow the competent authorities to complete their investigations.

Finally, as suggested in the ECA report, improved provisions to establish standardised and digitalised inspection reports and to exchange these reports between Member States, the European Commission and EFCA could be introduced in Title VII of the Control Regulation. It should also be ensured that Member States report, perhaps to the Commission or to EFCA, on follow-up actions taken after a breach of the rules of the CFP or, if no action has been taken, explain clearly the reasons why it has been decided to do nothing. So far, only the number of infringements detected are included in the five-years reports of the Member States on the implementation of the Control Regulation. It is extremely difficult to determine to which extent Member States are talking, in these documents, about infringements merely detected or which had further been sanctioned. As a result, competent authorities and civil society only have an approximate idea of the level of compliance with the CFP and cannot determine with certainty to which extent Member States are complying with their obligation under Article 89 of the Control Regulation to ensure that appropriate measures are systematically taken against the persons suspected of a breach of the rules of the CFP.

## Recommendations

- Remove "the economic situation of the offender" as a criteria to determine if an infringement is a serious one or not in Article 90 (1) of the Control Regulation.
- Further precise and homogenize the criteria which Member States have to take into consideration to determine what constitutes a serious infringement.
- Enhance Article 91 of the Control Regulation with a cross-reference to Article 43 of the IUU Regulation.
- Mandate, through Title VII of the Control Regulation, the use of standardised and digitalised inspection reports and mandate the reporting on follow-up actions if infringements are discovered.

## 8 Improve the design and implementation of the penalty point system

As stated in the previous section, Article 92 of the Control Regulation obliges Member States to create a penalty point system for licence holders and masters of fishing vessels who commit serious infringements to the rules of the CFP. The rules governing the application of the system to licence holders are detailed in Article 92 (1) to (5). Article 92 (6) creates merely a general obligation for Member States to establish a point system for masters of fishing vessels.

The idea behind the adoption of this point system was two-fold:

- Create a type of sanction which could be uniformly applied across the EU, as it is not based on fluctuant criteria such as the value of the catch, and which would in the end create a sense of fairness and level-playing field amongst the fishing community; and
- Take stock of the situation that if many Member States have in their legislations provisions on the withdrawal of fishing licences, they do in fact really rarely apply this sanction - and oblige them to do so. The withdrawal of a fishing licence is a powerful tool to sanction violations of the rules and further deter other infringements. As such, in case of repeated offences, it ensures that action stricter than fines or other types of financial penalties is taken. Through this system, Member States have therefore to ensure that each time a serious infringement of the rules of the CFP is committed, penalty points corresponding to the serious infringement are attributed to the licence holder and to the master of the fishing vessel. Once some thresholds are reached, the fishing licence can be suspended and, eventually, revoked, and masters can also be suspended from their right to exercise their activity.

Since its creation, the penalty point system met with strong opposition from the fishing community and Member States have generally shown reluctance to implement it.<sup>66</sup> It has often been criticised as being a "double-sanction" or as leading to the "criminalisation" of fishers. None of these assumptions is true. Indeed, it is common in all jurisdictions across the EU to impose sanctions (fine, imprisonment sentence, etc.) and accompanying sanctions (penalty points for drivers' licence, community service, etc.) and this has never been seen as "double sanctions", but rather as complementary ones, which serve different purposes. In addition, the use of "criminalisation" in this context is incorrect. Criminalisation refers to the act of categorising an act as a criminal offence, an action which would entail the opening of criminal proceedings in front of a criminal court. The penalty point system serves the opposite purpose: instead of criminalising, it offers the opportunity to administrative authorities in each Member State to deal with the most severe fisheries infringement cases. It does not "criminalise" fishers - the criminalisation of fisheries infringements is an issue to be tackled at the national level, where each Member State decides if it wants to sanction infringements through administrative or judicial proceedings, not at the EU level.

In its 2017 report, the European Court of Auditors was highly critical regarding the lack of implementation of the penalty point system by several EU Member States. It noted *that "in Spain, the EU penalty points system was applied to a limited number of cases (49 between 2013 and 2015). (...) In Scotland, (...) points were only applied to serious infringements following a conviction in court. Points were only applied in seven cases between 2013 and 2015. (...) In France, the EU penalty point system was not applied."*<sup>67</sup>

Analysis of the data included in the five-years reports from Member States on the implementation of the Control Regulation also clearly shows that Member States do not make a direct, automatic link between the detection of a serious infringement and the attribution of penalty points. This direct link is an obligation that they have to respect under Article 92 of the Control Regulation.

In light of these conclusions, we would like to further reiterate our position that, on enforcement issues, new rules will be of little help if competent national and European authorities do not commit

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<sup>66</sup> See ClientEarth (2016), *Slipping Through The Net: The control and enforcement of fisheries in England, France, Ireland and Poland*, 11p.

<sup>67</sup> European Court of Auditors (2017), *Special Report No 08/2017, EU fisheries controls: more efforts needed*, Box 10.

to a better implementation of the rules. Not only are the Member States failing to impose penalty points; but also the European Commission has not opened any infringement proceedings against Member States (like Ireland) which, eight years after the entry into force of the Control Regulation, still have not fully implemented the penalty point system in their national order.<sup>68</sup>

We support the ideas developed by the Commission in its policy option 2, namely to:

- Maintain the common list of points to be attributed to serious infringements;
- Clarify that points apply in addition to the main sanction; and
- Establish common/minimum rules for the masters' point system.

In addition, the following elements should also be integrated in the Commission' proposal:

- Ensure that penalty points are also imposed for the serious infringements defined in Article 90 (1) (a) and (b) of the Control Regulation, as this is not currently the case;
- Investigate the possibility of also imposing penalty points to masters/licence holders of support vessels engaged in IUU fishing operations, as these vessels can be identified as being engaged in IUU fishing under Article 3 of the IUU Regulation;
- Ensure that, in Member States where the sanctioning system is predominantly criminal, the implementation of the penalty point system is not watered down by the application of Article 92 (4) of the Control Regulation. According to this Article, points attributed to the licence holder shall be deleted if he does not commit any serious infringement within three years from the date of the last serious infringement. In Member States with predominant criminal sanctioning systems, where the procedures take a long time to complete (i.e., almost three years) and which have decided to apply penalty points only after a judgment recognising the criminal conviction has taken place, this means that the penalty points could potentially never been assigned, or only for a very short amount of time, making them ineffective; and
- Ensure that the national competent authority which grants the fishing licences and authorisations has also the power to suspend or withdraw these licences and authorisations, especially after penalty points have been attributed.

## Recommendations

- Impose penalty points for the serious infringements defined in Article 90 (1) (a) and (b) of the Control Regulation.
- Impose penalty points to support vessels engaged in IUU fishing operations.
- Rephrase Article 92 (4) of the Control Regulation to ensure the efficiency of the penalty point system, even in Member States with predominant criminal sanctioning systems.
- Ensure that the national authority granting the fishing licences and authorisations is also the one having the power to suspend or withdraw the fishing licence.

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<sup>68</sup> See ClientEarth (2017), The control and enforcement of fisheries in the Republic of Ireland, available at: <https://www.documents.clientearth.org/library/download-info/the-control-and-enforcement-of-fisheries-in-the-republic-of-ireland/>.

## 9 Increase accountability and transparency

Information on the implementation of the Control Regulation is currently very limited and difficult to access. According to Article 118 of the regulation, Member States have to submit only every five years reports on its application, and these reports are not published by the Commission, but simply summarised in another report that this institution has to submit to the Council and to the Parliament.

The content and quality of the Member States' reports is also a cause of concern. They do not allow interested stakeholders and the Commission to prepare a sound analysis of the status of the implementation of the Control Regulation, especially on its enforcement chapter. National competent authorities only report, without further details, on infringements detected and do not indicate if there has been any follow-up to the detection of this infringement, if it was determined that it was a serious one or not, and the level of the sanctions imposed.

The frequency of this reporting exercise is also questionable. For example, according to Article 93 (4) of the Control Regulation, Member States shall store in a national register data related to infringements of the CFP for a minimum period of three years. This timeline does not match the five years reporting period to the Commission on the application of the Regulation.

Ensuring that reports are prepared at more frequent intervals and contain better quality data, in addition to making these reports further available publically, and discuss regularly this issue with the Council and with the Parliament will ensure a better transparency of the EU Fisheries Control System and eventually encourage the development of a culture of compliance. It is also because fishers and industry players believe that they are more controlled than the other players in other EU Member States that they are reluctant to abide by the rules. Discussing publically the evidence at the disposal of the authorities will help to overcome this defiance. It will also help national competent authorities to engage into a "race-to-the-top", as opposed to a "race-to-the-bottom", by providing best practices examples and encouraging them to not shy away from sanctioning practices which eventually benefit not only the marine environment but also the fishing communities.

Finally, this transparency exercise would also be an accountability exercise, in a context where "results-based management" has become a new motto for fisheries management. No results-based approach can succeed without a minimum level of accountability, and this exercise should be conducted at intervals appropriate enough to ensure that it has an impact on the behaviour of competent authorities.

## Recommendations

- Improve the format of the reports Member States have to submit in accordance with Article 118 of the Control Regulation.
- Increase the frequency of reports by Member States to the Commission, at least on key issues such as infringements numbers and follow-up enforcement actions, from every 5 years to every 2 years, as foreseen in the IUU Regulation.
- Make these reports automatically public, for example in the website of the Commission.
- Increase the frequency of reports from the Commission to the European Parliament and the Council on the implementation of the Control Regulation, to ensure regular exchange of views with the legislators on this important topic.

## 10 Enlarge the role of EFCA

We agree with the description of the problems related to the EFCA Founding Regulation made by the Commission in its paper presenting the 3 policy options it will analyse during its impact assessment. We would welcome a proposal to enlarge, deepen and clarify the role of the Agency. Notably, it would be important to enlarge the scope of JDPs to cover additional species and to have more flexible working arrangements for these plans, to allow a greater participation of EU Member States and third countries.

We would also like to underline the key role played by EFCA in the training of national fisheries inspectors. In particular, the development of the core curricula training material should be further encouraged and consideration could be given, in the context of this revision process, to the development of an EU qualification framework for fisheries inspectors. Standardising fisheries inspections procedures would further allow the development of an EU level-playing field by ensuring that fishers and operators are controlled in similar ways across EU waters and by establishing best practices to follow during fisheries inspections.

Finally, in this process, due consideration should be given to the financial, human and technical means allocated to EFCA, to ensure that they would allow the Agency to carry out its missions appropriately.

## Recommendations

- Enlarge the scope of JDPs, so as to cover additional species.
- Consider the possibility to establish, through EFCA, an EU qualification framework for fisheries inspectors.
- Ensure that sufficient financial, human and technical means are given to the Agency to fulfil its mandate.

## 11 Improve the control of the landing obligation

The landing obligation, which was introduced in 2013 through the CFP Basic Regulation, has reshaped the focus of controls and inspections from landing operations and places to fishing activities at sea.

In essence, the respect of this obligation is extremely difficult to control, as there will be little evidence that fish that would normally be landed is thrown back to the sea and not kept on board. For this reason, it is crucial to ensure that control takes place at sea, at the time when the infringements could take place. To that end, the number of inspections at sea should be maintained in EU Member States. The recent trend which has seen the decrease in the number of inspections at sea in some EU Member States like France or Spain is, in this respect, extremely worrying. Budgetary constraints have been invoked, for example by France, to explain this situation but, according to Article 5 (3) of the Control Regulation, "*Member States shall adopt appropriate measures, allocate adequate financial, human and technical resources and set up all administrative and technical structures necessary for ensuring control, inspection and enforcement of activities carried out within the scope of the common fisheries policy*". In addition, it must also be reminded that the Court of Justice of the EU has confirmed on a number of occasions that Member States cannot invoke internal problems as justifications for failures on their part to secure due implementation and application of EU law within their territory. It has been held for example that Member States may not plead financial difficulties as mitigating factors.<sup>69</sup>

In the document it circulated during the 16 November workshop on the revision of the EU Fisheries Control System, the Commission underlines that there is currently no legal basis in the Control Regulation to mandate the use of remote electronic technologies such as CCTV to control the landing obligation. We agree that an EU-wide obligation to mandate the use of remote electronic technologies to better control the implementation of the landing obligation could be useful and would like to further emphasise the need to establish this obligation at the European level, to ensure that fishers do not feel discriminated between regions. EFCA should be involved in the implementation of this obligation, so as to ensure consistency in its application across the entire EU.

## Recommendations

- Maintain Article 5 (3) of the Control Regulation.
- Ensure that Member States allocate enough resources to inspections and control activities.
- Introduce a legal basis to use remote electronic monitoring technologies, taking care of establishing this obligation at the EU level.

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<sup>69</sup> See judgment of 18 October 2012 in case C-301/10, Commission v. UK, §66.

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