

**To: European Commission, DG MARE**

**From: ClientEarth**

**Date: March 2016**

**Subject: European Commission Consultation on the evaluation of Regulation (EC) 1224/2009 on fisheries control**

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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.

Transparency Register Number: 96645517357-19

This document provides a general statement on the evaluation of the Control Regulation and replies to some of the questions raised in the consultation document.

## General statement

In 2007, the European Court of Auditors published an audit on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources.<sup>1</sup> The audit was severe, underlying that:

- Catch data was neither complete nor reliable, and the level of catches was thus unknown;
- The inspection systems did not provide assurance that infringements were effectively prevented and detected;
- The procedures for dealing with reported infringements did not support the assertion that every infringement was followed up and still less that infringements were attracting penalties;
- Overcapacity was detracting from the profitability of the fishing industry and, in a context of decreasing authorised catches, was an incitement to non-compliance with these restrictions.
- The Court concluded that *"if the situation continues, it will bring grave consequences not only for the natural resources, but also for the future of the fishing industry and the areas associated with it"*.

The Commission shared *"the conclusions of the Court concerning the shortcomings of the provisions concerning control, inspection and enforcement, which endanger the effectiveness of the CFP"*.<sup>2</sup>

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<sup>1</sup> Court of Auditors Special Report No 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies.

This report helped to prompt the adoption of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy ("the Control Regulation"). It is important to recall that, if the Control Regulation entered into force on 1 January 2010, some of its provisions, such as the ones concerning the introduction of a vessel monitoring system (VMS)<sup>3</sup>, an automatic identification system (AIS)<sup>4</sup> or the completion and submission of the fishing logbook<sup>5</sup> were only implemented on a gradual basis between 2010 and 2014.

According to Article 118 (3) of the Control Regulation on reporting obligations, "*an evaluation of the impact of this Regulation on the common fisheries policy shall be undertaken by the Commission five years after the entry into force of this Regulation*". The Commission is now carrying out this evaluation exercise, the outcome of which does not necessarily entail a revision of the Control Regulation.

Indeed, in our view, it is premature to revise this regulation at this point. One reason for this is that efforts to fully implement its requirements are still ongoing at the Commission, Member State and fishing sector levels. This has required substantial investment, and the impacts and efficiency of these relatively new systems are not yet known.

Instead, we argue that the focus of the upcoming years should be on implementation, to ensure that the Control Regulation does deliver results effectively. In this respect, implementation at the national level is crucially important, especially as the control of fisheries is a shared competence between the EU and its Member States. Before the adoption of the Control Regulation, the Commission already pointed out that "*the success of the CFP depends for a large part on the commitment of Member States and their efforts to effectively control and enforce CFP rules*".<sup>6</sup> Almost ten years after, this statement remains highly relevant.

The Commission should also continue to play its role, by evaluating and controlling the implementation of the Control Regulation in the Member States. In addition, the Commission should not shy away from adopting measures to ensure compliance by Member States with the objectives of the CFP.

## Consultation Questions and Answers

### In your view, what are the main strengths of the fisheries control regime?

The main strength of the current fisheries control regime is that it relies upon the Control Regulation, which forms a sound basis to implement control schemes within EU Member States. In particular:

- Before 2010, control provisions were included in several different pieces of legislation, making it difficult for the competent authorities and the fishing sector to have a clear idea of the rules applicable to them. The Control Regulation has repealed these regulations

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<sup>2</sup> Ibid.

<sup>3</sup> Article 9 of the Control Regulation.

<sup>4</sup> Article 10 of the Control Regulation.

<sup>5</sup> Articles 14 and 15 of the Control Regulation.

<sup>6</sup> Court of Auditors Special Report No 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies.

and provides for only one set of rules, found in one instrument, which is the basis for controlling fisheries across the EU - a significant improvement to the previous system;

- By introducing stringent control rules and traceability requirements, the Control Regulation also ensures that there is a level playing field between EU Member States and the third countries implementing the catch documentation scheme under the EU Regulation to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing (the EU IUU Regulation).<sup>7</sup> The global success of the EU IUU policy also depends on the ability of the EU to demonstrate that its own fishing industry is also subjected to the stringent control requirements it is asking third countries to implement in order to be able to export fisheries products into the EU;
- The 2007 ECA report pointed out that data management was not functioning well, either at national or Commission levels. It also advocated for an electronic system for recording and reporting fishing activity data to be implemented as quickly and as widely as possible. The Control Regulation followed these recommendations and introduced an electronic system for completing and transmitting a number of documents (the fishing logbook; the transshipment declaration; the landing declaration; the sales note...). Although these provisions do not apply to small-scale fisheries, which are subject to different, simplified control requirements, they ensure that the operations carried out by the EU industrial fishing fleet are thoroughly monitored through an electronic system which allows for easier cross-checking and sharing of data, reducing opportunities for fraud. In addition, a whole title of the Regulation is dedicated to data management, providing for the establishment of databases through which Member States and the Commission may identify inconsistencies and request or carry out investigations to verify the reason for the inconsistency.
- Reliable data is the core of any efficient control system. As the ECA underlined in 2007, under the previous system the failure of data collection and management resulted in the real level of catches being unknown, a situation which prevented the "*proper application of the TAC and quota system*".<sup>8</sup> In this context, electronic systems for data recording and data exchange should be supported.

### In your view, what are the main weaknesses of the fisheries control regime?

There are shortcomings in the implementation of the Control Regulation, but also weaknesses inherent to the system established by this piece of legislation.

One of ClientEarth's main concerns lies within the implementation of the sanctioning system introduced by the Control Regulation in EU Member States. One of the ideas behind the adoption of the Control Regulation was to create a harmonised sanctioning system that would have a sufficient deterrent effect and thus encourage compliance.<sup>9</sup> The 2007 ECA report highlighted the inappropriateness of the national systems for following-up infringements and

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<sup>7</sup> Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

<sup>8</sup> Court of Auditors Special Report No 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies.

<sup>9</sup> With respect to harmonisation, the 2007 Commission Proposal for a Council Regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy included an article related to the harmonisation of sanctions for serious infringements which stated that "for all serious infringements which level cannot be linked to the value of the fishery products obtained by committing the serious infringements, Member States shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by an administrative fine of at least 5,000 EUR and a maximum of at least 300,000 EUR for each serious infringement." This proposed Article 82, which sought to harmonise the level of sanctions across Europe, was not included in the final version of the Control Regulation.

imposing sanctions as one of the biggest failures of the previous control scheme. Although Title VIII of the Control Regulation is seeking to close these loopholes and to harmonise the sanctioning system across the EU, notably through the introduction of the penalty point system for serious infringements, it is not clear to which extent these provisions are implemented by Member States. Research conducted by the services of the European Parliament<sup>10</sup> points out deficiencies in the current system, including deficiencies linked to lack of transparency and access to data.

Concerns also exist with respect to the implementation of Articles 39, 40 and 41 on the monitoring, certification and verification of engine power. There, the main issue does not lie in the exemptions contained in Article 40 for fishing vessels whose propulsion engine power does not exceed 120 kilowatts. The problem is that the measures upon which the certificates of engine power are made are not reliable. Indeed, it was noted by the Commission itself in 2007: *"The current system of measurement and certification of engine power has serious shortcomings. An engine can be certified with a power much lower than its maximum continuous power. The lower power rating (de-rating) is generally achieved by means of adjustments to the fuel injection settings when the engine is certified. These adjustments are easily reversible and, as a result, the real power output once the engine is installed on board is almost impossible to monitor or verify"*.<sup>11</sup>

The provisions regarding the measurement of engine power for fishing vessels are found in Article 5 of Council Regulation (EEC) No 2930/86 of 22 September 1986 defining characteristics for fishing vessels. Despite the 2007 Communication from the Commission, Article 5 has not been amended so far, and therefore, the procedures described in Articles 39, 40 and 41 are based on measurements which do not correspond to the real maximum continuous power. Concretely, it means that the management of fishing capacity and fishing effort in EU Member States is jeopardised by the lack of reliable certificates of engine power.

Another serious concern is that the Control Regulation allows too many exemptions to its most stringent rules. Indeed, this is one of its fundamental weaknesses. For example, Article 55 of the Regulation exempts the large majority of recreational fisheries from any reporting or control requirements. Only catches of stocks subject to recovery plans shall be monitored on the basis of sampling plans, and it is only after these specific fisheries are found to have a significant impact that they could be submitted to specific management measures.

Small-scale fisheries are also exempt from some of the requirements of the Control Regulation, such as the obligation to be fitted with VMS<sup>12</sup> or AIS,<sup>13</sup> to maintain a fishing logbook of operations,<sup>14</sup> to send a prior notification at least four hours before the estimated time of arrival at port<sup>15</sup> or to complete and submit transshipment<sup>16</sup> and landing<sup>17</sup> declarations. Instead, their

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10 See for example Beke M. and Blomeyer R. (2016), Social and Economic Impact of the Penalty Point System, Study, European Parliament, 78p.

11 Communication from the Commission to the Council and the European Parliament on improving fishing capacity and effort indicators under the common fisheries policy, COM (2007) 39, p.5.

12 Article 9 of the Control Regulation.

13 Article 10 of the Control Regulation.

14 Article 14 of the Control Regulation.

15 Article 17 of the Control Regulation.

16 Article 21 of the Control Regulation.

17 Article 23 of the Control Regulation.

activities are monitored on the basis of sampling plans or sales notes. And a large proportion of EU vessels are exempted from these provisions of the Control Regulation - a recent report on the EU fishing fleet highlighted that 74% of all active EU fishing vessels are small-scale.<sup>18</sup>

In Articles 14, 17 and 21 of the Control Regulation, the weight to be added in the relevant documents (logbook, prior notification, transshipment declaration) is an estimate expressed in kilograms live weight. The master of the fishing vessel is responsible for the accuracy of this information and there is an overall margin of tolerance of 10% for all species which have to be included in these documents.

In 2007, ECA highlighted that *"the tolerance margin for quantity estimates declared in logbooks is set at a level of 20%. This does not allow the imposition of penalties for practices that result in under-declarations that may be as high as 36% in the absence of landing inspections"*.<sup>19</sup> The original proposal from the Commission was to have a tolerance margin of 5% for estimates, a provision which would have led to more accurate catch data. The same applies to catches of less than 50 kg live-weight equivalent exempted from reporting requirements such as logbooks or transshipment declarations, instead of 15 kg in the original proposal.

These margins of tolerance, together with uncertainties about the certification of engine power and various exemptions related to small-scale and recreational fisheries, pose the question of the accuracy of data used by the competent authorities within Member States and the EU to monitor fisheries and ultimately take management decisions such as quotas or closure of certain fisheries.

### **In your view, how could the above identified weaknesses be addressed?**

The first issue to tackle is the one of implementation: Member States and the Commission should continue to fully implement the provisions in the Control Regulation, particularly the provisions on sanctions.

Creating a culture of compliance across the EU was one of the stated objectives of the adoption of the Control Regulation. This objective will only be fulfilled if the sanctions imposed by EU Member States are a sufficient deterrent. Transparency is also a key issue; improvements in transparency regarding the sanctioning schemes of EU Member States will help promote the establishment of a level playing field. If, subject to data privacy requirements, the fishing industry and fishers are able to access publicly available information, for example through the national registers of infringements, then they will be more informed of the level playing field across the EU and this may further contribute to the creation of a culture of compliance.

To promote harmonisation and a level playing field, better use must be made of the common tools at the disposal of the competent authorities of the Member States and the Commission. For example, the role of the European Fisheries Control Agency (EFCA), coordinating

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<sup>18</sup> Scientific, Technical and Economic Committee for Fisheries (STECF) –The 2015 Annual Economic Report on the EU Fishing Fleet (STECF-15-07). 2015. Publications Office of the European Union, Luxembourg, EUR 27428 EN, JRC 97371, p.1.

<sup>19</sup> Court of Auditors Special Report No 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies, § 21 (c).

inspections efforts between EU Member States and providing common training to inspectors, should be reinforced. Through EFCA, a common understanding of the requirements of the Control Regulation could be further developed, hence leading to a better harmonisation of fisheries controls in Europe.

In parallel, it is essential to improve the accuracy of data used for management and control of fishing activities by EU fishing vessels. This is most needed when it comes to certification and verification of engine power: in this case, a revision of Regulation No 2930/86 could be envisaged, or the adoption of new rules to more precisely measure engine power or the use of new proxies to measure fishing capacity.

In the long-term, exemptions and margins of tolerance will undermine the effectiveness of the Control Regulation. As of today, it is clearly not a priority to look at these issues, as the focus should be on the full implementation of the existing provisions, but this will certainly be an area of discussion in the future.

### **Do you think the Control Regulation allows sufficient control of the landing obligation?**

The Control Regulation was adopted immediately after the IUU Regulation, at a time when the international community was increasingly focusing on the control of fisheries throughout the supply chain ("from net to plate"). In this respect, controls upon landings and in ports are extremely useful, but controls at sea are of utmost importance. The Control Regulation was amended later through an 'Omnibus' Regulation<sup>20</sup> following the agreement on the reformed CFP. A particular focus of this alignment of was creating legal certainty for all actors responsible for implementing and acting under the landing obligation. However, in addition to this legal alignment, more resources should be dedicated to control at sea since this is where infringements against the landing obligation are most likely to occur.

Furthermore, there is a legal basis in the Control Regulation for the introduction of tools which would help to monitor the implementation of the landing obligation, including new technologies.<sup>21</sup> In addition, there is a legal basis in Regulation (EU) No 1380/2013 to provide incentives for fishermen who have a history of compliance with the landing obligation.<sup>22</sup>

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<sup>20</sup> Regulation (EU) 2015/812 of the European Parliament and of the Council of 20 May 2015.

<sup>21</sup> Article 13 of the Control Regulation.

<sup>22</sup> Article 17 of Regulation No 1380/2013.

ClientEarth's contribution to this public consultation can be directly published with ClientEarth information. ClientEarth consents to the publication of all information in its contribution in whole or in part, including ClientEarth's name, and ClientEarth declares that nothing within its response is unlawful or would infringe the right of any third party in a manner that would prevent publication. The Commission services can contact ClientEarth for further details on the information submitted.

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