

Tullio Scovazzi *

LEGAL ANALYSIS ON THE MARGIN OF TOLERANCE
IN THE EUROPEAN UNION FISHERIES REGIME

Introduction

1. The subject of the legal analysis;
2. A personal antecedent;

Part I – The importance of data on fisheries in the international and European Union framework

3. The international framework:
 - 3.A. Agenda 21;
 - 3.B. The Code of Conduct for Responsible Fisheries;
 - 3.C. The United Nations General Assembly Resolutions on Sustainable Fisheries;
 - 3.D. The United Nations Convention on the Law of the Sea;
 - 3.E. The Compliance Agreement;
 - 3.F. The Fish Stocks Agreement;
 - 3.G. Regional fisheries agreements (GFCM, ICCAT, IOCT);
4. The European Union framework:
 - 4.A. The common fisheries policy;
 - 4.B. The instruments against illegal, unreported and unregulated fishing;
5. Conclusive remarks;

Part II – The proposed amendments to the provision on the margin of tolerance

6. The Commission proposal;
7. The question of the margin of tolerance;
8. The European Parliament proposal;
9. The Council proposal;
10. The recent Commission compromise package;
11. Conclusive remarks.

* Former professor of international law in the Universities of Parma, Genoa, Milan and Milan-Bicocca, Italy.

Introduction

1. The Subject of the Legal Analysis

A legal analysis has been requested on the legality of the proposed changes by the European Parliament and the Council of the European Union (EU) to the margin of tolerance provided for in Art. 14 of Council Regulation No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy. In particular, the legal analysis should assess: a) the lowering of environmental protection; b) the lack of impact assessment; c) the reduced accuracy.

The consultant carried out the legal analysis with specific reference to questions of international and EU fisheries law, which are supposed to fall into his field of competence, and with less consideration for questions of general EU law.

2. A Personal Antecedent

Several years ago, I was involved, as legal advisor, in a technical cooperation programme sponsored by the Food and Agriculture Organization of the United Nations (FAO) for the development of fisheries in a developing State. When I asked the Minister of Fisheries of that State why licences for foreign fishing vessels were granted on the basis of the number of vessels and not of the quantity of fish caught, the Minister answered: “You should know that it is easier to count vessels than to count fish!”.

The assumption implied in the Minister’s answer was that for a developing country there was not enough personnel and technical or financial means to check the data on fish collected and reported by the fishermen themselves. In such a circumstance, a gross and approximate assessment based on the number of fishing vessels was anyhow preferable than resorting to another kind of method, in principle better, but not practically feasible. In fact, to comply with the international provisions on fisheries management, based on best available scientific evidence and reliable data, was an unrealistic task for many coastal States.

This occurred in 1992 in a developing country. But do problems of collection and reliability of fishing data persist in 2022 within the EU as well? The subject matter of this legal analysis gives rise to such an unexpected question.

Part I

The Importance of Data on Fisheries in the International and European Union Framework

3. The International Framework

In recent times, fisheries have become a market-driven and dynamic sector of the food industry and enterprises have invested in modern fishing fleets and processing factories. However, in many cases, living natural resources cannot sustain an uncontrolled exploitation and approaches to fisheries management aiming at conservation and sustainable exploitation of resources were introduced in fisheries legislation. Decision-making on the basis of scientific evidence and collection of relevant data are essential in this regard. The obligation to conserve living resources reasonably implies the burden of acquiring reliable and accurate data¹.

A review of the main policy² and legal³ instruments on fisheries adopted at the international level is made hereunder.

3.A. Agenda 21

According to Agenda 21, the programme of action adopted by the United Nations Conference on Environment and Development (Rio de Janeiro, 1992),

“States, individually or through bilateral and multilateral cooperation and with the support, as appropriate, of international organizations, whether subregional, regional or global, should:

- a. Promote enhanced collection and exchange of data necessary for the conservation and sustainable use of the marine living resources under national jurisdiction;
- b. Exchange on a regular basis up-to-date data and information necessary for fisheries assessment; (...)⁴.

3.B. The Code of Conduct for Responsible Fisheries

The Code of Conduct for Responsible Fisheries, adopted by the FAO Conference on 31 October 1995, stresses, as a general principle, that decisions for the management of fisheries should be based on best scientific evidence available:

“Conservation and management decisions for fisheries should be based on the best scientific evidence available, also taking into account traditional knowledge of the resources and their habitat, as well as relevant environmental, economic and social factors. States should assign priority to undertake research and data collection in order to improve scientific and technical knowledge of fisheries including their interaction with the

¹ See BURKE, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, Oxford, 1994, p. 57.

² *Infra*, paras. from 3.A to 3.C.

³ *Infra*, paras. from 3.D to 3.F.

⁴ Para. 17.86.

ecosystem. In recognizing the transboundary nature of many aquatic ecosystems, States should encourage bilateral and multilateral cooperation in research, as appropriate”⁵.

Conservation and management measures, whether at local, national, subregional or regional levels, should be designed to ensure the long-term sustainability of fishery resources at levels which promote the objective of their optimum utilization and maintain their availability for present and future generations. This objective should not be compromised by short-term considerations⁶.

In its turn, the best scientific evidence available is based on accurate and reliable data collection:

“States should ensure that timely, complete and reliable statistics on catch and fishing effort are collected and maintained in accordance with applicable international standards and practices and in sufficient detail to allow sound statistical analysis. Such data should be updated regularly and verified through an appropriate system. States should compile and disseminate such data in a manner consistent with any applicable confidentiality requirements”⁷.

States are called to compile fishery-related and other supporting scientific data relating to fish stocks covered by subregional or regional fisheries management organizations or arrangements in an internationally agreed format and provide them in a timely manner to the organization or arrangement⁸. In particular,

“States should make every effort to ensure that documentation with regard to fishing operations, retained catch of fish and non-fish species and, as regards discards, the information required for stock assessment as decided by relevant management bodies, is collected and forwarded systematically to those bodies. States should, as far as possible, establish programmes, such as observer and inspection schemes, in order to promote compliance with applicable measures”⁹.

“States should collect reliable and accurate data which are required to assess the status of fisheries and ecosystems, including data on bycatch, discards and waste. Where appropriate, this data should be provided, at an appropriate time and level of aggregation, to relevant States and subregional, regional and global fisheries organizations”¹⁰.

Especially in case of absence of adequate scientific information, the precautionary approach should be applied and measures to conserve target and non-target species should be taken:

“States and subregional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information should not be used as a

⁵ Para. 6.4.

⁶ See para. 7.1.1.

⁷ Para. 7.4.4.

⁸ See para. 7.4.6.

⁹ Para. 8.4.3.

¹⁰ Para. 12.4.

reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment”¹¹.

The Code also provides that States should establish, within their respective competences and capacities, effective mechanisms for fisheries monitoring, surveillance, control and enforcement, in order to ensure compliance with their conservation and management measures, as well as those adopted by subregional or regional organizations or arrangements¹². Sanctions applicable in respect of violations should be adequate in severity to be effective in securing compliance and to discourage violations, whenever they occur, and should deprive offenders of the benefit accruing from their illegal activities¹³.

3.C. The United Nations General Assembly Resolutions on Sustainable Fisheries

The United Nations General Assembly yearly adopts a resolution on sustainable fisheries. Limiting for the sake of brevity the analysis to the last instrument (Resolution 76/71 of 9 December 2021), several references can be found on the importance of collecting data relating to fisheries. For instance, the preamble recognizes

“the importance of data collection through accurate and reliable reporting and monitoring of catches, including by-catch and discards, as a fundamental element of effective fisheries management that provides a basis for scientific stock assessment, and ecosystem approaches to fisheries management”.

The General Assembly also notes with concern the dangers posed by unreliable and incomplete information and data, in particular

“that the effective management of marine capture fisheries has been made difficult in some areas by unreliable and incomplete information and data caused by, inter alia, unreported and misreported fish catch and fishing effort and that this lack of accurate data undermines the assessment of fish stocks and contributes to overfishing in some areas, and in this regard recalling that members of regional fisheries management organizations or arrangements must fully comply with their associated data-collection and reporting obligations, including to ensure that required data submissions are complete, reliable and submitted in a timely manner”.

In the operative part of Resolution 76/71, the General Assembly encourages States

“to implement, individually and through regional fisheries management organizations and arrangements, accurate, complete, reliable and effective data collection and reporting of required data on catches, including bycatch and discards, reviewing and validating the data, and providing catch information in support of scientific stock assessment and ecosystem approaches to fisheries management, while noting the

¹¹ Para. 6.5. According to the 1992 Rio Declaration on Environment and Development, “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation” (Principle 15).

¹² See para. 7.1.7.

¹³ See para. 8.2.7.

importance, particularly for developing countries, of improving the capacity to collect accurate, complete, reliable and effective data¹⁴”.

The General Assembly encourages

“States, with respect to vessels flying their flag, and port States, to make every effort to share data on landings and catch quotas, and in this regard encourages regional fisheries management organizations and arrangements to consider developing open databases containing such data for the purpose of enhancing the effectiveness of fisheries management”¹⁵.

It also calls upon

“States and subregional and regional fisheries management organizations and arrangements to adopt or improve measures to assess the impact of their fisheries on species caught as by-catch and to improve the comprehensiveness and accuracy of information and reporting on incidental catch of species caught as by-catch, including through adequate observer coverage and the use of modern technologies, such as electronic monitoring, and to provide assistance to developing States to meet data-collection and reporting obligations”¹⁶.

3.D. The United Nations Convention on the Law of the Sea

Several international treaties put in effect the measures recommended by policy instruments. Some examples are hereunder given.

The United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS), to which the EU and its Member States are parties, embodies the present codification of international law of the sea, including a number of provisions on fisheries.

According to the UNCLOS, within its 200-mile exclusive economic zone the coastal State has, *inter alia*, sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural living resources¹⁷ and is bound to promote the objective of optimum utilization of such resources¹⁸. To this purpose, the coastal State shall determine the allowable catch of living resources¹⁹ and, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of such resources is not endangered by over-exploitation²⁰. These measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the

¹⁴ Para. 24.

¹⁵ Para. 99.

¹⁶ Para. 143.

¹⁷ Art. 56, para. 1.

¹⁸ Art. 62, para. 1. An exception applies in the case of marine mammals of which the coastal State is free to prohibit, limit or regulate the exploitation (Art. 65).

¹⁹ Art. 61, para. 1.

²⁰ Art. 61, para. 2.

interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global²¹. In particular, the UNCLOS provides that

“Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone”²².

The coastal State is entitled to determine its capacity to harvest the living resources of the exclusive economic zone and, where it does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations it has adopted, give other States access to the surplus of the allowable catch²³. The requirements established by the coastal State may, *inter alia*, relate to the reporting of scientific data associated with research programmes²⁴.

Rules on conservation of living marine resources and the determination of the total allowable catch apply also as regards fisheries on the high seas. In particular,

“available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned”²⁵.

It should be added that, under the UNCLOS, every State is bound to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag²⁶. According to the advisory opinion issued on 2 April 2015 by the International Tribunal for the Law of the Sea on the *Request submitted by the Sub-regional Fisheries Commission*,

“as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation”²⁷.

Among activities that undermine the flag State’s responsibilities, the unreporting or misreporting of catches can be included²⁸.

²¹ Art. 61, para. 3.

²² Art. 61, para. 5.

²³ Art. 62, para. 2.

²⁴ Art. 62, para. 4, f.

²⁵ Art. 119, para. 2.

²⁶ Art. 94, para. 1.

²⁷ Para. 119.

²⁸ Para. 114.

3.E. The Compliance Agreement

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 1993), to which the EU is a party, binds parties to take such measures as may be necessary to ensure that fishing vessels entitled to fly their flag do not engage in any activity that undermines the effectiveness of international conservation and management measures²⁹.

3.F. The Fish Stocks Agreement

The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 1995; Fish Stocks Agreement), to which the EU and its Member States are parties, specifically addresses the question of data collection. The Fish Stock Agreement specifies in a resource conservation direction several obligations included in the UNCLOS fisheries regime³⁰.

In the preamble of the Fish Stocks Agreement, “unreliable databases” are identified as a problem in the management of high seas fisheries. As a general principle, in order to conserve and manage the fish stocks to which the agreement applies, the States parties are bound to

“collect and share, in a timely manner, complete and accurate data concerning fishing activities on, *inter alia*, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes”³¹.

In implementing the precautionary approach, States parties are bound to develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment³². In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States parties are called to agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks³³ and to compile and disseminate accurate and complete statistical data, in order to ensure that

²⁹ Art. III, para. 1, a.

³⁰ “The MSY [= maximum sustainable yield], which under UNCLOS and other legal instruments serves as an internationally agreed benchmark that determines overfishing, is no longer a target reference point under the FSA [= Fish Stocks Agreement], but a management goal which serves as a limit that needs to be applied together with the precautionary approach, the minimization of waste and bycatch, the prevention of excess capacity, and the protection of biodiversity”: BORG, *The Conservation of Marine Living Resources under International Law: The 1982 United Nations Convention on the Law of the Sea and beyond*, in ATTARD, FITZMAURICE & GUTIÉRREZ (eds.), *The IMLI Manual of International Maritime Law*, Oxford, 2014, p. 362.

³¹ Art. 5, j.

³² Art. 6, para. 3, d.

³³ Art. 10, e.

the best scientific evidence is available, while maintaining confidentiality where appropriate³⁴. In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States parties must take into account, *inter alia*, the respective contributions of new and existing members or participants to conservation and management of the stocks to the collection and provision of accurate data³⁵. States parties are bound to ensure that fishing vessels flying their flag

“(a) collect and exchange scientific, technical and statistical data with respect to fisheries for straddling fish stocks and highly migratory fish stocks;

(b) ensure that data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements of subregional or regional fisheries management organizations or arrangements; and

(c) take appropriate measures to verify the accuracy of such data”³⁶.

States parties must agree, either directly or through subregional or regional fisheries management organizations or arrangements, on the specification of data and the format in which they are to be provided to such organizations or arrangements, taking into account the nature of the stocks and the fisheries for those stocks³⁷.

States parties are bound to take a number of measures in respect of vessels flying their flag, including requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional and global standards for collection of such data³⁸. For the purposes of the Fish Stocks Convention, a “serious violation” includes also failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement³⁹.

Annex I to the Fish Stocks Agreement is wholly devoted to “standard requirements for the collection and sharing of data”. Among the general principles, it provides that all data should be verified to ensure accuracy⁴⁰ and that assistance to developing States should focus on enhancing capacity to implement data collection and verification, observer programmes, data analysis and

³⁴ Art. 10, f.

³⁵ Art. 11, c.

³⁶ Art. 14, para. 1.

³⁷ Art. 14, para. 2, a.

³⁸ Art. 18, para. 3, e.

³⁹ Art. 21, para. 11, b.

⁴⁰ Annex I, art. 1, para. 1.

research projects supporting stock assessments⁴¹. Other provisions relate to data collection, compilation and exchange⁴², to basic fishery data⁴³, to vessel data and information⁴⁴, to reporting⁴⁵, to data verification⁴⁶ and to data exchange⁴⁷.

3.G. Regional Fisheries Agreements (GFCM, ICCAT, IOCT)

It has been remarked that the dissemination and exchange of information is critical to the ability of regional fisheries management organizations to fulfil their mandate to set total allowable catches and to determine participatory rights⁴⁸. Data reporting requirements exist across all regional fisheries management organizations and include data on efforts, catches and discards in both established and exploratory fisheries, where the primary objective is to ensure relevant data for future stock management and quota allocation purposes. These requirements have become increasingly complex and detailed over the years.

To make some examples, the General Fisheries Commission for the Mediterranean (GFCM), was established by the General Fisheries Agreement for the Mediterranean (Rome, 1949)⁴⁹, to which the EU and some of its Member States are parties. The GFCM is entitled, *inter alia*, to adopt recommendations on conservation and management measures aimed at ensuring the long-term sustainability of fishing activities, in order to preserve the marine living resources, the economic and social viability of fisheries and aquaculture⁵⁰, to formulate appropriate measures based on the best scientific advice available, taking into account relevant environmental, economic and social factors⁵¹ and to take the appropriate measures to ensure compliance with its recommendations to deter and eradicate illegal, unreported and unregulated fishing activities⁵². To these purposes, the GFCM exercises, *inter alia*, the function to “regularly review the socio-economic aspects of the fishing industry, including by obtaining and evaluating economic and other data and information relevant to the work of the Commission”⁵³.

⁴¹ Annex I, art. 1, para. 2.

⁴² Annex I, art. 2.

⁴³ Annex I, art. 3.

⁴⁴ Annex I, art. 4.

⁴⁵ Annex I, art. 5.

⁴⁶ Annex I, art. 6.

⁴⁷ Annex I, art. 7.

⁴⁸ RAYFUSE, *Article 119*, in PROELSS (ed.), *United Nations Convention on the Law of the Sea – A Commentary*, München, 2017, p. 849.

⁴⁹ The Agreement applies to the Mediterranean and Black Seas.

⁵⁰ Art. 5, a.

⁵¹ Art. 5, b.

⁵² Art. 5, f.

⁵³ Art. 8, d.

In 2011, the GFCM adopted Recommendation 35/2011/1, concerning the establishment of a GFCM logbook. The Recommendation, “considering the importance of knowing the spatial allocation of the fishing effort and the origin of the catches, at the highest possible level of resolution, for sound scientific monitoring and management of fisheries”⁵⁴, binds contracting parties and co-operating non-contracting parties to

“require that the masters of fishing vessels over 15 metres in length overall authorized to fish in the GFCM area of application and registered on the GFCM record of vessels keep a bound logbook of their operations, indicating in particular the quantities of each species caught and kept on board, above 50 kg in live weight, whether the catches are weighed or estimated, the date and geographical positions of such catches and the type of gear used in accordance with the minimum specifications and information set out in Annex 1”⁵⁵.

Subsequently, Resolution GFCM/44/2021/9, on the implementation of an electronic logbook was adopted, based on the consideration “that the technology used to ensure the electronic reporting of catches, the electronic logbook, has reached an adequate level of development to be operationalized, as demonstrated in various other regional fisheries management organizations around the world”⁵⁶. It provides terms of reference for two voluntary pilot projects aimed at testing the feasibility of the establishment of an electronic logbook reporting system.

Other regional fisheries management agreements apply to certain species. The International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 1966), which established the International Commission for the Conservation of Atlantic Tunas (ICCAT), competent for the management of fisheries of tuna and tuna-like fishes in the Convention area, which includes the whole of the Atlantic, as well as connected seas. The EU is a party to the Convention.

The ICCAT is in charge, *inter alia*, of making recommendations based on scientific evidence and designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch⁵⁷. In fact, the ICCAT has adopted quotas for some species falling under its competence. The parties agree to take all action necessary to ensure the enforcement of the convention⁵⁸ and to furnish, on the request of the ICCAT, any available statistical, biological and other scientific information the ICCAT may need for the purposes of the Convention⁵⁹.

⁵⁴ Preamble.

⁵⁵ Art. 1.

⁵⁶ Preamble. The Resolution also considers in the preamble “the high level of illegal, unreported and unregulated fishing activities in the GFCM area of application and the need for an adequate monitoring of the catches”.

⁵⁷ Art. VIII, para. 1, a. The ICCAT recommendations become effective for all parties six months after the date of the notification from the Commission transmitting the recommendation to them, unless a party casts an objection.

⁵⁸ Art. IX, para. 1.

⁵⁹ Art. IX, para. 2, a.

Annex II to the final act of the conference that adopted the convention is a resolution showing the importance of collecting statistics on the Atlantic tuna fisheries, whereby the conference,

“agreeing that it is essential that all countries fishing these Atlantic tuna resources should collect adequate statistics on catch and fishing effort and the necessary biological data, and make available for publication the statistical and related economic data with a view to enabling the International Commission for the Conservation of Atlantic Tunas to fulfil its functions adequately as soon as it is established;

urges all countries to take steps without delay to create, where they do not already exist, offices within their fisheries administrations suitably staffed and having appropriate financial and legislative support to undertake the collection and the processing of the data to be used by the Commission; and

suggests that all countries faced with the tasks of establishing and operating such offices, give priority to requests for assistance in this connection through the United Nations Development Programme and through the regular programme of the Food and Agriculture Organization of the United Nations”.

In 2003, the ICCAT adopted Recommendation 03-12, according to which

“each flag Contracting Party, Cooperating non-Contracting Party, Entity or Fishing Entity shall ensure that all fishing vessels flying its flag and authorized to fish species managed by ICCAT in the Convention area be subject to a data recording system. All commercial fishing vessels over 24 m length overall shall keep a bound or electronic logbook recording the information required in the ICCAT Field Manual for Statistics and Sampling”.

Several among the ICCAT instruments confirm that collection and submission of accurate fisheries data is a fundamental obligation for the parties, including Resolution 03-21 of 2003 on improvements in data collection and quality assurance, Recommendation 05-09 of 2005 on compliance with statistical reporting obligations, Recommendation 11-15 of 2011 on penalties applicable in case of non fulfilment of reporting obligations, Resolution 11-17 of 2011 on best available science and Recommendation 21-13 of 2021 on the establishment of a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities, which includes among such vessels those that do not record or report their catches made in the ICCAT Convention area or make false reports.

The EU is also a party to the Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 1993; IOTC), which applies to the Indian Ocean and its adjacent seas. The IOTC is in charge, *inter alia*, to keep under review the conditions and trends of the stocks and to gather, analyse and disseminate scientific information, catch and effort statistics and other data relevant to the conservation and management of the tuna stocks and to related fisheries⁶⁰, as well as to adopt, on the basis of scientific evidence, conservation and management measures to ensure the conservation

⁶⁰ Art. V, 2, a.

of the stocks covered by the Agreement and to promote the objective of their optimum utilization⁶¹ throughout the Area⁶².

Under the IOTC Agreement,

“the Members of the Commission shall, on the request of the Commission, provide such available and accessible statistical and other data and information as the Commission may require for the purposes of this Agreement. The Commission shall decide the scope and form of such statistics and the intervals at which they shall be provided”⁶³.

Since its inception, the IOTC has adopted several instruments that call parties to report fisheries data to it and has repeatedly stressed in its instruments the importance of timely data submissions, including in Resolution 15/02 of 2015 on mandatory statistical reporting requirements for IOTC contracting parties and cooperating non-contracting parties.

4. The European Union Framework

4.A. The Common Fisheries Policy

A particular role as regards fisheries is played by the EU (previously the European Community), a regional economic integration organization of which twenty-seven States are members.

According to the Treaty on the Functioning of the European Union (Rome, 1957; subsequently amended), the EU shares competence with its Member States in the areas of “environment”⁶⁴ and of “agriculture and fisheries, excluding the conservation of marine biological resources”⁶⁵. The EU policy on the environment must, *inter alia*, contribute to pursuit of the objective of “prudent and rational utilisation of natural resources”⁶⁶. Another important objective of this policy is the high level of protection, based on the principles of precaution and prevention:

“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”⁶⁷.

Moreover, the EU has exclusive competence in the area of “the conservation of marine biological resources under the common fisheries policy”⁶⁸ and is entitled to define and implement a

⁶¹ Art. V, 2, c.

⁶² Conservation and management measures adopted by the IOTC are binding on parties, unless they cast an objection.

⁶³ Art. IX, para. 1.

⁶⁴ Art. 4, e.

⁶⁵ Art. 4, d.

⁶⁶ Art. 191, para. 1.

⁶⁷ Art. 191, para. 2, sub-para. 1.

⁶⁸ Art. 3, d.

common fisheries policy⁶⁹. The EU adopts legislative measures (regulations or directives) for fisheries management and conservation within the waters falling under the jurisdiction of its Member States and, beyond such waters, as far as Member States' vessels and nationals are concerned. Treaties relating to fisheries and applying to Member States are negotiated and concluded by the EU.

The EU common fisheries policy has been several times revised and updated since its establishment in 1971. The current regime is provided by Regulation No. 1380/2013 of 11 December 2013. The common fisheries policy covers the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources⁷⁰, as well as, in relation to measures on markets and financial measures in support of the implementation of the common fisheries policy, fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products⁷¹.

The common fisheries policy is based on the principle of environmental sustainability, which combines both developmental and environmental and objectives⁷²:

“The CFP [= common fisheries policy] shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies”⁷³.

The common fisheries policy aims at reaching the objective of restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield⁷⁴, applying the precautionary⁷⁵ and the ecosystem-based⁷⁶ approaches:

“The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield”⁷⁷.

⁶⁹ Art. 38, para. 1.

⁷⁰ Art. 1, para. 1, a.

⁷¹ Art. 1, para. 1, a.

⁷² The concept of sustainable development is set forth in some well-known principles of the 1992 Rio Declaration on Environment and Development: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations” (Principle 3). “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it” (Principle 4).

⁷³ Art. 2, para. 1.

⁷⁴ Art. 2, para. 2, sub-para. 2.

⁷⁵ “‘Precautionary approach to fisheries management’, as referred to in Article 6 of the UN Fish Stocks Agreement, means an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment” (Art. 4, para. 7).

⁷⁶ “‘Ecosystem-based approach to fisheries management’ means an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems” (Art. 4, para. 9).

⁷⁷ Art. 2, para. 2, sub-para. 1.

“The CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment”⁷⁸.

The balance of developmental and environmental objective is evident in the provision according to which the common fisheries policy shall, *inter alia*:

“provide for measures to adjust the fishing capacity of the fleets to levels of fishing opportunities consistent with paragraph 2, with a view to having economically viable fleets without overexploiting marine biological resources”⁷⁹;

“be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC, as well as with other Union policies”⁸⁰.

Among the principles of good governance of the common fisheries policy, some are particularly relevant for this legal analysis, namely:

“the establishment of measures in accordance with the best available scientific advice”⁸¹;

“consistency with other Union policies”⁸²;

“transparency of data handling in accordance with existing legal requirements, with due respect for private life, the protection of personal data and confidentiality rules; availability of data to the appropriate scientific bodies, other bodies with a scientific or management interest, and other defined end-users”⁸³.

Conservation measures must be adopted taking into account available scientific, technical and economic advice⁸⁴. As explained in the preamble,

“fisheries management based on the best available scientific advice requires harmonised, reliable and accurate data sets. Therefore, Member States should collect data on fleets and their fishing activities, in particular biological data on catches, including discards and survey information on fish stocks and on the potential environmental impact of fishing activities on the marine ecosystem”⁸⁵.

A specific and quite detailed provision in Regulation 1380/2013 addresses data requirements for fisheries management, specifying the content of the relevant obligations incumbent on Member States:

“Member States shall, in accordance with the rules adopted in the area of data collection, collect biological, environmental, technical, and socio-economic data necessary for fisheries management, manage those data and make them available to end-users, including bodies designated by the Commission. The

⁷⁸ Art. 2, para. 3.

⁷⁹ Art. 2, para. 5, d.

⁸⁰ Art. 2, para. 5, j. Directive 2008/56 of 17 June 2008 establishes a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive).

⁸¹ Art. 3, c.

⁸² Art. 3, h.

⁸³ Art. 3, k.

⁸⁴ Art. 6, para. 2.

⁸⁵ Art. 25, para. 1.

acquisition and management of such data shall be eligible for funding through the European Maritime and Fisheries Fund (...) Those data shall, in particular, enable the assessment of:

- (a) the state of exploited marine biological resources;
- (b) the level of fishing and the impact that fishing activities have on the marine biological resources and on the marine ecosystems; and
- (c) the socio-economic performance of the fisheries, aquaculture and processing sectors within and outside Union waters⁸⁶.

Data collected must, *inter alia*, be accurate, reliable and timely:

“The collection, management and use of data shall be based on the following principles:

- (a) accuracy and reliability, and collection in a timely manner;
- (b) the use of coordination mechanisms with a view to avoiding duplication of data collection for different purposes;
- (c) safe storage and protection of collected data in computerised databases, and their public availability where appropriate, including at aggregated level, whilst ensuring confidentiality;
- (d) access by the Commission, or by bodies designated by it, to the national databases and systems used for processing the collected data for the purpose of verification of the existence and quality of the data;
- (e) the availability in a timely manner of the relevant data and the respective methodologies by which they are obtained, for bodies with a research or management interest in the scientific analysis of data in the fisheries sector and for any interested parties, save in circumstances where protection and confidentiality are required under applicable Union law⁸⁷.

Member States that do not comply with the obligation of collecting and providing accurate, reliable and timely data can be subjected to sanctions:

“Failure by a Member State to collect and/or to provide data in a timely manner to end-users may result in a proportionate suspension or interruption of relevant Union financial assistance to that Member State, in accordance with a future Union legal act establishing the conditions for the financial support for maritime and fisheries policy for the period 2014–2020⁸⁸.”

Moreover, Member States are bound to adopt appropriate measures for ensuring control, inspection and enforcement of activities carried out within the scope of the common fisheries policy, including the establishment of effective, proportionate and dissuasive penalties⁸⁹. As regards financial instruments, non-compliance by Member States with the rules of the common fisheries policy may result in the application of a financial correction to EU financial assistance⁹⁰, while non-compliance by operators results in a temporary or permanent ban to EU financial assistance and/or the application of a financial reduction⁹¹.

⁸⁶ 46th preambular para.

⁸⁷ Art. 25, para. 2.

⁸⁸ Art. 25, para. 7.

⁸⁹ Art. 36, para. 3.

⁹⁰ Art. 41, para. 2.

⁹¹ Art. 42, para. 2.

4.B. The Instruments against Illegal, Unreported and Unregulated Fishing

EU action to ensure implementation of the rules of the common fisheries policy is based on two specific regulations.

First, under Regulation No. 1005/2008 of 29 September 2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, each Member State is bound to take appropriate measures to ensure the effectiveness of the system and to place sufficient means at the disposal of its competent authorities to enable them to perform their tasks⁹². A fishing vessel is presumed to be engaged in illegal, unreported and unregulated (IUU) fishing if it is shown that, contrary to the conservation and management measures applicable in the fishing area concerned, it has, *inter alia*:

“not fulfilled its obligations to record and report catch or catch-related data, including data to be transmitted by satellite vessel monitoring system (...)”⁹³.

The said conduct is considered as a serious infringement, depending on its gravity which shall be determined by the competent authority of the Member State, taking into account criteria such as the damage done, its value, the extent of the infringement or its repetition⁹⁴. The Commission identifies fishing vessels for which sufficient information has been obtained to presume that such fishing vessels may be engaged in IUU fishing⁹⁵ and establishes an EU IUU vessel list⁹⁶. Immediate enforcement measures⁹⁷, sanctions and accompanying sanctions⁹⁸ are provided for nationals of EU Member States and non-nationals who support or engage in IUU fishing⁹⁹. In particular, in case of serious infringements,

“1. Member States shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions.

2. The Member States shall impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement. In case of a repeated serious infringement within a five-year period, the Member States shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement. In applying these sanctions the Member States

⁹² Art. 1, paras. 1 and 2.

⁹³ Art. 3, para. 1, b.

⁹⁴ Art. 3, para. 2.

⁹⁵ Art. 26, para. 1.

⁹⁶ Art. 27, para. 1.

⁹⁷ Examples of immediate enforcement measures are: the immediate cessation of fishing activities; the rerouting to port of the fishing vessel; the rerouting of the transport vehicle to another location for inspection; (d) the ordering of a bond; the seizure of fishing gear, catches or fisheries products; the temporary immobilisation of the fishing vessel or transport vehicle concerned; the suspension of the authorisation to fish (Art. 43, para. 1).

⁹⁸ Examples of accompanying sanctions are: the sequestration of the fishing vessel involved in the infringement; the temporary immobilisation of the fishing vessel; the confiscation of prohibited fishing gear, catches or fishery products; the suspension or withdrawal of authorisation to fish; the reduction or withdrawal of fishing rights; the temporary or permanent exclusion from the right to obtain new fishing rights; the temporary or permanent ban on access to public assistance or subsidies; the suspension or withdrawal of the status of approved economic operator (Art. 45).

⁹⁹ Chap. VIII and IX.

shall also take into account the value of the prejudice to the fishing resources and the marine environment concerned.

3. Member States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions¹⁰⁰.

Second, Regulation No. 1224/2009 of 20 November 2009, establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (the Control Regulation)¹⁰¹, moves from the assumption that, as management of fishery resources at EU level is based in particular on total allowable catches, quotas, effort regimes and other technical measures, appropriate steps should be taken to ensure that Member States adopt the necessary measures to implement these management measures in an effective manner¹⁰²:

“Since the management of fishing resources is based on fishing opportunities it should be ensured that catches and deployed effort are correctly recorded and that the catches and deployed effort are charged against the quotas and effort allocations of the flag Member State. Fisheries should be closed if the available quota or effort allocation have been exhausted¹⁰³.”

In particular,

“Member States should monitor the activities of their fishing vessels in and outside Community waters. To facilitate effective monitoring masters of Community fishing vessels of 10 metres’ length overall or more should be obliged to keep a fishing logbook and submit landing and transshipment declarations. In order to make use of modern technologies, for fishing vessels of 12 metres’ length overall or more, the fishing logbook should be in electronic form and the landing and transshipment declarations should be submitted electronically¹⁰⁴.”

“The information contained in the fishing logbooks of fishing vessels should be verified at the time of landing. Accordingly, those involved in the landing and marketing of fish and fishery products should be required to declare the quantities landed, transhipped, offered for sale or purchased¹⁰⁵.”

“For small fishing vessels of less than 10 metres’ length overall an obligation to keep a fishing logbook or to complete a landing declaration would constitute a disproportionate burden in relation to their fishing capacity. In order to ensure an adequate level of control over such vessels, Member States should monitor their activities by the implementation of a sampling plan¹⁰⁶.”

The Control Regulation sets forth as a general principle that Member States are bound to control all kind of fishing activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters under their sovereignty or jurisdiction¹⁰⁷,

¹⁰⁰ Art. 44.

¹⁰¹ See also Regulation No. 404/2011 of 8 April 2011, laying down detailed rules for the implementation of Regulation 1224/2009.

¹⁰² Preamble para. 10.

¹⁰³ Preamble para. 22.

¹⁰⁴ Preamble para. 17.

¹⁰⁵ Preamble para. 18.

¹⁰⁶ Preamble para. 19.

¹⁰⁷ Art. 5, para. 1.

as well as to control activities outside EU waters carried out by fishing vessels flying their flag¹⁰⁸. To this purpose, Member States are bound to adopt appropriate measures for ensuring controls and inspections on the basis of risk management:

“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. They shall make available to their competent authorities and officials all adequate means to enable them to carry out their tasks”¹⁰⁹.

“Each Member State shall ensure that control, inspection and enforcement are carried out on a non-discriminatory basis as regards sectors, vessels or persons, and on the basis of risk management”¹¹⁰.

The completion and submission of a fishing logbook, in which relevant information is contained, is one of the main aspects of the EU control system. The matter is specifically considered by Art. 14 of the Control Regulation, which is articulated in ten paragraphs:

“1. Without prejudice to specific provisions contained in multiannual plans, masters of Community fishing vessels of 10 metres’ length overall or more shall keep a fishing logbook of their operations, indicating specifically all quantities of each species caught and kept on board above 50 kg of live-weight equivalent.

“2 The fishing logbook referred to in paragraph 1 shall contain in particular the following information: (...) the estimated quantities of each species in kilograms live weight or, where appropriate, the number of individuals; (...).

3. The permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10 % for all species.

4. Masters of Community fishing vessels shall also record in their fishing logbook all estimated discards above 50 kg of live weight equivalent in volume for any species.

5. In fisheries subject to a Community regime of fishing effort, masters of Community fishing vessels shall record and account in their fishing logbooks for the time spent in an area as follows:

(a) with regard to towed gear:

(...) (iii) the catch retained on board by species in kilograms live weight at the time of exit from that area or before entry into a port located in that area;

(b) with regard to static gear:

(...) (v) the catch retained on board by species in kilograms live weight at the time of exit from that area or before entry into a port located in that area.

6. Masters of Community fishing vessels shall submit the fishing logbook information as soon as possible and not later than 48 hours after landing:

(a) to their flag Member State; and

(b) if the landing has taken place in a port of another Member State, to the competent authorities of the port Member State concerned.

¹⁰⁸ Art. 5, para. 2.

¹⁰⁹ Art. 5, para. 3.

¹¹⁰ Art. 5, para. 4. “‘Risk management’ means the systematic identification of risks and the implementation of all measures necessary for limiting the occurrence of these risks. This includes activities such as collecting data and information, analysing and assessing risks, preparing and taking action, and regular monitoring and review of the process and its outcomes, based on international, Community and national sources and strategies” (Art. 4, para. 18).

7. To convert stored or processed fish weight into live fish weight, masters of Community fishing vessels shall apply the conversion factor established in accordance with the procedure referred to in Article 119.

8. Masters of third country fishing vessels operating in Community waters shall record the information referred to in this Article in the same way as masters of Community fishing vessels.

9. The accuracy of the data recorded in the fishing logbook shall be the responsibility of the master.

10. Detailed rules for the application of this Article shall be adopted in accordance with the procedure referred to in Article 119”.

Para. 3 of Art. 14 deals with the margin of tolerance, that is the crucial aspect of the present legal analysis. Due to challenges in determining the exact quantity of catches on board during fishing operations at sea, masters are allowed to estimate the catch within a permitted margin of tolerance.

After having collected the relevant data, the master of a fishing vessel of 12 metres’ length overall or more must electronically transmit the logbook data electronically once a day to the flag Member State:

“Masters of Community fishing vessels of 12 metres’ length overall or more shall record by electronic means the information referred to in Article 14, and shall send it by electronic means to the competent authority of the flag Member State at least once a day”¹¹¹.

Before entering a port, a EU fishing vessel is bound to notify its flag State a number of data, including the quantities of each species to be landed (prior notification):

“Masters of Community fishing vessels of 12 metres’ length overall or more engaged in fisheries on stocks subject to a multiannual plan, which are under the obligation to record fishing logbook data electronically in accordance with Article 15, shall notify the competent authorities of their flag Member State at least four hours before the estimated time of arrival at port of the following information:

(...) the quantities of each species to be landed or transhipped”¹¹².

The flag State, if the port is located in a State different from it, immediately forwards the notification to the competent authorities of the port State.

Moreover, the master of a EU fishing vessel or his representative is bound to the electronic submission, not later than 48 hours after the completion of the landing¹¹³, to the flag State and to the EU port State, if different from the flag State, of a landing declaration, containing a number of data:

¹¹¹ Art. 15, para. 1. Moreover, “Masters of Community fishing vessels of 12 metres’ length overall or more shall send the information referred to in Article 14 at the request of the competent authority of the flag Member State, and shall in any event transmit the relevant fishing logbook data after the last fishing operation has been completed and before entering port” (Art. 15, para. 2). “Masters of Community fishing vessels that electronically record and report data on their fishing activities shall be exempt from the obligation to complete a paper fishing logbook, a landing declaration and a transshipment declaration” (Art. 15, para 5).

¹¹² Art. 17, para. 1, f.

¹¹³ “‘Landing’ means the initial unloading of any quantity of fisheries products from on board a fishing vessel to land” (Art. 4, para. 22).

“Without prejudice to specific provisions contained in multiannual plans, the master of a Community fishing vessel of 10 metres’ length overall or more, or his representative, shall complete a landing declaration, indicating specifically all quantities of each species landed”¹¹⁴.

“The landing declaration referred to in paragraph 1 shall contain at least the following information: (...) the quantities of each species in kilograms in product weight, broken down by type of product presentation or, where appropriate, the number of individuals; (...)”¹¹⁵.

“The accuracy of the data recorded in the landing declaration shall be the responsibility of the master”¹¹⁶.

The flag Member States must monthly notify the Commission of the aggregated data of quantities of stocks landed¹¹⁷, which are charged against the quotas applicable to that Member State for the stocks in question, irrespective of the place of landing¹¹⁸.

Member States are bound to ensure that all data recorded are accurate, complete and submitted within deadlines laid down in the common fisheries policy¹¹⁹, as well as to perform cross-checking, analyses and verifications through automated computerised algorithms and mechanisms of fishing activities data, in particular the fishing logbook and the landing declaration¹²⁰. Officials of Member States responsible for carrying out inspections shall check, inter alia, “the legality of the catch kept on board, stored, transported, processed or marketed and the accuracy of the documentations or electronic transmissions relating to it”¹²¹.

A derogation from the margin of tolerance set forth in Art. 14 of the Control Regulation is provided for by Regulation 2016/1139 of 6 July 2016, establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks:

“By way of derogation from Article 14(3) of Regulation (EC) No 1224/2009, for catches which are landed unsorted the permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10 % of the total quantity retained on board”¹²².

In the case of the Baltic, the margin of tolerance is calculated with respect to the total quantity of catches retained on board and not with respect to catches of single species.

5. Conclusive Remarks

The review made above shows that, under international law instruments on fisheries, to collect and timely transmit to the competent authorities complete and accurate data on fishing activities and

¹¹⁴ Art. 23, para. 1.

¹¹⁵ Art. 23, para. 2, c.

¹¹⁶ Art. 23, para. 4.

¹¹⁷ Art. 33, para. 2.

¹¹⁸ Art. 33, para. 5.

¹¹⁹ Art. 109, para. 2.

¹²⁰ Art. 109, para. 2, a, ii.

¹²¹ Art. 74, para. 3, a.

¹²² Art. 13.

efforts is a necessary precondition for complying with the obligation to achieve the optimum utilization of marine living resources on the basis of available scientific evidence. States are bound to ensure that fishing vessels flying their flag or fishing in waters under their sovereignty or jurisdiction comply with the obligation of transmitting such data. The Fish Stocks Agreement, which is the most specific fisheries treaty applying at the world level, is particularly relevant in this regard. To fail to maintain accurate records of catches or to misreport catches are considered by it as serious violations of its provisions.

The EU fisheries regime, which is based on the principle of environmental sustainability, can be understood as a detailed specification and coherent implementation of the international rules on fisheries, including the obligation of collecting and transmitting accurate and reliable data. Particularly notable appear the measures on effectiveness of controls and the sanctions for breaches, which are intended to effectively deprive those responsible of the economic benefits derived from any serious infringements. Both the EU policies on the environment and on conservation of marine biological resources concur in this direction, together with the EU purpose of avoiding discrimination and unfair competition among fishers, given the previous absence of dissuasive, proportionate and effective sanctions in certain Member States¹²³.

Part II

The Proposed Amendments to the Provision on the Margin of Tolerance

6. The Commission Proposal

On 30 May 2018 the Commission submitted a proposal for amending the Control Regulation and other regulations relevant for fisheries control¹²⁴. According to the Commission, the current control system was designed prior to the reformed common fisheries policy (Regulation 1380/2013) and is not fully coherent with it. In addition,

“the system reflects control strategies, methodologies and challenges of more than 10 years ago, and it is not equipped to effectively address current and future needs in terms of fisheries data and fleet control, to match the constant evolution of fishing practices and techniques and to take advantage of modern and more cost-effective control technologies and data exchange systems. The current system also does not reflect new and

¹²³ “Nationals of Member States should be deterred from committing infringements of the rules of the common fisheries policy. Since action taken following infringements of those rules differs widely from one Member State to another, thereby causing discrimination and unfair competition rules for fishermen and given that the absence of dissuasive, proportionate and effective sanctions in certain Member States reduces the effectiveness of controls, it is appropriate to introduce administrative sanctions in combination with a point system for serious infringements to provide a real deterrent” (preamble para. 38 of the Control Regulation).

¹²⁴ Doc. COM(2018) 368 final of 30 May 2018.

modern Union policies recently adopted, such as the plastic strategy, the digital single market strategy, and the international ocean governance”¹²⁵.

According to the Commission, discussions within the Council, the Parliament, the European Fishery Control Agency, Member States and stakeholders confirm that there is unanimous agreement that the fisheries control system is not effective and efficient and, as such, not entirely fit for the purpose to sustain the achievements of the common fisheries policy objectives¹²⁶. One of the specific purposes of the Commission proposal is to

“improve availability, reliability and completeness of fisheries data and information, in particular of catch data, and allow exchange and sharing of information”¹²⁷.

Some of the *consideranda* in the Commission proposal are specifically referring to the collection and transmission of data:

“In order to achieve the objectives of the common fisheries policy, the reliability and comprehensive collection of data on catches is of the utmost importance”¹²⁸.

“The absence of catch reporting obligations by masters of vessels less than 10 metres’ length led to incomplete and unreliable data for such vessels as the data collection for those vessels was based on sampling plans. Therefore it is important to require reporting of catches for all fishing vessels without regard to their size. In this way the rules will also be simplified and compliance and controls will be improved”¹²⁹.

“The provisions on the margin of tolerance in logbook estimates of quantities of fish retained on board should be amended to take into account the new rules pertaining to the reporting of catches below 50 kg in logbooks. In addition, the provisions on the margin of tolerance should be amended in order to address the specificity of catches which are landed unsorted”¹³⁰.

As regards the above mentioned Art. 14 of the Control Regulation¹³¹, the Commission proposal is based on the following points:

“The exemption from reporting in logbooks of catches of less than 50 kg is removed for all categories of vessels.

The rules for the so-called ‘margin of tolerance’ are clarified and tailored to specific situations/fisheries. The content of the logbook is aligned to the new provision on traceability (use of the unique fishing trip identifier) and is amended to increase the quality of recorded data”¹³².

In addition, according to the Commission proposal, the special regime on the margin of tolerance applicable in the Baltic Sea (Regulation 2016/1139)¹³³ should be deleted:

¹²⁵ *Ibidem*, p. 1.

¹²⁶ *Ibidem*, p. 2.

¹²⁷ *Ibidem*, p. 2.

¹²⁸ Preambular para. 15.

¹²⁹ Preambular para. 17.

¹³⁰ Preambular para. 19.

¹³¹ *Supra*, para. 4.B.

¹³² Doc. COM(2018) 368 final, p. 8.

¹³³ *Supra*, para. 4.B.

“In order to ensure compatibility with Regulation 1224/2009, provisions on logbooks and on the margin of tolerance are deleted”¹³⁴.

More precisely, under the Commission proposal, the amended Art. 14 (completion of the fishing logbook) should have the following wording (para. 4 addresses the question of the margin of tolerance):

“1. The master of each Union catching vessel shall keep an electronic fishing logbook for the purpose of recording fishing activities.

2. The fishing logbook referred to in paragraph 1 shall contain in particular the following information:

(...) the estimated quantities of each species in kilograms live weight or, where appropriate, the number of individuals, including the quantities or individuals below the applicable minimum conservation reference size, as a separate entry; for Union fishing vessels of 12 metres’ length overall or more, this information shall be provided per haul or per fishing operation; (...).

4. When compared with the quantities landed or the result of an inspection, the permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10% per species. For species retained on board that do not exceed 50 kg live weight equivalent, the permitted margin of tolerance shall be 20% per species.

By derogation to the first subparagraph for fisheries referred to in the first and third indents of Article 15(1)(a) of Regulation (EU) No 1380/2013 which are landed unsorted, the tolerance limitations set out in this paragraph shall not apply to catches of species which meet both of the following conditions:

(a) they represent less than 1% in weight of all species landed; and

(b) their total weight is less than 100 kg”.

5. In fisheries subject to a Union regime of fishing effort, masters of Union catching vessels shall record and account in their fishing logbooks for the time spent in an area as follows:

(a) with regard to towed gear:

(...) (iii) the catch retained on board by species in kilograms live weight at the time of exit from that area or before entry into a port located in that area;

(b) with regard to static gear:

(...) (v) the catch retained on board by species in kilograms live weight at the time of exit from that area or before entry into a port located in that area”.

6. To convert stored or processed fish weight into live fish weight for the purposes of the logbook, masters of Union catching vessels shall apply a conversion factor established in accordance with paragraph 9.

7. Masters of third country catching vessels operating in Union waters shall record the information referred to in this Article in the same way as masters of Union fishing vessels.

8. The accuracy of the data recorded in the fishing logbook shall be the responsibility of the master.

9. The Commission may, by means of implementing acts,

(a) lay down detailed rules on the implementation of the margin of tolerance as defined in paragraph 3;

(b) lay down detailed rules on the use of conversion factors;

(c) set conversion factors.

¹³⁴ Doc. COM(2018) 368 final, p. 12.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 119(2)”.

Amendments are proposed also as regards Art. 23 (completion of the landing declaration):

“1. The master of a Union fishing vessel, or its representative, shall complete an electronic landing declaration.

2. The landing declaration referred to in paragraph 1 shall contain at least the following information:

(...) (d) the quantities of each species landed in kilograms of product weighed in accordance with Article 60 and in live weight, broken down by type of product presentation, or, where appropriate, the number of individuals, including, as a separate entry, the quantities or individuals below the applicable minimum conservation reference size; (...)

3. The accuracy of the data recorded in the landing declaration shall be the responsibility of the master.

5. To convert stored or processed fish weight into live fish weight for the purposes of the landing declaration, masters of fishing vessels shall apply a conversion factor established pursuant to Article 14(9)”.

The Commission proposal also deletes Art. 13 (margin of tolerance in the logbook) of the above mentioned Regulation 2016/1139¹³⁵, that is the 10% margin of tolerance for Baltic cod based on the total quantity of fish retained on board.

Finally, as regards serious infringements, the Commission proposal amends Art. 90 of the Control Regulation as follows:

“2. The following activities shall constitute serious infringements:

(...) (o) falsifying documents, data or information or using of falsified or invalid documents, data or information required under the rules of the common fisheries policy (...).

3. The following activities shall constitute serious infringements depending on the gravity of the infringement in question which shall be determined by the competent authority of the Member State concerned taking into account one or more of the alternative criteria defined in accordance with Annex IV:

(a) not fulfilling of obligations to accurately record and report data relating to fishing activities, including data to be transmitted by vessel monitoring system and prior notices, as required under the rules of the common fisheries policy; or

(b) not making available a catch declaration or a landing declaration to the third country and not sending an electronic copy of it to their flag Member States as required under in paragraph 1 of Article 30 of the Regulation (EU) 2017/2403; (...)¹³⁶”.

¹³⁵ *Supra*, para. 4.B.

¹³⁶ Regulation 2017/2403 of 12 December 2017 relates to the sustainable management of external fishing fleets.

7. The Question of the Margin of Tolerance

A explanatory non-paper by the Commission on the margin of tolerance¹³⁷ distributed to Members of the European Parliament sheds light on the real danger of misreporting and on the importance of not relaxing the provision on the margin of tolerance.

It appears that, as Member States' inspection resources are limited, only a relatively small percentage of landings are inspected. For the majority of landings, weighing and catch registration takes place in the absence of officials. This is the reason why there are very strong financial incentives for operators to be tempted to misreport the quantities of fishery products in fishing logbooks and other catch registration documents, such as landing declarations and sales notes. By doing so, some operators can circumvent quota restrictions and stand to make greater profits. The existing rules on margin of tolerance, as provided by Article 14, para. 3, of the Control Regulation, serve to mitigate the extent to which the misreporting can take place.

According to the non-paper, circumvention of weighing activities, as prescribed by EU legislation and failure to document catches have unfortunately shown to be long established practices and pose one of the greatest risks to the success of the common fisheries policy. The failure by masters to record catches within the 10% margin of tolerance is one of the most commonly encountered infringement types (a potentially "serious infringement") by officials during inspections at landing. Inadequate systems of weighing and catch registration substantially aggravate the risk that some operators circumvent weighing and the submission of accurate post-landing catch registration documents, such as landing declarations and sales notes.

The non-paper remarks that it is possible to play with the margin of tolerance to "stretch" fishing opportunities. It is common practice for some masters to record quantities in the fishing logbook that do not reflect the actual quantities on board, but within the 10% margin of tolerance. In the event that the landing is inspected, and the quantities on board are verified, the master would not be liable for sanction, as the margin would not be exceeded. However, in the more likely event that the landing is not inspected, and due to possible collusion with other operators in the supply chain, such as the first buyer weighing the fishery products responsible for completing the sales note, the master may well be tempted to record a figure up to 10% lower in the landing declaration than that (already inaccurate) recorded in the fishing logbook. This effectively allows for a doubling of the permitted margin of tolerance figure between the quantities recorded in landing declarations and sales notes, compared to the actual quantities landed. The combined effect would be a misreporting

¹³⁷ The non-paper has no date and bears the following wording: "This document has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the staff of the Commission and may not in any circumstances be regarded as stating an official position of the Commission".

equivalent to 20% of the logbook figure, upon which quota uptake monitoring and data analysis are based.

The non-paper gives five practical examples of misreporting – relating the first to the Baltic Sea situation, the second to tropical tuna purse seine fishery and the other three to fisheries where catches are stored and landed in standardized boxes or cartons. Only the first two examples will be recalled hereunder.

Catches of tropical tuna purse seine fishery are composed of bigeye tunas, yellowfin tunas and skipjack tunas and are landed or transshipped in ports of third countries of the Indian or Atlantic Ocean, such as Seychelles or Ivory Coast. Operators have an interest in underdeclaring tuna species subject to quotas, such as yellowfin in the Indian Ocean and bigeye in the Atlantic Ocean, and overdeclaring non quota species, relying on the margin of tolerance and in the unlikelihood of an inspection. The result will be that 20% of the logbook figure will remain unreported and unaccounted on the quota uptake.

The worst-case scenario occurs in the Baltic Sea, given the special rule in Regulation 2016/1139 derogating from the general margin of tolerance per species¹³⁸ and establishing a margin of 10% of the total quantity of fish retained on board. The rule allows to report any combination of catch composition on board (e.g. 90% herring and 10% sprat recorded in the logbook) and to land any different combination (e.g. 10% herring and 90% sprat reported in the landing declaration), without triggering any non-compliance with the rule. This is a sort of “legal” misreporting that prevents any accurate catch reporting for Baltic pelagic fisheries and is likely to be a contributory factor in the declining status of Baltic pelagic stocks.

In the Commission’s view, it is essential that the existing rules on margin of tolerance are not undermined or relaxed. The larger the percentage of the margin of tolerance, the higher the expected level of misreporting in key quota fisheries, given the lack, or very limited, consequences for masters tempted to abuse the rules. Any increase of margin of tolerance elevates the risk and magnitude of misreporting for the operator with almost no risk of infringement and sanction. For example, a margin of 15% could lead to 30% of potential misreporting and a margin of 20% could lead to up to 40%. Underreporting leads in the short and long term to considerable negative impacts and could therefore determine a deterioration of stocks, undermining the objective of achieving maximum sustainable yield targets. A limited value of margin of tolerance is necessary for Member States to fulfil their obligations to ensure that catch registration data is accurate and complete and that the Commission is notified of the actual quantities landed.

The conclusions of the non-paper are simple:

¹³⁸ *Supra*, para. 4.B.

“The higher is the margin of tolerance, the less the master is incentivised to accurately report the catches on board by species.

Therefore, the higher the margin of tolerance, the greater the impact on the resource and the threat to the objectives of the common fisheries policy”.

It is difficult to find such a clear and convincing explanation about the danger of taking a step backwards and a direction that would fully contradict the main objectives of the EU and international fisheries regimes.

8. The European Parliament Proposal

The co-legislators - the European Parliament¹³⁹ and the Council - have expressed their positions on the proposed amendments of the Control Regulation.

On 11 March 2021, the European Parliament discussed and approved a legislative resolution on the Commission proposal¹⁴⁰. The Parliament proposes to draft Art. 14, para. 4, sub-para. 1, of the amended Control Regulation as follows:

“When compared with the quantities landed or the result of an inspection, the permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10% per species. For mixed fisheries, small pelagic purse-seine vessels or species retained on board that do not exceed 100 kg live weight equivalent, the permitted margin of tolerance shall be 20% per species. For tuna species, it shall be 25%”.

As it can be noticed, with respect to the Commission proposal more instances are listed to which a margin of tolerance higher than 10% is applicable, namely a 20% margin for mixed fisheries, small pelagic purse-seine vessels or species retained on board that do not exceed 100 kg live weight equivalent, as well as a 25% margin for tuna species.

Even more elaborated is the text of Art. 14, para. 4, sub-para 2, where the Parliament proposes a derogation for small pelagics, industrial and tropical purse seine fishery, allowing a margin of tolerance based on the total volume or quantity of fish caught, instead of single species:

“By way of derogation from the first subparagraph for small pelagic fisheries (mackerel, herring, horse mackerel, blue whiting, boarfish, anchovy, Argentinian silverside, sardine and sprat) and industrial fisheries (inter alia capelin, sand eel and Norway pout) which are landed unsorted, the following exceptions shall be made:

(a) the tolerance limitations set out in this paragraph shall not apply to catches of species which meet one of the following conditions:

¹³⁹ It may be remarked that, on 25 October 2016, the European Parliament adopted a resolution on how to make fisheries controls in Europe uniform. *Inter alia*, the Parliament recalled that “there is real inequity, or inequity is felt by fishermen, as regards the regularity, frequency, duration, severity, thoroughness, effectiveness and methods of fisheries control in Europe, and a need for equal and non-discriminatory treatment” (preamble) and believed that “there is a need for the collection, management and use of good-quality data regarding the landing obligation, in order to control and assess the effectiveness of the implementation of the landing obligation and to bring data collection into line with the requirements resulting from the revised CFP” (para. 33).

¹⁴⁰ Report-A9-0016/2021.

- (i) they represent less than 1% in weight of all species landed; or
- (ii) their total weight is less than 100kg;

(b) for Member States which have adopted a risk-based sampling plan, approved by the Commission, for weighing unsorted landings, the following tolerance limitations shall apply:

(i) for small pelagics, and industrial fisheries, the permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10 % of the total volume of all species recorded in the logbook for each species;

(ii) for other non-target species, the permitted margin of tolerance in estimates, whether recorded in the logbook or not, of the quantities in kilograms of fish retained on board shall be 200 kg or 1 % of the total volume of all species recorded in the logbook for each species; and

(iii) for the total quantity of all species, the permitted margin of tolerance in estimates recorded in the logbook of the total quantity in kilograms of fish retained on board shall be 10 % of the total volume of all species recorded in the logbook.

By way of derogation from the first paragraph, for the tropical tuna purse seine fishery, for species covered by a risk-based sampling plan approved by the Commission, the tolerance allowed in the estimate recorded in the fishing logbook of the total quantities in kilograms of fish kept on board, all species combined, shall be 10% of the total quantities landed of all species combined”.

The Parliament puts forward the following justification for its proposal:

“It is not legitimate to have rules, with which the fishers – even with the best intentions – in reality cannot comply. An alternative framework, which does not affect the accuracy of the management of fishing opportunities and lies within the fishers’ ability and responsibility for their estimates in the logbooks concerning unsorted catches, is proposed”.

During the debate held in the Parliament on 9 March 2021, Commissioner Sinkevičius took a strong position against any proposals to relax the rule on the margin of tolerance and to allow generous derogations from it:

“Firstly, there is a clear risk that we are backtracking compared to current rules by relaxing current standards, and I am referring to the rules on the ‘margin of tolerance’, which sets the boundaries between what is considered to be legally and illegally caught and what is reported. Increasing the margin of tolerance or allowing generous derogations would legalise under-reporting and thus promote overfishing. Those amendments would actually erase 40 years of successive regulations and improvements in this field and would also largely benefit big operators as compared to small-scale fisheries. Such lax standards would therefore undermine the common fisheries policy and the objective of the EU biodiversity strategy, and there would be risks of reputational damage for the EU at international level.

On the margin of tolerance, let me recall here one of the fundamental principles of the common fisheries policy, the accurate reporting of catches. Without this, setting quotas just has no purpose. The rule of 10% per species has been foreseen in the EU for more than ten years, and it is not changed by the Commission proposal. This rule applies to all fisheries in the different sea basins.

The margin of tolerance is meant to mitigate and discourage under-reporting, especially for species subject to quotas because they are in a fragile state. Some of them, such as yellowfin tuna in the Indian Ocean, are overfished. Most tuna are fished in the waters of third countries and landed in third countries where controls

are not performed to the same standards as in the EU. It is therefore of the utmost importance that the tuna fisheries provide as accurate estimates of their catches as possible and use all available means and technologies to enable those estimations. Techniques and technologies available today and their use on board the large majority of fishing vessels, in particular the larger ones, make it possible to estimate catches much more accurately than ten percent while at sea. If we managed to send men to the moon in the 1960s, we can certainly estimate catches within 10% accuracy in 2021”.

9. The Council Proposal

Also the Council, in its proposal of 24 June 2021 for a general approach to the Control Regulation¹⁴¹, puts forward a number of amendments, including some to Art. 14:

“1. The master of each Union catching vessel shall keep an electronic fishing logbook for the purpose of recording fishing activities.

2. The fishing logbook referred to in paragraph 1 shall contain in particular at least the following information:

(...) (g) the estimated quantities of each species retained on board in kilograms live weight or, where appropriate, the number of individuals, including, as a separate entry, the quantities or individuals below the applicable minimum conservation reference size; for Union catching vessels of 12 metres’ length overall or more, this information shall be provided per fishing operation; (...).

4. When compared with the quantities landed or with the result of an inspection, the permitted margin of tolerance in estimates recorded in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10% per each species.

The tolerance limitation referred to in the first subparagraph shall not apply to each species, irrespective of whether it is landed sorted or unsorted, retained on board that does not exceed 50 kg live weight equivalent.

4a. By way of derogation from the first subparagraph of paragraph 4, in the case of fisheries referred to in the first and third indents of point (a) of Article 15(1) of Regulation (EU) No 1380/2013, for species which are landed unsorted and which are covered by a sampling plan referred to in Article 60(1a), the following margins of tolerance shall apply:

(a) for small pelagic species and species for industrial purposes, the permitted margin of tolerance in estimates recorded or not in the fishing logbook of the quantities in kilograms of fish retained on board shall be 10 % of the total quantity of all species recorded in the fishing logbook, per each species;

(b) for all other species, the permitted margin of tolerance in estimates recorded or not in the fishing logbook of the quantities in kilograms of fish retained on board shall be 200 kg or 1 %, whatever is greater, of the total quantity of all species recorded in the fishing logbook per each species.

Notwithstanding the provisions set out in points (a) and (b), for the total quantity of all species, the permitted margin of tolerance in estimates recorded in the fishing logbook of the total quantity in kilograms of fish retained on board shall be 10 % of the total quantity of all species recorded in the fishing logbook.

4b. By way of derogation from the first sub-paragraph of paragraph 4, in the case of fisheries targeting species whose morphological similarity has been certified by a Union or international scientific body and in the case of unsorted mixed fisheries, the permitted margin of tolerance in estimates recorded in the fishing logbook

¹⁴¹ Doc. 9390/2/21 of 24 June 2021.

of the quantities in kilograms of fish retained on board of those species shall be 10 % of the total quantity of those species recorded in the fishing logbook, provided that those species are covered by a sampling plan referred to in Article 60(1a).

[Paras. 5 and 6: As in the Commission proposal¹⁴²]

8. The accuracy of the data recorded in the fishing logbook shall be the responsibility of the master.

8a. Paragraphs 1 to 4 and 5 to 8 of this Article shall apply from ... [24 months after the date of application of this Regulation].

9. The Commission may, by means of implementing acts, establish conversion factors and lay down detailed rules on:

(a) the implementation of the margin of tolerance as defined in paragraph 4, 4a and 4b3;

(b) the use of conversion factors.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 119(2). Implementing acts referred to in point (a) of this paragraph shall be adopted by ... [18 months after the entry into force of this Regulation]”.

Basically, the Council proposes for unsorted mixed fisheries and for fisheries targeting species deemed morphologically similar a 10% tolerance margin based on the total catch, instead of on single species.

10. The Recent Commission Compromise Package

On 19 October 2022, Commissioner Sinkevičius sent a letter¹⁴³ to the European Parliament and the Council on key principles and compromise solutions in view of an agreement on the amendments to the Control Regulation. According to the Commissioner,

“it has been more than four years since the Commission tabled the proposal in March 2018 and we have been discussing it in trilogues over more than one year already. We have made substantial progress, but many cornerstone elements of the fisheries control system – those that are complex and technical, but also of high political sensitivity, and with a tangible impact for the sector and for sustainable fishing more generally – are yet to be agreed”.

The Commissioner suggests to have a strategic vision on all the pending elements in their entirety, intended as a package, and puts forward a set of key principles and compromise solutions, without denying the difficulty of the unsettled questions:

“In this context, I do want to underline both aspects – key principles and key concerns of all three institutions. I am aware that the Commission’s announcement in May this year that amendments on four key issues – CCTV [= close-circuit television], margin of tolerance, engine power, and traceability – risked amending the Commission proposal in a way that would deprive it of its *raison d’être*, caused unease. While it was my duty to inform you of this risk, I also declared my unequivocal determination to explore all paths to a compromise and spare no effort to avoid that risk and conclude this reform successfully”.

¹⁴² *Supra*, para. 6.

¹⁴³ Doc. 13881/22 of 22 October 2022.

On the key principle “margin of tolerance”, the position of the Commission, although with some concessions, remains basically clear:

“The revision of the EU fisheries control system should improve the accuracy of the catch data on the ground and not worsen it. In particular, the rule on the margin of tolerance should guarantee the accuracy of catch data, while also limiting the risk for misreporting. To that end:

- margin of tolerance (MOT) should be set per species only; no derogation applicable to mixed fisheries;
- operators should apply the best available techniques, including samples; REM [= remote electronic monitoring] with artificial intelligence to accurately estimate catches on board;
- for certain fisheries (e.g. tropical tuna purse seine fishing on FADs [= fish aggregation device], the Commission could, in consultation with, request EFCA [= European Fisheries Control Agency] to develop technical guidance to improve the accuracy of the estimation of catches;
- in the case of unsorted landings in the Union ports of small pelagic species and of industrial fisheries, an alternative margin of tolerance can be considered on the condition that an accredited independent third party guarantees the accuracy of the catch reporting at landing;
- small quantities of catches, such as those caught by small scale vessels, are more difficult to estimate; therefore MOT could be higher: 20%;
- MOT for transshipment declaration should be the same as MOT for the fishing logbook. No MOT for the transport document”.

11. Conclusive Remarks

It would go beyond the limits of this legal analysis to enter into a detailed comparison of the technical aspects of the three proposals on the margin of tolerance respectively presented by the Commission, the Parliament and the Council. In short, while the Commission seems more sensitive to the resource conservation aspect of the question, the Parliament and the Council seem to give priority to the developmental one. Any decision on making a choice and stressing either the former or the latter aspect of the principle of sustainable development¹⁴⁴ has a typically political character, being also based on a number of non-legal factors.

In the drafting process of the amended Control Regulation, political, economic and technical factors have been broadly discussed. For instance, the tuna producer organizations argue that it is practically impossible to know the exact quantities of species stored on board before landing and that weighing after landing can face practical problems, especially where fish is landed in non-EU ports¹⁴⁵. They put forward the risk that fishing companies would go bankrupt, if the margin of tolerance is not

¹⁴⁴ *Supra*, para. 4.A.

¹⁴⁵ See a report by Orthongel (the main French tuna producer organization) on *La problématique de la marge de tolérance*: “du fait des particularités de la pêche thonière tropicale à la senne, l’application stricte de cette règle inapplicable engendre des infractions involontaires mais systématiques à chaque marée pour lesquelles sont appliquées des sanctions économiquement insupportables qui mettent en péril la durabilité de ce secteur. Si la France veut maintenir une activité de pêche thonière tropicale à la senne contribuant à sa souveraineté alimentaire, le règlement doit être adapté, en particulier en soutenant l’amendement (...) sur cette règle adopté par le Parlement européen”.

increased and referred to quantities instead of species¹⁴⁶. On the contrary, in an open letter, a number of scientists¹⁴⁷ stress that the population of yellowfin tuna in the Indian Ocean is already under great threat because of overfishing and unselective fishing practices. In a paper some non-governmental organizations¹⁴⁸ point out that, in recent years, technology and equipment allowing the estimation on-board of quantities and catch composition have significantly improved, even if investments are needed for carrying out on-board sampling¹⁴⁹.

However, the question of the margin of tolerance also raises legal aspects that have a considerable bearing on the legislative choices that the EU is called to make in the near future.

A recent judgment of the EU Court of Justice, rendered on 10 February 2022 in the case C-564/20, shows how much legal considerations are involved in the matter. The judgment addressed the subject of the interpretation of the terms “data” and “information”, used in the Control Regulation and, in particular, whether the sea fisheries authority is limited, when making notifications to the Commission, to sending it the information contained in the fishing logbooks or whether, where it has a reasonable basis to doubt the reliability of that information, it may instead employ a reasonable and scientifically based method to analyse the data recorded in those fishing logbooks in order to obtain more accurate outtake figures for the purposes of those notifications¹⁵⁰. The Court, considering not only the wording, but also the context and the object of the Control Regulation, found that

“28. As regards, in the first place, the literal interpretation of the provisions referred to by the national court, it is apparent from the wording of Article 33 of Regulation No 1224/2009 that that provision does not relate exclusively to the data referred to in Articles 14, 21, 23, 28 and 62 of that regulation, but covers a wider set of ‘all ... data’ that may be considered relevant, as is shown by the expression ‘in particular’.

29. Furthermore, it is clear from the use of the adjective ‘aggregated’ in Article 33(2)(a) of Regulation No 1224/2009 that the data which must be notified to the Commission are not limited to the raw data from the fishing logbook, but that those data must undergo some processing, in the form of aggregation.

30. As regards the wording of Article 34 of Regulation No 1224/2009, it must be observed that it does not refer to the terms ‘data’ and ‘information’ referred to in other articles of that regulation in order to determine whether the 80% threshold for exhaustion of a quota is reached and does not lay down, for the Member States, any methodology for that purpose.

¹⁴⁶ See *Socio-economic Study of the Impact of the Margin of Tolerance on the French Tropical Tuna Fishery*, prepared by the firm Rinzen on behalf of Orthongel.

¹⁴⁷ See the paper *Expanding the EU’s Margins of Tolerance for Misreporting of Fish Catches Would Make Accurate Assessment of Fish Populations Impossible*.

¹⁴⁸ See *The EU Purse Seine Fleet in the Indian Ocean: Legalising the Misreporting of Catches Must Not Be the Solution to a Technical Problem*.

¹⁴⁹ In the case of EU tuna fishing in the Indian Ocean, the Commission issued a letter of formal notice and, on 29 September 2022, a reasoned opinion calling France to comply with the Control Regulation, in particular as regards the French fleet operating outside EU waters. The Commission assumes that France has failed to ensure adequate control, inspection and enforcement activities and, in particular, that the French system for collecting, validating and compiling catch data has serious shortcomings, impacting on the effectiveness of the relevant fisheries management measures.

¹⁵⁰ In the specific case, the alternative was the “time spent” methodology.

31. It follows from those considerations that, first, the wording of Articles 33 and 34 of that regulation does not support an interpretation which allows the interpretation of the terms ‘data’ or ‘information’ to be restricted solely to raw data recorded by the masters of fishing vessels in the fishing logbook.

32. Second, it follows from the wording of those provisions and, in particular, from the wording of Article 33(2)(a) of Regulation No 1224/2009, that the Single Control Authority must not merely transmit automatically the data recorded by the masters of vessels in the fishing logbook but must process those data before submitting them to the Commission.

33. As regards, in the second place, the context of Articles 33 and 34 of Regulation No 1224/2009, it must be stated at the outset that there is nothing in the wording of Articles 14 and 15 of Regulation No 1224/2009 to support the interpretation that the information referred to in Article 14(2) of that regulation constitutes the only relevant ‘data’ for the purposes of Articles 33 or 34 of that regulation.

34. Furthermore, reference should also be made, in that context, to Articles 5, 9 and 109 of Regulation No 1224/2009.

35. First of all, in accordance with Article 5(5) of that regulation, the Single Control Authority designated by the Member State is responsible, *inter alia*, for coordinating the collection, treatment and certification of information relating to fishing activities, which it then notifies to the Commission. That information includes, *inter alia*, that referred to in Article 33(2)(a) and Article 34 of that regulation. Furthermore, according to Article 9(1) of that regulation, Member States are to operate a satellite-based vessel monitoring system for effective monitoring of fishing activities of the fishing vessels flying their flag wherever those vessels may be and of fishing activities in the Member States’ waters.

36. Next, in accordance with Article 109(2) of Regulation No 1224/2009, Member States are to ensure that all data recorded in accordance with that regulation are accurate and complete. To that end, subparagraph (a) of Article 109(2) provides that Member States are to perform cross-checking, analyses and verifications of various items of information and data, *inter alia*, vessel monitoring system data and fishing activities data, in particular data in the fishing logbook, landing declarations, prior notifications, data from transport documents, sales notes, fishing licences and fishing authorisations.

37. Lastly, Article 109(5) of Regulation No 1224/2009 provides that, if Member States identify inconsistencies in collected information and recorded data, they are to undertake the necessary investigations and, if there are reasons to suspect that an infringement has been committed, they are to take the necessary action.

38. Thus, Article 5(5) and Article 109(2) and (5) of Regulation No 1224/2009 seek to ensure that the Member States transmit accurate and complete information to the Commission, having recourse, where appropriate, to verification. It also follows from the wording of Article 5 that the Single Control Authority designated by a Member State cannot simply automatically transmit the information which it collects to the Commission but must process and verify that information and, where appropriate, take the necessary action.

39. Accordingly, the context of Articles 33 and 34 of Regulation No 1224/2009 supports the interpretation set out in paragraph 32 of the present judgment. A Single Control Authority and, consequently, the Member State to which it belongs, would not be able to fulfil their obligations under that regulation if that authority was unable to check the reliability and accuracy of the data which it collects and confined itself to automatically transmitting the data recorded by masters of vessels in the fishing logbook.

40. In the third place, as regards the objective pursued by Regulation No 1224/2009, it should be recalled that that regulation forms part of the CFP, the objectives of which in terms of conservation are defined

in Article 2(1) of Regulation No 1380/2013. According to that provision, the CFP seeks to ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.

41. Member States can properly monitor the uptake of quotas and contribute to the achievement of the objectives of the CFP as set out in Article 2 of Regulation No 1380/2013 only if they can ensure that they have accurate and comprehensive information and data on fishing opportunities.

42. Thus, it would be incompatible with the conservation objectives of the CFP to deny the Single Control Authority the power to use a reasonable and scientifically valid method to verify the data recorded in the fishing logbook in order to ensure the accuracy of the data concerning catches with a view to their transmission to the Commission, in accordance with Article 33(2)(a) and Article 34 of Regulation No 1224/2009.

43. As the Commission submits, the interpretation to the effect that the Single Control Authority must notify automatically, without exercising its expertise independently, where, as in the present case, it is satisfied, on reasonable grounds, that the data in the fishing logbook are inaccurate, would require that clear wording be used in either Regulation No 1380/2013 or Regulation No 1224/2009, which is not the case.

As it can be seen, the Court found that EU Member States are under an obligation, arising from Art. 33, par. 2, a (recording of catches and fishing effort) and Art. 34 (exhaustion of fishing effort) of the Control Regulation, to transmit to the Commission accurate and complete information¹⁵¹ and to check the reliability of the data transmitted. The Court stated in very clear terms that Member States can achieve the objectives of the common fishery policy “*only if they can ensure that they have accurate and comprehensive information and data on fishing opportunities*”¹⁵². This Court’s statement casts many doubts about the legality of the Parliament or Council proposals on the margin of tolerance, if they were retained in the future amended Control Regulation. Starting from the judgment, some general considerations can be developed on the legal questions addressed by this analysis.

A) It is a matter of fact that only the transmission of complete and accurate data on fishing activities and efforts enables the EU (or any regional fisheries management organization) to determine on the basis of scientific evidence the level of optimum utilization of marine living and, if appropriate, fishing quotas. This is the subject of a legal obligation arising from treaties to which the EU is a party, in particular the Fish Stocks Agreement and some regional agreements, and from the whole EU fisheries regime itself. In all international and EU regulatory and policy instruments the assumption is repeated that without accurate catch data, both sustainable catch limits and quotas cannot be determined on the basis of scientific evidence.

¹⁵¹ The same conclusion was reached by the Court in the judgment of 14 November 2002, *Commission v. United Kingdom*, case C-454-99, referring to the provisions of previous Regulation No. 2241/87: “Those provisions cannot (...) be interpreted as merely laying down an obligation to provide the information which the Member States have gathered within the time-limit set. On the contrary, the Member States must ensure that the information notified is correct” (para. 48).

¹⁵² Para. 41 of the judgment.

The criteria proposed by the Council and the Parliament allow dangerous inaccuracies, by expanding the margin of tolerance and by allowing interchangeable reporting of different species. This would mark a significant step backwards, worsening the accuracy and completeness of information, and would weaken the scientific basis for fish stocks surveys, decreasing the effectivity of controls, especially in presence of the frankly shocking scenario described in the above mentioned Commission non-paper¹⁵³ (“the higher is the margin of tolerance, the less the master is incentivised to accurately report the catches on board by species; therefore, the higher the margin of tolerance, the greater the impact on the resource and the threat to the objectives of the common fisheries policy”). In fact, the question of the margin of tolerance would have less importance if Member States and non-member landing States had in place proper control systems to weight the catches immediately after landing. This would allow decision-makers to monitor quota uptakes and scientists to prepare the recommendations for catch limits, based on reliable and accurate data. However, in many present cases, as weighing does not take place on landing or is not done properly, the risk of underreporting becomes a serious concern. The recent Commission compromise package envisages, in certain cases, an alternative margin of tolerance, provided that an accredited independent third party guarantees the accuracy of the catch reporting at landing¹⁵⁴.

By underestimating the evident risk of misreporting, the Parliament and Council proposals seem to put in question the objective of environmental sustainability and the principles of good governance (Arts. 2 and 3 of Regulation 1380/2013) on which the whole EU common fisheries policy is based, as well as the objective of “prudent and rational utilisation of natural resources” set forth in Art. 191, para. 1, of the Treaty on the Functioning of the EU. Precise international obligations, arising from treaties to which the EU is party, in particular the Fish Stocks Agreement, seem to be put in question as well.

B) By expanding the margin of tolerance and by allowing interchangeable reporting of different species, the Parliament and Council proposals would mark a regression in the level of conservation resulting from the present common fisheries policy. It is not the case to discuss here to what extent the principle of non-regression is accepted in general international law of the environment¹⁵⁵. It may however be open to question how much a regression in the measures for the

¹⁵³ *Supra*, para. 7.

¹⁵⁴ *Supra*, para. 10.

¹⁵⁵ See PRIEUR & SOZZO (sous la direction de), *Le principe de non régression en droit de l'environnement*, Bruxelles, 2012. Notably, the principle of non-regression is reflected in the 2015 Paris Agreement: “As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with a view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement” (Art. 3).

conservation of natural resources is consistent not only with the core objectives of the common fisheries policy, but also with those of the EU environmental policy, such as the prudent and rational utilisation of natural resources and the high level of protection, based on the principles of precaution and prevention, set forth by Art. 191, paras. 1 and 2, of the Treaty on the functioning of the EU¹⁵⁶.

In addition, a move by a major fishing power, which reverses almost 40 years of progress brought by successive EU fisheries regulations, would be noticed by all States involved in fishing activities. It would probably determine a corresponding decrease in conservation measures adopted at the international and national level, weakening the approach towards conservation usually taken by the EU and its credibility.

C) The Parliament and Council proposals, which are not supported by detailed impact considerations, seem basically justified under the practical reason of not putting rules that the fishers cannot comply¹⁵⁷. The Commission does not concur on such a justification, believing that techniques are available to accurately estimate catches on board, and is ready to promote measures of technical guidance to improve the accuracy of estimation of catches¹⁵⁸. The Commission proposal was accompanied by an impact assessment, made under the Interinstitutional Agreement between the Parliament, the Council and the Commission on Better Law-making (Strasbourg, 2016)¹⁵⁹. The assessment, *inter alia*, remarks that

“Positive environmental impacts of the preferred option would encompass: reduction of overfishing, elimination of discards at sea, healthier fish stocks and proper control of marine protected areas. Main socio-economic benefits include: increased wages and competitiveness of fishing industry, especially for the small fleet; promotion of job creation (especially in ICT [= information, communication and technology]); improved compliance with the CFP and equal treatment of fishers.

The costs would be ‘proportionate’ to the benefits achieved (especially considering cost savings) and cost-effective, with considerable benefits outweighing the relatively modest changes in costs. Member States authorities would also benefit from cost savings (157 M€ over a five years, compared to the baseline scenario) through simplification and interoperability.

¹⁵⁶ *Supra*, para. 4.A.

¹⁵⁷ *Supra*, para. 8.

¹⁵⁸ *Supra*, para. 10.

¹⁵⁹ *Official Journal of the European Union* No. L 123 of 12 May 2016. Under the Agreement, “impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses” (Art. 12, para. 3). “The Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts” (Art. 13, para. 1). “The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission’s proposal. The European Parliament and the Council will, as a general rule, take the Commission’s impact assessment as the starting point for their further work. The definition of a ‘substantial’ amendment should be for the respective Institution to determine” (Art. 15).

No negative social or environmental impacts are expected as a result of the preferred option”¹⁶⁰.

It does not seem that the Parliament or the Council have so far submitted a different impact assessment as regards their substantial amendments to the Commission proposal on the subject of the margin of tolerance.

D) The amendments proposed by the Parliament and the Council are filled with many derogations and, sometimes, derogations from derogations that it is difficult to reconstruct the wording and the logic of the whole para. 4 of Art. 14. Moreover the Council proposal uses, in one of its derogations, the term “unsorted mixed fisheries” that is not defined¹⁶¹ and could potentially cover significant parts of the fishing fleet, much beyond the proper margins of an exception and the correct ratio between a rule and an exception.

E) More generally, the issue of the margin of tolerance is linked to the credibility of the whole system of EU fisheries control, including monitoring and surveillance. The Commission proposal basically aims at putting in place a system addressing current needs in terms of data and fleet surveillance and matching the constant evolution of fishing practices and techniques. If margins of tolerance are increased and controls are not strengthened by Member States, ensuring the proper validation of catch data in logbook, in most cases fishers will remain responsible for the control of their own quota uptake, in open contradiction with the principle that those who are to be controlled should not be the ones controlling themselves. An efficient control system, where there are few derogations and no loopholes that would allow the inaccurate recording and reporting of fishing data, as reflected in the Commission proposal, is essential to implement the common fisheries policy and to both protect fisheries resources and sustain the livelihoods of fishers. Most of them comply with the rules of the EU common fisheries policy and should be protected against unfair competition with those not complying.

In conclusion, the accurate and complete reporting of fishing data is mandatory under treaties to which the EU and its Member States are parties and is consistent with the core objectives of both the EU fisheries and environmental policies. The legality of new EU rules that would substantially weaken such an obligation would be very questionable under both international and EU law¹⁶².

¹⁶⁰ Doc. COM(2018) 368 final, p. 5.

¹⁶¹ Only “mixed fisheries” is defined in Art. 4, para. 36, of Regulation 1380/2013.

¹⁶² To come back to the personal antecedent (*supra*, para. 2), such rules could put the EU in a condition to count fishing vessels instead of fish.