

## MAC ADVICE

### Level Playing Field (LPF)

30.09.2019

#### Context

The MAC, at its Working Group 2 “EU Market” meeting of 24 May 2018, established the Focus Group on Level Playing Field (LPF), with the following objectives (terms of references):

- Analyse which regulations apply to both EU and imported products and assess where the MAC thinks that there are deficiencies creating an uneven playing field;
- Identify regulations and case studies to consider the potential problems;
- Carry out a mapping of three major areas: IUU, Control Regulation, and Food information for consumers, marketing, labelling;
- Explore the market discrepancies resulting from uneven implementation of regulations by EU Member states;
- Explore areas of sustainability and socio-ethic labour aspects not covered under IUU;
- Extend that analysis to include the treatment of such issues in relation to trade agreements in addition to questions relating to tariffs, technical issues around market access, and dispute settlement provisions;
- Integrate aquaculture.

The first exercise was to identify if and where EU legislation establishes an uneven playing field between EU and imported products, and/or between EU products, in the field of fisheries and aquaculture with regard to the access to the markets.

MAC members have contributed with numerous examples of an uneven playing field, out of which those provided in this report have clear link back to specific EU legislation.

## **1. INTRODUCTION**

EU fisheries market policies must ensure that imported products meet comparable or similar requirements that apply to EU production in every respect, as enshrined in the Common Fisheries Policy (CFP). In particular, the CFP basic Regulation 1380/2013, as well as the Common Market Organisation Regulation 1379/2013, are referring to the need to ensure a level playing field in several recitals and articles reminded in annex II.

## **2. SCOPE FOR THIS EXERCISE**

Considering the task given by the terms of reference, the scope of this exercise was limited to compare advantages or disadvantages of products and operators between EU production and imports:

- review if and how EU legislation creates advantages or disadvantages to operators inside compared to outside the EU;
- review if and how national implementation and enforcement of EU legislation by Member States (MS) create advantages or disadvantages to products or operators of certain MS;
- explore international trade questions in relation to sustainability and socio-ethic labour aspects.

It was decided to restrict the discussion only to fisheries and aquaculture products and not make comparisons with other food groups. Furthermore, it was decided to restrict the exercise to not cover differences between different regions within the EU.

## **3. DEFINITIONS**

It is important to clarify what *level playing field* means in the context of this exercise and to limit the scope of this advice.

### **Definitions of level playing field**

*Cambridge dictionary*: (a) a situation that is fair because everyone has the same chance of succeeding; or (b) a situation in which everyone has the same advantages and disadvantages:

*Collins Dictionary*: “a situation in which none of the competing parties has an advantage at the outset of a competitive activity”

*Free idioms dictionary*: “a situation in which everyone has the same opportunities”.

*OECD*: “A level playing field in global trade means that all countries and firms compete on an equal footing to offer consumers everywhere the widest possible choice and the best value for money.”<sup>1</sup>

A level playing field in this context can therefore be taken to mean fair competition conditions between operators and products. It should also be noted that a perfectly even playing field cannot exist as for instance geographical or climatic conditions create inherently different conditions between EU and third countries or even between EU MS.

Implementation and compliance with relevant international instruments and conventions must be used as a benchmarking tool globally. They establish a set of legislative, trade and policy “ground rules” internationally agreed by all parties aimed at securing a global level playing field.

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<sup>1</sup> <https://www.oecd.org/trade/topics/levelling-the-playing-field/>

## **4. REVIEW OF LEGISLATION**

*Question raised: is there any EU legislation which creates an uneven playing field between EU and non-EU operators / products?*

### **4.1. Hygiene package**

The EU [hygiene package](#) is based on the “Principle of equivalence”.

Its aim is to create a level playing field as to the safety of products that are placed on the EU market, irrespective of their origin or provenance.

In this respect, the EU recognises the equivalence of third countries hygiene systems and their facilities. The recognition is based on proper audits in those countries by the DG Health and Food Safety; it is granted per establishment. Reports are published whenever inspections take place in third countries.

However, even considering this principle of equivalence, the EU cannot interfere in the institutional organization of third countries. Therefore another level of checks is performed at the EU border by MS authorities, when products are imported from third countries. In this case, it is the role of border inspection to check the conformity of products, and for example the absence of substances that are forbidden in EU production system (antibiotics, veterinary drugs etc.); however, it is not possible to exclude that such substances have been used in the aquaculture production cycle in a third country if it is not detected in the product at border inspection.

#### ***Recommendation***

*The EU hygiene package is designed to provide the best possible level playing field for EU and non-EU products, based on the principle of equivalence. The MAC recommends preserving the principle of equivalence, and ensuring its proper implementation through strengthened audits in third countries and proper border checks, with sufficient frequency of physical and analytical examination.*

### **4.2. Common customs code & tariffs**

The EU Customs tariff system has as a primary objective to collect a fee on imported goods. Tariffs may be levied either to generate revenue (EU budget) or to protect domestic industries. By doing so, it creates an uneven playing field between EU producers and third countries’ producers.

For this reason, bilateral tariff arrangements, such as Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs), are aiming at partly re-establishing a level playing field from which industries from both parties can benefit, through reciprocal reduction of duties.

Also, full or partial import tax exemptions can be granted unilaterally specifically to vulnerable developing states under a format notified and agreed at WTO level: this is the General Scheme of Preferences. Under the GSP, concessions are granted to third countries in terms of taxes, provided they engage in a certain number of progress measures (social, environmental, human rights etc.).

Where considered necessary, the EU also adopts tariff free provisions for certain fishery products for a certain period of time. An example is the Regulation setting autonomous tariff quotas (ATQ) for

certain fishery products for the period 2019-2021<sup>2</sup>. It covers 28 product categories among which pelagic fish (frozen or salted anchovies, semi-processed or frozen tuna), various white fish species (Cod, Hake, Alaska pollock, flatfish...), crustaceans and molluscs, for which specific volumes can be imported from non-EU / non-preferential countries at a reduced or zero-duty tariff. Raw materials benefiting from this scheme can enter the EU market without prejudice to other legislation covering indication of origin, information to consumers, way of production, sustainability of the stock, labour standards, or catch certificate scheme under the EU legislation for illegal, unreported and unregulated (IUU) fishing. These products are solely imported for further processing in the EU through a strict end use control system by national customs authorities and Taxud.

#### **Recommendations**

- *A level playing field in the market is essential to ensure fair competition between economic operators within and outside the EU. However, due attention must be paid to the sensitivity of the fishing and processing industries to the concession of such benefits for certain fishery products. This is particularly the case for those third countries where standards differ in respect of sustainability criteria (socio-economic and environmental). Otherwise, the EU would be sending the wrong message to the international community by rewarding those who have done little for the sustainability of fish stocks and fair treatment of people (see, for instance, the GSP scheme).*
- *It is important to ensure a uniform application of Community customs legislation and identical customs controls between all Member States to prevent operators from third countries from using points of entry into the EU market with fewer controls to introduce goods that do not meet the requirements or to avoid paying the corresponding fee.*
- *The MAC also strongly recommends that countries which are linked to IUU fishing and serious labour abuses shall not benefit from preferential market access; rather the opposite. The EU should work towards achieving a true level playing field between EU produced and third country produced seafood.*
- *The ATQ instrument must be solely used when there is not sufficient seafood supply for our markets and cannot be intended to import non-sustainable products nor put pressure on EU producers' prices.*

### **4.3. Trade defence instruments**

The EU's trade defence policy instruments<sup>3</sup> can be mobilized whenever there is evidence that a third country government is granting public advantages to its operators (eg. tax reduction, subsidies, dumping). In this case a third country government is acting in a way that distorts competition and thereby creates an uneven playing field. Trade defence instruments will in this case tend to re-establish a level playing field through compensating duties.

#### **Recommendations**

*Reconfirm the importance of trade defence instruments of the EU.*

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<sup>2</sup> Council Regulation (EU) 2018/1977 of 11 December 2018 opening and providing for the management of autonomous Union tariff quotas for certain fishery products for the period 2019–2020

<sup>3</sup> Trade defence policy covers a range of instruments, see list here

#### **4.4. Food Information to Consumers Regulation**

The Food Information to Consumers Regulation (FIC) applies to all products that are placed on the EU market, irrespective of their origin or provenance.

*See the Focus Group's comments on this regulation below*

#### **4.5. Common Organisation of the Markets Regulation**

##### **Producer's organizations**

The question of level-playing-field, raised in the CMO recital No 12 (see annex II), relates to access to fishing grounds and organization of producers. As fish stocks are shared resources, their sustainable and efficient exploitation can, in certain instances, be better achieved by producer organisations and/or associations of producer organisations at national or transnational level. Such organisations should seek to lay down common and binding rules providing a level playing field for all stakeholders that are engaged in a particular fishery, without infringement to competition laws.

##### **Labelling tools – FIC and CMO**

###### **General considerations**

Fishery and aquaculture products placed on the EU market, irrespective of their origin or provenance, are governed by two different sets of requirements stemming respectively from the Food Information for Consumers regulations and from the Common Market Organisation (CMO) for fish and fishery products. The CMO, as "Lex Specialis" for fisheries and aquaculture products, lays down mandatory consumer information rules, including extraction/production location provisions, applicable for these products depending on the way of production (capture fisheries or aquaculture) or the degree of processing. The different treatment gives rise to both actual and perceived inconsistencies, for example in relation to country of origin labelling as between EU and imported products. These are further complicated by distinctions between fresh, prepared, processed and preserved products.

The Focus Group spent a considerable amount of time exploring these issues without being able to reach a consensus position. It was, however, noted that MAC Working Group 3 had established a separate and specific Focus Group to look at consumer information and was in the process of drafting advice in relation to labelling. It was agreed that points raised in the Working Group 2 Focus Group would be passed on to inform those discussions. They are not therefore included in this report.

#### **4.6. Common Fisheries Policy**

##### **SFPA Direct authorisations**

*Note: this question is also under consideration in the Advisory Council for Long Distance fishing*

According to the sustainable management of external fishing fleets Regulation 2017/2403, fishing operations under direct authorisations require a higher level of administrative requirements than those for operators fishing in EU waters or under SFPAs. For instance, these operators have to provide a copy of the applicable fisheries legislation in the third country with sovereignty or jurisdiction over the waters where the activities take place, a scientific evaluation demonstrating the sustainability of the planned fishing operations and designated official, public bank account number for the payment of all the fees.

### **Recommendations**

*The MAC encourages the Commission to:*

- *Negotiate and adopt SFPAs of interest for the EU fishing fleet since they have proved both more transparent and less administratively burdensome than direct authorisations and, in case of tuna agreements, have been beneficial for both the EU and third countries;*
- *Assist third countries, flag MS and operators concerned to fulfil all the requirements and conditions set in the EU law.*

## **4.7. Fisheries Control Regulation**

### **4.7.1. In EU waters**

The rules established in the Fisheries Control Regulation apply to EU waters irrespective of the flag of the vessels, both EU MS and non-EU flagged. A level playing field is ensured in this context.

### **4.7.2. Outside EU waters**

The Fisheries Control Regulation only applies to EU flagged vessels, not to third countries vessels. A level playing field is not ensured in this case. As for Norwegian or US fleets for example, EU flagged vessels have to comply with high mandatory requirements in terms of electronic monitoring systems (AIS, VMS, electronic logbooks etc.) and face high penalties for the infringements compared with many other flag states.

## **4.8. IUU Regulation and catch certification Scheme**

### **4.8.1. Insufficient data provided through the Catch Certificate**

The IUU Regulation establishes a Catch Certification scheme to ensure that products deriving from IUU fishing activities are prevented from entering the EU market.

The Catch Certificate scheme is intended to ensure the legality of imported seafood products. However, there is clear disparity in the quality and granularity of information that is provided by the Catch Certificate compared with information needed in the traceability scheme of EU-caught products under the EU Fisheries control legislation.

While EU-caught seafood is subject to detailed logbook and sales note data, imported seafood is covered by data provided in the Catch Certificate (although certain exporting countries provide further information, including links to logbooks and sales notes). This difference is crucial as certain key data elements are not required in the Catch Certificate which in turn means that the seafood consignment is not necessarily traceable and in turn it is not necessarily possible to establish the legality.

Specifically, the Catch Certificate lacks essential information for traceability purposes, such as:

- The exact identification of the fishing vessel (i.e. unique vessel identifier, eg. IMO number), which only needs to be provided if available. This contrast with the requirements for EU vessels, which need to provide the identification whenever a vessel is above 15 meters.
- The fishing method that was used. This contrast with the requirements for seafood products covered by the CMO Regulation.
- Identification of the exact date and location where the catch took place. Most operators provide FAO area codes to indicate the location of the catches, however, they vary greatly in



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their level of detail. For example FAO 71 covers parts of the waters of Australia, Cambodia, Indonesia, Papua New Guinea, Philippines and Thailand, as well as some pockets of high seas, an area which is more than 13 times the size of the Mediterranean Sea. Hence, using FAO area code to designate the place of capture in the Catch Certificate is not sufficiently detailed.

***Recommendation***

*While the MAC strongly supports the IUU Regulations and the Catch Certificate, it is recommended that the Catch Certificate is improved to include the above-mentioned elements. Additionally, the MAC welcomes the recent launch of the electronic database for the submission and handling of Catch Certificates. It is stressed that the database should preserve business confidentiality.*

**4.8.2. Re-introducing EU-caught products in to the EU following processing in third countries**

If a product is exported from the EU for processing in a third country, it is subject to the same certification requirements as non-EU products. In this particular case, the level playing field is ensured by this regulation.

***Recommendation***

*Maintain the mandatory Catch Certification for EU fisheries products exported to third countries in view of their extra-EU processing and their subsequent reimport in to the EU.*

## **5. IMPLEMENTATION OF EU LEGISLATION – CASE STUDIES**

*Question raised: are there EU legislations which by un-harmonized implementation by MS create an uneven playing field to products and operators of different Member States?*

### **5.1. Sustainable Management of the External Fishing Fleet**

As stated in a LDAC letter on the subject, “Whereas countries such as Spain and France seem to be providing DG MARE periodically with mandatory and requested information about their flagged vessels operations under direct agreements, as required under Articles 17 and 18, certain Member States with long distance fleets such as Italy do not seem to have the same level of engagement. This lack of level playing field places compliant national fleets at a serious competitive disadvantage vis-à-vis non-compliant ones. Furthermore, it bears the risk to undermine the efforts of the EU long distance fleet in terms of credibility, becoming the most transparent, accountable and sustainable fleet in the world.”

#### ***Recommendation***

*The MAC requests that the EU maintains the momentum after the adoption of the SMEFF Regulation and ensures that all EU flagged vessels fishing outside EU waters adhere to these rules without any further delay.*

### **5.2. Hygiene package**

According to Regulation 853/2004, fresh fishery products and crustaceans should be stored and transported at the temperature of melting ice.

There are different interpretations between member states of what the temperature is of melting ice. Some MS may consider a strict limit, eg. [0°C - + 2°C] in France, while others have broader interpretation, eg. [0°C - + 4°C] in Belgium, or even higher upper limits in more northern MS. Some MS may accept “chilling temperature”, meaning slightly negative temperature down to the point of beginning of crystallization of water, some may not accept such temperatures. The question of “super-chilling” meaning the use of temperature slightly below the crystallization point, with partial crystallization, has not been harmonized either.

This leads to very strange situations where a load of freshly cooked shrimps, for example, shipped from France to Belgium, must be labelled with a Belgian approved temperature range [0°C - + 4°C], but actually kept at a French temperature range [0°C - + 2°C] until the French-Belgian border.

Equally, it seems that Polish authorities accept the freezing of products at “stiffening temperatures” (-7°C to -12°C) to store and transport products, while other MS duly apply legal freezing temperatures for frozen products (below -18°C).

#### ***Recommendation***

*The MAC recommends that a harmonized implementation of the hygiene package is ensured in all MS especially as regards the implementation of the temperature “of the melting ice” and the definitions of chilling and super-chilling, giving precise rules to MS for this area.*

### **5.3. Control Regulation not harmonised across MS: Sanctions and point system**

The Control Regulation is essentially concerned with the control and enforcement of other EU regulations relating to the management of the fishing industry. It is designed to ensure that rules are

applied to all fisheries in the same harmonised way across the EU, that fishery products can be fully traced through the supply chain and that fishermen operate on a level playing field. The lack of harmonised sanctions and point systems jeopardises the creation of a level playing field in fisheries with comparable administrative penalties in all MS.

For instance, there is still no clear definition of '*serious infringements*' adopted by all MS. These different interpretations to what constitutes '*serious*' results in some MS in different consequences for similar behaviours depending on the nationality of the fleet. This may lead to the assignment of penalty points even for small infringements.

In addition, in some MS, national authorities additionally punish fishermen for infringements according to their national rules so the vessel owner is penalised twice, or the vessel owner is punished for infringements of the captain. This is unfair, and a harmonised sanction system is the way forward to combat the varied sanctions from one Member State to another.

Moreover, the point system is not yet implemented in all MS. This does not only create direct inconsistencies among MS regarding the administration and consequences of penalties, but also creates further indirect inequality as access to EMFF funds is denied when one committed a serious infringement for an identified period of time (Regulation 508/2014, art. 10).

#### **Recommendation**

*The sanctions and point systems should be harmonised across the EU.*

#### **5.4. Catch Certificates: Disparity in the level of scrutiny across Member States**

The IUU Regulation requires MS authorities to verify the information in the Catch Certificates they receive based on a risk assessment. Verifications may include contacting flag States or other third countries for assistance, such as to request logbook and Vessel Monitoring System (VMS) data, or copies of fishing licenses to confirm the legal origin of catches.

However, there are clear indications that there is disparity in the level of scrutiny of Catch Certificates across MS. In turn, this disparity leads to trade diversions of high-risk seafood imports to MS with weaker border controls. Ultimately, this leads to possible IUU-products arriving in the EU market.

A recent study<sup>4</sup> as well as biannual reports on the application of the IUU Regulation by MS<sup>5</sup> highlight clear disparities in the implementation of import controls across the EU which creates an uneven playing field for operators and leaves the system open for abuse. Differences were observed, in particular, in the frequency and rigour of checks and verifications of Catch Certificates, and in the quality of risk assessment procedures for identifying consignments for verification. The aforementioned study concluded that, as a consequence of these disparities, high-risk trade flows may have shifted to MS with less stringent procedures for the assessment of import Catch Certificates.

The examples of trade diversions highlight the need for harmonised and effective implementation of the IUU Regulation Catch Certification scheme to secure a level playing field for operators and to ensure weaker border controls are not exploited as a route for non-compliant products to enter the EU market.

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4 Mundy, V. (2018). The impact of the EU IUU Regulation on seafood trade flows: Identification of intra-EU shifts in import trends related to the catch certification scheme and third country carding process. Environmental Justice Foundation, Oceana, The Pew Charitable Trusts, WWF. Brussels, Belgium.

5 Obtained from the Commission through public access to documents request

**Recommendation**

*There is a need for an effective and harmonised implantation of the Catch Certification scheme which requires a number of actions by the Commission, MS and the industry. Amongst other this requires for the electronic Catch Certificate database to allow for information on consignments to be exchanged between MS and to ensure that products rejected in one MS are not permitted entry to the EU market via another MS, as well as improved cooperation between MS of transit and of destination to ensure Catch Certificates and consignments are effectively scrutinised.*

**5.5. Minimum sizes Clams – Italian derogation**

*Note: this example concerns only wild harvested clams; it does not cover farmed clams.*

The legal minimum size for clams of 25mm is established for all EU countries in Annex III of Regulation 1967/2006. Italy, however, benefits from a three-year derogation deriving from the landing obligation (Articles 15 and 18.3 of the CFP), decreed with EU Delegated Regulation 2016/2376 which has led to the minimum conservation reference size 22 mm. Italy submitted a recommendation to the Commission in accordance with the procedure set out in Article 18 of the CFP. This recommendation was presented in the form of a national discard management plan for the Venus spp. stock. Following the submission of this recommendation, the STECF examined the scientific contributions presented by Italy. Based on the STECF conclusions on the national discard management plan for the Venus spp. stock, the Venus spp. are among the species with a high survival rate, which justifies a request for derogation from the landing obligation. While Italy benefits from a three-year derogation which has led to the minimum conservation reference size of 22 mm, other Mediterranean countries must respect the 25mm; which may lead in some cases to internal market disruptions. The Italian clams are not solely commercialised in their national market but also exported to other MS markets which has a direct impact on the price and market demands.

Regulation 850/98 sets the minimum size for several clam species of Atlantic origin in 38-40 mm, whilst the Mediterranean Regulation (1967/2006) sets the minimum legal size at 25 mm. The Turkish clam with a minimum legal size of 17 mm generates unfair market competition which has negative socioeconomic impacts for the Adriatic Sea clam fisheries sector. From 2000 to 2013 there is a steady increase of Turkish production whilst the Italian production decreased throughout the same period. A maximum of 4.32 Euros per kilo was reached in 2002, dropping afterwards to a minimum in 2012 of 1.88 Euros, halving the value in 5 years. These values correspond to a year of scarcity of the product in 2002 with low productions and thus higher prices and high Turkish production in 2007 with a drop in the prices due to greater availability of the product in the markets.

**Recommendation**

- Extend the Italian derogation concerning the clams' minimum conservation reference size to other Member States with a similar fishery conditioned to a positive scientific assessment and following the procedure set out in Article 18 of the CFP.*
- Regulations 850/98 setting the minimum size for several clam species of Atlantic origin in 38-40 mm, and 1967/2006, setting the minimum legal size for clams in the Mediterranean at 25 mm, should be assessed in order to evaluate whether they ensure a level playing field or not (???)*

*- The EU should make every effort to ensure that in the broader Mediterranean region, non-EU legislation does not create an uneven playing field.*

#### **5.6. Minimum size Red bream – legal minimum size in Morocco**

Regulation 1967/2006 sets a minimum conservation reference size for the red bream of 33 cm, while in Morocco by Order No. 3083-09DU 12 Muharram 1431 (2009) a minimum size for commercialization of 25 cm is fixed. Similarly to the clam case, this situation generates market competition which derives in socioeconomic impact for the EU fishing sector.

#### ***Recommendation***

*Review the fishing agreement and the free trade agreement between EU and Morocco to include harmonized sizes for Red Bream between EU and Morocco.*

#### **5.7. Cascade Principle for veterinary medicinal products**

The availability of vaccines and other veterinary medicinal products (VMPs) for aquatic animals in Europe is very low as it is a limited market in some countries. Directive 2001/82/EC defines the Cascade Principle which allows veterinarians to prescribe unauthorised medicines (e.g. a VMP for another species, a human medicine or a VMP authorised abroad) or a species-specific medicine registered in another Member State but not in the Member State that wants to use it. Under this Directive, an obligatory withdrawal period of 500 degree days must be respected. MS can implement this Directive differently and in some cases, some MS have implemented it much stricter than others leading to additional hurdles for the movement of VMP between Member States e.g. some MS do not consider vaccines as an important intervention for severely suffering animals. In addition, the withdrawal period of 500 degree days makes no sense in the case of vaccines for which the withdrawal period should be 0 days. This creates an uneven playing field since some MS VMPs are authorised in MS and not in others. For the veterinarian who must use a VMP authorised in another MS, he/she must respect the obligatory withdrawal period of 500 days whereas a veterinarian in the MS who has authorised the VMP respects the withdrawal period for that specific VMP which could be 0 degree days.

#### ***Recommendation***

*Vaccines available and registered in any EU Member State should be legally usable for farmers and veterinarians all over the EU. A true single market of aquaculture vaccines is needed and should be applied to all vaccines approved by national competent authorities. A truly functional import procedure of VMPs from EFTA and certain third countries (e.g. USA and Canada) should exist. The MAC hopes that the implementation of new Regulation 2019/6 is able to address this issue, however this only enters into force in 2022.*

#### **5.8. Different production regulation between EU and 3<sup>rd</sup> countries**

##### **5.8.1. Prohibited veterinary substances**

The following is a list of prohibited substances for use in aquaculture that should be prohibited at all stages of production and that very often are detected by the RASFF (the EU's Rapid Alert System for Food and Feed) such as malachite green and nitrofurans.

## LIST OF PROHIBITED SUBSTANCES/FEEDS IN EU AQUACULTURE

- Chloramphenicol,
- Chloroform
- Dimetridazole,
- Metronidazole,
- Nitrofurans (Furazolidone, Furaladone)
- Malachite green
- Feed from ruminants
- Feed from same species (cannibalism)
- Use of unauthorized enzymes in EU in feed
- Use of growth hormones or hormones for sexual inversion of fish intended for consumption
- Use of antibiotics as growth factors
- Diphenoxyethanol as an anesthetic

### **Recommendation**

*The MAC recommends proper border checks, which should be frequent and not only for the purposes of documental compliance but also for analytical purposes.*

### **5.9. EU China case**

EU operators are subject to high levels of fisheries management, environmental, labour, safety, control and inspection standards when compared to Chinese fishing fleets. China is not even party to the 2009 FAO Agreement on Port State Measures, nor the FAO Compliance Agreement. It also has to be noted that this country is characterised by:

- a) Insufficient staff and equipment for enforcement;
- b) Low level of quality controls across the value chain;
- c) Lloyd's database of vessels - incomplete coverage Chinese vessels;
- d) Observed data contradicts the data reported to FAO by China;
- e) No evidence of strong measures to tackle illegal fishing activities
- f) The EU has to comply with higher standards and therefore higher costs which places the EU at a disadvantage in terms of international trade.

Furthermore, the way China reaches fisheries agreements with other countries has its effect on EU policies and agreements with third countries. Namely, China has a record of prioritising the securing of access to the supply it needs without due regard to the needs and context of the country concerned and without transparency. China's approach to fisheries agreements, particularly in Western Africa, makes it more difficult for the EU when it comes to negotiate its own agreement conditions with the host country as the third countries are well aware that if the EU conditions are too demanding for them, they can always secure an 'easier' deal with China. It also threatens food security in local communities since the fish caught is normally used for fish meal.

**Recommendation**

- *EU to perform IUU audit in China fisheries and eventually act with carding process as necessary.*
- *Strengthen sustainable fisheries and ocean governance, particularly in Western Africa, by linking SFPAs and other fisheries agreements to regional management policies and negotiations*
- *The MAC calls on the Union to ensure that more favourable conditions are not granted to non-EU long distance fleets operating in 3rd country EEZs concerning the conservation, development and management of resources, financial arrangements, and fees and rights relating to the issuing of fishing authorisations, whenever there is a SFPA in place (Art.31.6 CFP)*

## **6. Extraterritorial legislation**

*Questions: are there EU regulations / measures that could be imposed outside the EU without interference in third countries legal order? (Extraterritorial legislation). Which role of international bodies: UN bodies / conventions, RFMO's ...*

*[Note from the MAC: the aim of the comments and recommendations in this chapter is not only to ensure fairness for EU producers, but also to improve social and environmental sustainability of seafood production in third countries].*

### **6.1. TRADE REGIMES**

#### **6.1.1. EU Trade policy**

EU seafood imports fall under trade arrangements that deal mainly with tariff preferences (FTAs, GSP, or (interim) Economic Partnership Agreements etc.). There are cases where these preferences are negotiated with third countries not meeting the equivalent social and environmental sustainability standards as those that EU producers have to meet under EU regulations. This leads to a situation of uneven competition between EU and imported products with respect to this legislation. As an example, the International Labour Organization (ILO) has pointed out that in the fishing industry, the salaries of workers represent between 30% and 50% of the operating costs, which is why, in many regions of the world, there are operators who try to reduce labour costs through harmful or unlawful practices<sup>6</sup>. EU efforts to make fishing and producing of seafood sustainable and socially responsible are incompatible with importing products from certain countries that show little concern for sustainability and social accountability.

#### ***Recommendations***

- *Better coherence when ratifying free trade agreements with third countries between purely commercial objectives and the sustainable use of marine raw materials. Provide incentives for sustainable resource management by 3<sup>rd</sup> countries and fishing operators flying their flags ;*
- *FTAs should include reinforced chapters on sustainable development that address specific fishery concerns and that explicitly reinforce the requirements of the IUU Regulation;*
- *FTAs should incorporate a binding dispute settlement mechanism (to include government-to-government consultations, a panel procedure, public access to documents and the consultation of civil society), accompanied by the possibility of applying sanctions in case of non-compliance with the third countries international commitments;*
- *The Commission should require the third country with which it is negotiating a FTA/offering GSP scheme to ratify and implement effectively key international fishery instruments, such as the UN Convention on the Law of the Sea, the UN Fish Stocks Agreement, the UN Food and Agriculture Organisation (FAO) Port State Measures Agreement and the FAO Compliance Agreement, and to adhere to the standards of the relevant regional fisheries management organisations (RFMOs), and, in the case of GSP, provisions to allow the suspension of GSP+ status in cases where the provisions of these instruments are not applied; at a minimum it should allow for individual fisheries to demonstrate their adherence to these requirements;*
- *In order to facilitate the implementation of social and environmental sustainability standards for seafood products, by the countries with which the EU is negotiating an FTA/offering a GSP scheme,*

<sup>6</sup> ILO (2016), Fishers First. Good practices to end labour exploitation at sea, International Labour Office, Fundamental Principles and Rights at Work Branch (FUNDAMENTALS), Sectoral Policies Department (SECTOR) - Geneva: ILO, p. 12

*the EU should provide specific financial and technical support, including by incentivising fleets flying the flag of those countries;*

- It is not acceptable that countries which are linked to IUU fishing and serious labour abuses benefit from preferential market access; it should be rather the opposite. Tariff preferences should only be granted without prejudice for regulation to fight against IUU fishing.*
- In light of the entry into force of the ILO Convention 188 on Work in Fishing and the EU Directive implementing this Convention ((EU) 2017/159), trade and IUU policies must be aligned with labour policies in order for the EU to respect these standards when negotiating trade agreements.*
- For ethical and moral reasons and of fairness in competition, all States that intend to export their fishery products to the European Union must have ratified, be in the process of ratification or have national legislation equal to the main international conventions to ensure a level playing field, particularly the C188. This is allowed under WTO since its Member States have right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment.*

### **6.1.2. GSP+ scheme: the case of Philippines**

The EU has committed to using trade initiatives, such as the unilateral preferences GSP+ scheme, to promote the social and environmental pillars of sustainable development.

The Philippines are one of the top tuna catching and tuna exporting countries in the world. Since this country became a beneficiary country of the GSP+ scheme in 2014, its fisheries products are imported in to the EU with zero tariff for originating products (MFN Duty is 24 % ad valorem instead for canned tuna for example)<sup>7</sup>.

Working conditions in the Philippines fishing and processing sector have raised concern. The EC report about the GSP+ in the Philippines, published in 2016, states that *‘The Department of Labour and Employment (DOLE) [of the Philippines] has taken the GSP+ as an additional tool to help support some of its policies to strengthen labour rights. Notably following labour rights issues in the tuna industry in General Santos, DOLE has been working on a joint department order to ‘harmonize laws and regulations in giving decent work to fishermen and ease doing business with the fishing industry. The order was to “help compliance with labour standards and occupational safety and health standards and focus on the needs of fishermen”’.*

The EC latest report published in January 2018<sup>8</sup> highlights that, while new legislation had been adopted as a response to serious concerns expressed notably by the workers in tuna industry related to working and living conditions on board commercial fishing vessels, its enforcement has not materialised. Indeed, cases of human rights abuses in The Philippines fishing and processing sector continue to be widely reported.

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<sup>7</sup> The majority of the country’s exports to the EU are made up of machinery and appliances, and optical and photographic instruments; products which do not receive a duty advantage from the GSP+. Moreover, because the duties on other products which are covered are relatively low – coconut oil for industrial use has an MFN rate of just 2.5 % for instance – the benefits in relative terms are heavily concentrated on prepared fish, canned tuna in particular. As acknowledged by the country’s Export Marketing Bureau ‘the GSP+ is really a win for our tuna exporters’. Source: European Parliament, Study EP/EXPO/B/DROI/FWC/2013-08/Lot8/13, June 2017, Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries [http://www.tepsa.eu/download/studies\\_for\\_the\\_european\\_parliament/droi\\_report\\_on\\_labour\\_rights\\_in\\_epzs/Labour-Rights-In-Export-Processing-Zones.pdf](http://www.tepsa.eu/download/studies_for_the_european_parliament/droi_report_on_labour_rights_in_epzs/Labour-Rights-In-Export-Processing-Zones.pdf)

<sup>8</sup> [http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc\\_156546.pdf](http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156546.pdf)

**Recommendation**

*Withdraw the Philippines from the benefit from the GSP+ until they show progress in working conditions in their fishing fleets and factories.*

**6.1.3. FTA Negotiations with Vietnam**

Recent EU FTAs include provisions on trade and sustainable development, which focus on promoting decent work conditions and environmental protection. Some of them also have specific provisions on fisheries that are quite simplistic.

The Vietnam FTA<sup>9</sup>, for instance, lists a number of international agreements that are to be respected, including commitments to combat IUU fishing<sup>10</sup>. These provisions are in a section of the Agreement that is not subject to a legally binding dispute settlement mechanism. There is no commitment to ratify and effectively implement a list of fishery-related international instruments (like in the GSP+).

In 2017, the EU issued a ‘yellow card’ to Vietnam, warning that this country was not doing enough to fight IUU fishing. Currently, Vietnam has some 110,000 active fishing vessels, with around 33,000 of them operating in offshore areas, but only 3,000 of them are equipped with proper tracking equipment. Regulations for fisheries management are also lacking.

The FTA with Vietnam has also been heavily criticised because of the human rights situation in this country. Improvements to the situation, including implementation of ILO core conventions, should be made before the FTA can be ratified.

**Recommendation**

*a) EU to perform IUU audit in Vietnam fisheries and eventually act with carding process as necessary under the IUU legislation.*

*b) Hold ratification of FTA with Vietnam, to be subject to implementation of ILO convention.*

**6.1.4. FTA Negotiations with Thailand**

Last December, EU foreign ministers in the Council decided to resume FTA discussions with Thailand. One of the reasons that held the EU-Thailand trade agreement back has been the inhumane conditions in the fishing industry; many of the 3.8 million foreign workers, mostly from Burma, Laos and Cambodia, have working conditions that border on slavery, as well as the involvement of Thai industry in IUU fishing (in 2015, the EU pre-notified Thailand -yellow carded- as non-cooperating country in the fight against IUU, while the Dialogue with the ERU has been concluded by a lift of this yellow card in 2018).

A report in 2018 by Human Rights Watch<sup>11</sup> identified poor working conditions, recruitment processes, terms of employment, and industry practices that put already vulnerable migrant workers into abusive situations—and often keep them there. It highlights shortcomings in Thai law and the practice of frontline agencies that allow for forced labour through gaps in existing prevention and protection frameworks. For example, in an official report from 2015, the Thai government noted that inspections of 474,334 fishery workers had failed, astonishingly, to identify a single case of forced labour.

<sup>9</sup> The ratification procedure of the Vietnam-EU FTA is still ongoing, with the European Commission hoping that it can be ratified in 2019.

<sup>10</sup> [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157373.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157373.pdf)

<sup>11</sup> <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>

Additionally, Thai authorities have not solved the problems connected to tuna from IUU fishing entering the country. A letter, dated 15 August 2019, sent by the Thai Tuna Industry Association illustrates serious problems in relation to Bigeye Tuna, including lack of traceability due to loss of documentation and mixing of species when receiving the cargo. As a consequence, the members of the Thai Tuna Industry Association decided that, if Bigeye Tuna is inevitable mixed in cargo, they would like to settle pricing of any sizes of mixed Bigeye to be the same as price of Skipjack size below 3lbs. The described situation is a clear example of how the Thai tuna industry operates and their manipulation of traceability documentation, including through internal setting of prices.

### **Recommendations**

- *The EC should perform an ex-ante analysis of the economic and social impact of the EU-Thailand FTAs on EU fishing, EU aquaculture and EU fish processors.*
- *The EC should adequately consult the MAC on the species intended to be included in the EU Thailand FTA which could lead to negative socio-economic consequences in the European fishing and processing industries.*
- *The EC must reinforce audits in a way that guarantees that the Thai authorities are capable of achieving a uniform control system in the entirety of the country against IUU fishing as well as slavery prevention in the raw material supply of Thai processors.*

## **6.2. Relations with overarching bodies : FAO / UN, RFMO's**

### **6.2.1. CFP outside EU waters / Fisheries agreements and RFMOs : social and safety standards (flag state duties under the UN Law of the Sea Convention)**

Sustainable Fisheries Partnership Agreements (SFPAs) impose certain conditions on EU operators in order to authorise fishing operations in the waters of the third country concerned. As an example, fishing vessel owners shall take Mauritanian fishermen on board its European Union fishing vessel to work as crew members for the duration of the vessel's fisheries activities in the Mauritanian fishing zone. The minimum number of Mauritanian fishermen to be engaged on board for shrimp vessels and demersal species shall be 60 % of the crew, rounded downwards, officers not being included in this figure.

These obligations may pose concerns in terms of safety on board caused by a lack of adequate training, language miscommunications on board or certification difficulties of the local fishermen embarked. Fishing vessel owners encounter many problems since they need to provide their national authorities with appropriate fishermen certificates of competence or health certificates that may not exist or are not recognised by the flag member state.

### **Recommendation**

*When negotiating agreements with third countries, such SFPAs, the EU needs to better take into consideration the flag state responsibilities concerning social and safety at sea standards (flag state duties under the Law of the Sea Convention and e.g. Directives 97/70/EEC and 2017/159 and flag state requirements concerning training and certification of fishermen (STCWF-F 95)) in order to avoid legal and safety concerns (medical certification, basic training, employment relationship, language issues).*

### **6.2.2. EU and RFMOs: the ‘shark fins attached’ Regulation**

Sharks caught by EU vessels anywhere in the world must be landed with their fins naturally attached as provided by Regulation 605/2013 regarding the removal of fins of sharks on board vessels. In Galicia (Spain) alone, this policy has led to the decommissioning of 20 EU vessels, due to the higher operational costs for production, loss of storage space and that community vessels compete with non-EU fleets fishing in the same areas that do not follow this rule. This figure represents a reduction of 15% of this fleet and almost 10% of capacity.

The EU has tried to propose a similar ‘fins attached’ policy in ICCAT<sup>12</sup>, together with other ICCAT contracting parties, but Asian countries rejected it.

The European Commission through the Regulation 2016/2336 also proposed to ban fishing authorisations for vessels using bottom trawls or bottom-set gillnets targeting deep-sea species in the North East Atlantic. In the end, policy-makers decided to prohibit fishing authorisation for bottom trawling at a depth below 800 metres only in EU waters. This is another example whereby the EU adopted restrictive measures for the EU fleet in contrast with RFMO regulations.

As a result, while no deep sea species can be fished by EU bottom trawlers below 800 meters and therefore cannot enter the EU market, a non-EU vessel operating just a few miles north of the EU waters has no problem to operate in this manner and sell the fish in the EU.

#### **Recommendations**

- *The EU should continue providing financial and operational support to RFMOs to assist them in enhancing data collection, monitoring and control.*
- *The EU has on many occasions failed in trying to export stringent measures to RFMOs. Therefore, EU legislation forcing EU vessels operating in RFMO regulated areas to comply with stringent standards creates uneven playing field and a discriminatory treatment that may lead to a loss of competitiveness and negative socio-economic impacts.*
- *As mandated by Art. 28.2.d) of the CFP, the EU must ensure that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a level playing field for Union operators vis-à-vis third-country operators. Therefore, prior to approval of stricter provisions for the EU fleet, the EU shall verify acceptance from both EU operators and the international community.*

### **6.2.3. EU participation in UN bodies: Promotion of the implementation of FAO Voluntary Guidelines for Catch Documentation Schemes**

*[Note from the FG: although interesting, this case does not relate to LPF between EU and imported products, it remains to be seen if it should be left in the final MAC report – we leave it here for the moment for further reflexion]*

The FAO Voluntary Guidelines for Catch Documentation Schemes<sup>13</sup> have been elaborated in response to the concerns expressed in the UN Fisheries Resolution on Sustainable Fisheries of 9 December 2013 over the continued threat to marine habitats and ecosystems represented by IUU fishing and other relevant criteria relating to catch documentation schemes. They have been adopted in July 2017.

#### **Recommendation**

12 [https://www.iccat.int/com2018/ENG/PA4\\_806\\_ENG.pdf](https://www.iccat.int/com2018/ENG/PA4_806_ENG.pdf)

13 <http://www.fao.org/3/a-i8076e.pdf>

*The Commission should continue to increase assistance and provide capacity building, including financial and technical assistance, technology transfer and training for developing states in order to implement these guidelines, particularly electronic catch certificates.*

### **6.3. Trade procedures & documentation schemes**

#### **6.3.1. Equivalent controls on traceability of the complete production process of fisheries products**

In the case of imports of aquaculture products, different approaches exist in applying surveillance of the production process at the global level, for example, the use of antibiotics/additives and disinfectants. Within the EU, EU producers are obliged to ensure traceability throughout the whole production process. This includes food safety, hygiene, welfare and feed. In the case of imported products, despite the principle of “whole chain requirement” they are often checked at the last stage of production (registered establishment). For example, it is prohibited in the EU to use feed including meats of ruminant origin, yet third countries are able to feed their fish on this type of feed with no EU checks as it depends from national rules. Proving this is extremely difficult since, to our knowledge, it is not possible to measure this in fish protein or materials without having access to compound feed samples. Even though the products are not considered to be of danger to human health, this is putting EU producers at a disadvantage since EU producers are not allowed to use this type of feed. Similarly, EU producers are not allowed to feed fish with feed of the same species (ie. cannibalism) yet, again, this cannot be checked.

#### **Recommendations**

- *It is extremely difficult to impose the same EU standards on third countries without interfering in their legislation and by ensuring accurate testing of the product. However, one option could be certification and labelling programmes that include these establish consistent rules: any certification programme would have the same requirements globally, which would contribute to transparency and favour consumer confidence.*
- *The EU must step up efforts in sanitary controls for both fishery and aquaculture products and IUU inspections to ensure that fishery products entering the EU market from third countries are legal as well as sustainable.*
- *GMO products can only be sold for consumption in the EU after they have been authorised at EU and national level even though they comply with all national requirements in origin. This process includes a scientific risk assessment. A similar approach should be applied to imported fishery products treated with unlawful chemicals or fished with methods that are banned in the EU, which should be checked at both 3<sup>rd</sup> country level and at Border Inspection Posts.*

#### **6.3.2. Health certificates**

Since 1 July 2018, the date on which the Regulation 2017/1973 came into force, the European fishing fleet, which performs fishery transfers in ports of third countries, are required to provide a health certificate signed by the health authorities of those countries. In addition, the containers transporting this fish are required to pass through the Border Inspection Posts when reaching EU ports. It should be noted that the fish is considered European for all legal and practical purposes.

Within this context, the Shipowners' Cooperative of the Port of Vigo (ARVI) has produced an economic report of the new costs derived from compliance with these new requirements. Thus, of the

approximately 400 transfers carried out by this fleets (around 175 by the trawler fleet and around 225 by the longline fleet), an approximate cost of around € 4,000 and around € 7,300 has been calculated for each transfer carried out by longline and trawl fleets respectively, which in global terms, entails a cost of around 3 million € per year. All this without taking into account the expenses derived from the incidents generated by the application of these new measures in relation to the operation of transshipments in ports of third countries.

From the point of view of the affected fishing sector, transshipments at port must be subject to health controls, but they cannot be subject to the same health controls required to imports of non-EU fishery products that access the EU market. On the one hand, because it does not take into account that EU ships periodically update their respective health records through on-site inspections on board (analysis of critical points), a circumstance that does not occur with foreign fishing vessels, which are not subject to EU health controls, but only to controls by their national flag states. On the other hand, because of the fact that the current model for the control of transshipments is expensive for EU operators.

In summary, since the fish caught by EU vessels has to remain for a short period of time in ports of third countries to be transhipped, they are treated, in sanitary terms, as products from third countries.

### **Recommendations**

*A simplified health control model for the long-distance fishing fleets carrying out their transshipments in ports of third countries would be necessary so as to facilitate their procedure in terms of burden and costs. Furthermore, if the documentary checks are favourable, these consignments should benefit simplified identity and physical checks at border inspection post.*

Extract of EU CFP regulation referring to level playing field - Regulation (EU) No 1380/2013

Recital (50)

The Union should promote the objectives of the CFP internationally, ensuring that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law, and promoting a **level-playing field** for Union operators and third-country operators.

Recital (54)

The Commission's Strategy for the Sustainable Development of European Aquaculture adopted in 2009, which was welcomed and endorsed by the Council and welcomed by the European Parliament, noted the need for the creation and promotion of a **level-playing field** for aquaculture as the basis for its sustainable development.

Recital (57)

There is a need to strengthen the competitiveness of the Union fishery and aquaculture sector, and for simplification in support of better management of its production and marketing activities. The common market organisation for fishery and aquaculture products should ensure a **level-playing field** for all fishery and aquaculture products marketed in the Union **regardless of their origin**, (...)

Article 2 (Objectives) –

Point 5 The CFP shall, in particular:

(...)

(g) contribute to an efficient and transparent internal market for fisheries and aquaculture products and contribute to ensuring a **level-playing field** for fisheries and aquaculture products marketed in the Union;

Article 28 (EXTERNAL POLICY)

In order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles set out in Articles 2 and 3.  
Point 2 - In particular, the Union shall:

(d) ensure that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a **level-playing field** for Union operators vis-à-vis third-country operators;

Article 33 (MANAGEMENT OF STOCKS OF COMMON INTEREST TO THE EU AND 3<sup>rd</sup> COUNTRIES ; AGREEMENTS ON EXCHANGE AND JOINT MANAGEMENT)

1. Where stocks of common interest are also exploited by third countries, the Union shall engage with those third countries with a view to ensuring that those stocks are managed in a sustainable manner that is consistent with this Regulation, and in particular with the objective laid down in Article 2(2). Where no formal agreement is reached, the Union shall make every effort to reach common arrangements for fishing of such stocks with a view to making the sustainable management possible, in particular, concerning the objective in Article 2(2), thereby promoting a **level-playing field** for Union operators.

Article 35 (COMMON MARKET ORGANISATION)

*Objectives*

1. A common organisation of the markets in fishery and aquaculture products (the common market organisation) shall be established to:

(e) contribute to ensuring a **level-playing field** for all products marketed in the Union by promoting sustainable exploitation of fisheries resources;

Extract of EU CMO regulation referring to level playing field - Regulation (EU) No 1379/2013

*Recital (4)*

*The provisions of the CMO should be implemented in compliance with the international commitments of the Union, in particular with regard to those under the provisions of the World Trade Organisation. When trading in fishery and aquaculture products with third countries, the conditions for fair competition should be ensured, in particular through respect for sustainability and the application of social standards equivalent to those which apply to Union products.*

*Recital (12)*

*As fish stocks are shared resources, their sustainable and efficient exploitation can, in certain instances, be better achieved by organisations composed of members from different Member States and different regions. Therefore, it is also necessary to encourage the possibility of setting up producer organisations and associations of producer organisations at national or transnational level based, where appropriate, on biogeographical regions. Such organisations should be partnerships that seek to lay down common and binding rules and to provide **a level playing field** for all stakeholders that are engaged in the fishery. In setting up such organisations, it is necessary to ensure that they remain subject to the competition rules provided for in this Regulation and that the need to maintain the link between individual coastal communities and the fisheries and waters that they have historically exploited is respected.*