

September 2017

The control and enforcement of fisheries in the Netherlands

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Executive summary and recommendations

In 2009, the European Union (EU) adopted a new regulation, the "Control Regulation", to establish general rules and principles governing the control of fisheries across its Member States. This regulation entered into force in 2010. It places a number of enforcement obligations on Member States' competent authorities:

- Ensuring that appropriate measures are taken for every breach of the rules of the Common Fisheries Policy (CFP);
- Imposing sanctions which effectively deprive those responsible of the economic benefit derived from their infringement for all types of infringements. For serious infringements, sanctions must be effective, proportionate and dissuasive;
- Establishing a penalty point system for licence holders and masters of fishing vessels who commit a serious infringement of the rules of the CFP;
- Entering into a national register all infringements of the rules of the CFP.

It is now seven years after the entry into force of the Control Regulation, and ClientEarth was unable to find an assessment of the extent to which the Netherlands are complying with these requirements. Therefore, through desk-based research and stakeholder interviews, we endeavour through this case study to assess the Netherlands' degree of implementation of the enforcement provisions of the Control Regulation.

This report examines the Dutch fisheries enforcement framework and its implementation in light of the requirements of the Control Regulation. It presents an overview of the Dutch control system for fisheries and a detailed analysis of the enforcement system, with a focus on the implementation of the sanctions scheme and the penalty point system. It also assesses transparency and access to information in relation to fisheries enforcement matters.

The organisation of fisheries control and enforcement in the Netherlands is based on the 1963 Fisheries Act and on several implementing acts. The Dutch Food and Consumer Product Safety Authority (or NVWA) is in charge of carrying out inspections in the coastal area and Exclusive Economic Zone (EEZ) of the Netherlands, as well as throughout the supply chain. The inspectors have the power to issue the so-called "*proces verbaal*"¹ when infringements to the applicable regulations are detected.

Once the "*proces verbaal*" is established, criminal proceedings can take place. The sanctions imposed by the Courts consist of fines and community service. Administrative sanctions can complement criminal ones and can take the form of (i) the suspension or withdrawal of fishing licences, (ii) the assignation of penalty points to the licence holder or to the master of the fishing vessel and (iii) the registration of the infringement into a national register of infringements. In this respect, the obligations of the Control Regulation have been effectively introduced into Dutch law.

In practice, data gathered in the course of this study has shown that the NVWA has decreased in size in the recent years and holds fewer resources, a situation which undermines the quality and effectiveness of inspections. In addition, there are also some concerns regarding the independence of the NVWA because it has a role as an inspection authority and as a certification

¹ Similarly to French or Belgian law; a "*procès verbal*" (in French) is a legal act written by a public official who has observed an infringement.

authority. Moreover, when infringements are detected, the general level of sanctions applied is low and cannot be considered as deterrent.

Recommendations

As a result, ClientEarth recommends that to improve the control system for fisheries in the Netherlands, the Dutch competent authorities:

- Increase the independence of the NVWA and the quality and effectiveness of inspections by ensuring there is sufficient funding, equipment and staff to inspect and impose sanctions;
- Ensure that the level of sanctions applied is actually a deterrent. Information collected throughout this study suggests that the level of sanctions in the Netherlands is quite low, in contradiction with the requirements of the Control Regulation. In addition, official guidance must be provided by the Ministry of Economic Affairs to the administrative and judicial authorities to ensure that they take into account the impact on the fish stock(s) concerned and on the marine environment, when deciding on the amount of a fine or sanction;
- Increase cooperation between the administrative and judicial authorities to ensure better coherence of the sanctions applied;
- Increase transparency through improving the availability and reliability of implementation data. Not only is most of the data not publically available, but it was also sometimes contradictory. Publishing consolidated data on fisheries infringements and sanctions would help to build trust amongst the fishing communities operating within the Netherlands and across Europe, and ultimately ensure that the level-playing field necessary to promote a culture of compliance actually exists.

Introduction

Although the European Union (EU) has exclusive competence for the conservation of marine biological resources under the Common Fisheries Policy (CFP),² it shares with its Member States the competence regarding fisheries control and enforcement. It seems now to be generally accepted that, in this respect, the EU institutions are in charge of adopting general rules which are then implemented by the Member States. The Member States are also responsible for applying sanctions in cases of infringements to the rules of the CFP. The EU, as such, has no competence to oblige its Member States to all have the same level of sanctions. Nevertheless, it can encourage them to harmonise their systems.

Prior to 2010, huge discrepancies existed within the national control systems of Member States with regard to sanctions for fisheries infringements. It has been noted, for example, that "*the average fine for fishing without holding a fishing licence ranged from €63 to €24,328 in 2006*",³ depending on the Member State in which the infringement took place.

In 2009, the control system for fisheries in Europe went through a drastic change. Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the CFP - the "Control Regulation" - was adopted and entered into force on 1 January 2010.⁴ One of the objectives of the Control Regulation was to ensure a level playing field for EU fishing operators, including in the areas of enforcement and sanctions. As a result, the regulation, through its Title VIII on Enforcement, seeks better harmonisation of sanctions across Member States. It also encourages the use of administrative sanctions for all infringements, including serious ones.⁵ Finally, it foresees the introduction of a penalty point system when serious infringements are committed.⁶

Article 118 of the Control Regulation requires the Commission to report to the European Parliament and the Council on: (1) the status of implementation of the regulation in the Member States every five years, and (2) the evaluation of its impacts on the CFP five years after its entry into force. In April 2017, for the first time since 2010, the Commission published its evaluation of the Control Regulation.⁷

This major report highlighted that sanctions for fishing violations are inconsistent and not enough of a deterrent to encourage compliance amongst fishers. The Commission found that, although the implementation of the Control Regulation led to many improvements in the existing control system, many EU countries still show little willingness to catch or fine boats fishing in the wrong place, at the wrong time or without quota for their catches. Enforcement, especially concerning

² Article 3 of the Treaty on the Functioning of the European Union: "The Union shall have exclusive competence in [...] the conservation of marine biological resources under the common fisheries policy".

³ Commission staff working document SEC(2008) 2760 of 14 November 2008 accompanying the proposal for a Council Regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy.

⁴ Council Regulation (EC) n° 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (Control Regulation).

⁵ Article 90(2) of the Control Regulation. Administrative sanctions can take the form of oral or written warning, fines, or suspension or withdrawal of fishing licenses...

⁶ Article 92 of the Control Regulation.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2017:192:FIN&from=EN> ; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2017:134:FIN>.

sanctions, the point system and the follow-up of infringements are some of the areas that show the biggest shortcomings, as highlighted by the Commission in its report.⁸

Against that background, this case study will focus on the implementation to date of the enforcement requirements of the Control Regulation in the Netherlands. As has already been underlined, the EU tends in general to favour the use of administrative sanctions in order to handle cases of violations of the rules of the CFP. Indeed, according to a 2014 study,⁹ most Member States are predominantly using administrative instead of criminal sanctions to deal with fisheries infringements. But they are also free to use criminal sanctions. The Netherlands, for example, combines both systems. In this respect, the use of administrative sanctions allows this Member State to implement the general enforcement requirements of the Control Regulation as a complement to the criminal sanctioning procedure.

The case study will also focus on the enforcement-related provisions of another important piece of fisheries legislation aimed at fighting Illegal, Unreported and Unregulated (IUU) fishing, the IUU Regulation.¹⁰ A general discussion on the implementation of these provisions by several Member States can be found in another document,¹¹ together with an EU-level analysis of the findings of five other case studies conducted in Ireland, England, France, Poland and Spain.¹²

1 The Dutch fisheries enforcement framework

In the Netherlands, there are three important pieces of fisheries legislation. Firstly, the 1963 Fisheries Act or "*Visserijwet*" lays down general provisions regulating the Dutch fisheries, including basic rules on the organisation of control and enforcement.¹³

Secondly, the 1977 Regulation on Sea and Coastal Fisheries authorises the Minister of Economic Affairs to adopt ministerial decrees establishing fisheries conservation measures and implementing the international obligations contracted by the Netherlands.¹⁴

Various ministerial decrees have been adopted on the basis of the 1977 Regulation. One of them, the 2011 Implementing Regulation on Sea Fisheries, is of particular interest for this case study.¹⁵ It lays down rules implementing the obligations under the CFP, and its section 6 specifically relates to the provisions of the Control Regulation.¹⁶

⁸ ClientEarth, Commission warns lack of enforcement is undermining EU fisheries law, <https://www.clientearth.org/commission-warns-lack-enforcement-undermining-eu-fisheries-law/>.

⁹ Blomeyer & Sanz (2014), Illegal, Unreported and Unregulated Fishing: Sanctions in the EU, Study, European Parliament, p.37.

¹⁰ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

¹¹ <http://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland/>.

¹² <http://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland/>.

¹³ Wet van 30 mei 1963, houdende nieuwe regelen omtrent de visserij (Dutch Fisheries Act) <http://wetten.overheid.nl/BWBR0002416/2015-01-01>.

¹⁴ Articles 3 and 4 of Besluit van 25 november 1977, houdende bepalingen omtrent de uitoefening van de zee- en kustvisserij (Regulation on Sea and Coastal Fisheries) <http://wetten.overheid.nl/BWBR0003144/2015-01-01>.

¹⁵ Regeling van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie, van 14 juli 2011, nr. 218837, houdende samenvoeging en vereenvoudiging van diverse regelingen op het gebied van de zeevisserij (Implementing Regulation on Sea Fisheries), <http://wetten.overheid.nl/BWBR0030288/2017-04-11>.

¹⁶ Articles 91 to 130 of the Implementing Regulation on Sea Fisheries.

1.1 The organisation of fisheries control

The Ministry of Economic Affairs or "EZ" is the competent authority for fisheries in the Netherlands. Under its responsibility are two executive agencies involved in the implementation of the Control Regulation.¹⁷ The Dutch Food and Consumer Product Safety Authority, or "NVWA", is responsible for ensuring compliance with EU and Dutch fisheries law. Its fisheries inspectors are in charge of surveillance and control in the coastal area and Exclusive Economic Zone (EEZ), as well as throughout the supply chain.¹⁸ The Dutch Enterprise Agency or "RVO" has a special unit, the "VIR", in charge of the enforcement of fisheries rules.

In addition, a national Fisheries Monitoring Centre, as defined by the Control Regulation, has been established under the authority of NVWA and is located in Den Helder.¹⁹ It is responsible for collecting and processing Vessel Monitoring System (VMS) and Electronic Recording and Reporting System (ERS) data. It is also in charge of coordinating inspections at sea and of supporting the coordination of inspections of landings.²⁰

At sea, the fisheries inspectors of the NVWA cooperate with the Dutch Coastguard, along with other departments and services with enforcement tasks in the North Sea.²¹ The different partners of the Coastguard establish annual enforcement plans and share information on a continual basis.²² When an irregularity is detected, a surveillance report is issued and a further inspection takes place.²³

Inspections at sea focus on checking fishing gears, logbooks, stowage plans (including separate stowage plans) and catch composition (for example checking that the percentages of target and bycatch species is within permissible limits). For safety reasons, inspections do not look at engine power during inspections at sea, but in port.²⁴

The NVWA inspectors carry out landings, markets and companies inspections in ports, in auctions and in cold storage facilities. Inspections can also take place during the transport of fish between ports and auctions.²⁵

The fisheries inspectors' powers include the right to:

- Board fishing vessels to verify fishing gears, inspect documents, licences and leases, or any other documents needed by the officers in the performance of their duties;²⁶

¹⁷ The Netherlands, Five Years Report on the implementation of the Control Regulation,

https://www.asktheeu.org/en/request/member_state_reports_under_artic?nocache=incoming-12455#incoming-12455.

¹⁸ Article 54a of the Dutch Fisheries Act ; Article 1, Besluit van de Staatssecretaris van Economische Zaken van 29 juni 2016, nr. WJZ/16082842, houdende aanwijzing toezichthouders 2016 Visserijwet 1963 (Decree for the 2016 Designation of Supervisors of the 1963 Fisheries Act), <http://wetten.overheid.nl/BWBR0038179/2016-07-05>.

¹⁹ Article 4(15) and Article 9 of the Control Regulation.

²⁰ The Netherlands, Five Years Report.

²¹ For example, the Maritime Police, the Royal Navy, customs, etc. For further information: <https://www.kustwacht.nl/en/participants.html>

²² The Netherlands, Five Years Report.

²³ The Netherlands, Five Years Report ; Article 71 of the Control Regulation.

²⁴ Article 74 of the Control Regulation.

²⁵ Article 74 of the Control Regulation.

²⁶ Article 55 of the 1963 Dutch Fisheries Act.

- Enter any premises in so far as this is reasonably necessary for the performance of their duties. If entry is denied, inspectors may gain access by force if needed. Entering private premises is conditional upon a written authorisation from a judge;²⁷
- Formally request masters to stop their vehicles, permit inspections of the vehicle and of the materials on board;²⁸
- Seize objects for confiscation, even outside the case of obvious offence.²⁹

The NVWA inspector issues an inspection report after each inspection at sea, after landing or during transport and sends this to the NVWA and to the ship owner.³⁰ The report must include specific information about the inspection and, importantly, state whether an infringement has been detected during the inspection.³¹

The NVWA stores all the surveillance and inspection reports in an electronic database.³² In the Netherlands, it is called the SPIN system.

Furthermore, when an infringement is committed by a vessel flying the flag of another Member State, the competent authorities of the coastal Member State must transmit the inspection report to the flag Member State and to the ship owner. When the Netherlands receives an inspection report from another Member State which concerns an infringement committed by a Dutch vessel, this report forms the basis for a further investigation or prosecution if the case is transferred to the Netherlands.³³

Outside waters under its sovereignty, the Netherlands may carry out inspections on the fishing vessels of other Member States under restrictive conditions.³⁴ Under the coordination of the European Fisheries Control Agency (EFCA), the Netherlands participates in the Joint Deployment Plans (JDPs) for the North Sea, the Western Waters and the area of competence of the North East Atlantic Fisheries Convention (NEAFC).

1.2 Enforcement and sanctions

Once an infringement is detected, Member States have an obligation under the Control Regulation to take appropriate measures, such as administrative sanctions or criminal proceedings, against the offender.³⁵ In the Netherlands, both administrative and criminal sanctions can be imposed.

²⁷ Article 60 of the 1963 Dutch Fisheries Act.

²⁸ Article 61 of the 1963 Dutch Fisheries Act.

²⁹ Article 62 of the 1963 Dutch Fisheries Act.

³⁰ Articles 76(1) and (2) and 82 of the Control Regulation.

³¹ See the list of minimum information required in Annex XXVII of the Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009.

³² Article 78 of the Control Regulation.

³³ The Netherlands, Five Years Report; Article 76(1) of Control Regulation.

³⁴ Article 80 and 81 of the Control Regulation.

³⁵ Article 89 of the Control Regulation.

1.2.1 Infringement procedure: the "intervention policy"

When an infringement is reported, the NVWA applies an "intervention policy" (*interventiebeleid*), reproduced in the table below.³⁶ In this policy, the infringement will be categorised according to its degree of seriousness. This classification in turn determines the types of intervention measures and follow-up actions.³⁷

The classification depends on the following factors:

- Economic gain;
- Damage to the environment;
- Undermining of the legal system; and
- Whether this is a repeat offence.³⁸

The NVWA applies the so-called "*soft where it can be, hard where it must be*" approach. This means that when the "soft" intervention policy, with corrective and sanctioning interventions (such as warnings, registration of the infringements or assistance provided to fishers to help them comply with the rules) does not effectively address the issue detected, then the NVWA escalates its action.³⁹ Depending on the classification of the infringement, the NVWA will undertake one or more of the following intervention measures:

- Address a warning brief to the offender for minor infringements (for class D infringements), i.e. when not falling under the scope of the 1950 Act on Economic Offences (see below);⁴⁰
- Send a "*proces verbaal*" (PV) to the public prosecutor's office for infringements falling under the scope of the 1950 Act on Economic Offences (classes A, B, C);
- Submit an administrative enforcement report, called a "BEHAVI report" (*bestuurlijke handhaving visserijrapport*),⁴¹ to the RVO for serious infringements of the CFP (classes A and B).⁴²

³⁶ NVWA, Interventiebeleid zeevisserij duurzaamheid, 1st of December 2015, <https://www.nvwa.nl/over-de-nvwa/documenten/export/veterinair/ks-documenten/interventiebeleid/ib02-spec48-v01-interventiebeleid-zeevisserij-duurzaamheid>.

³⁷ The Netherlands, Five Years Report.

³⁸ The Netherlands, Five Years Report.

³⁹ The Netherlands, Five Years Report.

⁴⁰ Article 1a of Wet van 22 juni 1950, houdende vaststelling van regelen voor opsporing, de vervolging en de berchting van economische delicten (The 1950 Economic Offences Act), <http://wetten.overheid.nl/BWBR0002063/2017-01-01>.

⁴¹ ClientEarth requested more information about the exact nature of such reports from the Dutch administrative authorities, but no answer was received.

⁴² Serious infringements to the CFP are listed in Articles 3 to 20 of Beleidsregel van de Staatssecretaris van Economische Zaken van 20 maart 2017, nr. WJZ/17038522, betreffende de kwalificatie van activiteiten als ernstige inbreuken op het Gemeenschappelijk Visserijbeleid (2017 Policy Rule for Serious Infringements under the CFP), <http://wetten.overheid.nl/BWBR0039373/2017-03-25>.

Infringement class	Intervention at the first observation of the infringement	Follow-up	Interventions in case of repeated infringement
Class A : crime or serious offence	Criminal prosecution ; BEHAVI ; compliance assistance ; registration in the national register		PV ; BEHAVI ; compliance assistance ; registration of the infringement
Class B : serious offence	PV ; BEHAVI ; compliance assistance ; registration in the national register	Re-inspection as soon as possible	PV ; BEHAVI ; compliance assistance ; registration of the infringement
Class C : offence	Written warning or PV ; compliance assistance ; and registration in the national register	Re-inspection within 4 months	Written warning, corrective intervention (such as seizure); compliance assistance ; PV
Class D : minor infringement	Verbal or written warning ; compliance assistance ; registration of the infringement in the national register	No action	Verbal or written warning; compliance assistance ; registration of the infringement in the national register

The approach aims to conclude the infringement procedure as quickly as possible and prevent its recurrence. It also ensures that the NVWA adapts its inspections frequency and applies heavier intervention instruments to notorious violators.

1.2.2 Determination of serious infringements

Activities considered serious infringements of the CFP

The 2017 Policy Rule for Serious Infringements fully implements Articles 3(1) and 42(1) of the IUU Regulation as well as Article 90(1) of the Control Regulation.⁴³

Criteria to determine serious infringements

For the purpose of Article 42(2) of the IUU Regulation and Article 90(1) of the Control Regulation, the national competent authority of each Member State must assess the seriousness of each detected infringement. The Control Regulation has defined several criteria which can be taken into account in order to determine the seriousness of an infringement. However, this list of criteria is not exhaustive, and the Member States enjoy a certain level of discretion in this determination.⁴⁴

In the Netherlands, the NVWA determines whether an infringement is "serious", based on the circumstances of the case, including:

⁴³ Articles 3 to 19 of the 2017 Policy Rule for Serious Infringements under the CFP.

⁴⁴ Article 90(1) of the Control Regulation, Articles 3(2) and 42 of the IUU Regulation. Criteria include the nature of the damage, its value, the economic situation of the offender and the extent of the infringements or its repetition.

- The nature of the infringement;
- The consequential damage;
- The value of the damage to the concerned fish stocks and to the marine environment; and
- The extent of the infringement.⁴⁵

1.2.3 Enforcement measures

Depending on the classification by the NVWA, an administrative proceeding and/or criminal prosecution can take place and lead to sanctions. There are very few administrative penalty options available, as the sanctioning system is criminal in nature. Moreover, it is important to keep in mind that administrative proceedings are completely independent and separate from criminal prosecution, as outlined below.

(a) Criminal proceedings

"*Proces-verbaal*" are sent to the Public Prosecution Office in Amsterdam,⁴⁶ which has a specific department to deal with environmental crimes, including fisheries infringements. Only the prosecutor can decide whether or not to bring a case before court. The "prosecutorial discretion" (*opportuiniteit beginself*) enjoyed by the prosecutor gives him a large amount of leeway, and therefore not all fisheries offences that could be prosecuted criminally actually are. While the prosecutor will look at the specific elements and circumstances of each case, there is also internal guidance to help prosecutors decide if an infringement should be prosecuted or not, as well as the level of fines deemed appropriate for each type of offence.

The prosecutor has also the power to waive prosecution or to propose an out-of-court settlement.⁴⁷ The latter allows the settlement of a case without the recourse to judicial prosecution. It is often offered when an infringement occurs for the first time and is relatively minor. If the suspect does not accept the offer of the compromise settlement (usually a fine), then the case is brought to court.⁴⁸ For other cases where the prosecutor deems it appropriate to prosecute the case, it will be brought before the Amsterdam Court (where all cases related to fisheries infringements will be heard).

For violations of rules regarding inspections and investigations, the Court can impose a custodial sentence of up to 3 months, or a fine of up to €4,100.⁴⁹

Any other violation of fisheries rules, either national or European, falls under the scope of the 1950 Act on Economic Offences.⁵⁰ This specific act complements the Dutch Criminal Code and lists many common criminal provisions for economic offences. Article 2 of the Economic Offences Act distinguishes "offences" from "crimes" ("*overtreding*" and "*misdrijf*").⁵¹ The latter refers to

⁴⁵ Article 2(2) of the 2017 Policy Rule for Serious Infringements.

⁴⁶ The National Public Prosecutor office for serious fraud, environmental crime and asset confiscation.

⁴⁷ The Netherlands, Five Years Report.

⁴⁸ The Netherlands, Five Years Report.

⁴⁹ Article 55, 56 or 61 of the 1963 Fisheries Act ; Article 23 of Dutch Criminal Code, <http://wetten.overheid.nl/BWBR0001854/2017-03-01>.

⁵⁰ Article 1a of Wet van 22 juni 1950, houdende vaststelling van regelen voor opsporing, de vervolging en de berchting van economische delicten (The 1950 Economic Offences Act), <http://wetten.overheid.nl/BWBR0002063/2017-01-01>.

⁵¹ Article 2 of the 1950 Economic Offences Act.

infringements committed with intent. As far as an infringement cannot be considered as a crime, it has to be considered as an offence.⁵²

Article 6 of the Economic Offences Act lays down maximum penalties. Offences may be punished by fines of up to €20,500, while crimes are punishable by fines of up to €82,000 or 6 years imprisonment.⁵³

Article 7 foresees accompanying sanctions, such as the withdrawal of licences, the closure of businesses or the publication of judgements.⁵⁴

Articles 28 and 29 define the provisional measures that the prosecutor or judge can order.⁵⁵

(b) Administrative measures

On the basis of the BEHAVI report received from the NWWA, the RVO can impose administrative sanctions. Breaches of applicable fisheries rules can be sanctioned by one or more of the following penalties:

- The assignation of penalty points to the licence holder or to the captain of the fishing vessel;
- The suspension or withdrawal of the fishing licence or of the fishing authorisation;
- The registration of the infringements in the national register of infringements.

Penalty Point System

The Control Regulation foresees the introduction of a penalty point system for serious infringements, on the basis of which the holder of a fishing licence is assigned a number of points for breaking the rules of the Common Fisheries Policy.⁵⁶ Member States are also required to establish a point system where the master of the vessel can receive penalty points for the infringements they themselves commit.⁵⁷

The types of infringements that can be considered 'serious' and therefore lead to the assignment of penalty points are listed in Annex VIII of the Control Implementing Regulation. The list also stipulates the number of points that can be granted for each offence.⁵⁸

The Dutch penalty point system, for both licence holders and masters of fishing vessels, entered into force on 1 January 2012.⁵⁹

The RVO (on behalf of the Minister of Economic Affairs) enjoys a certain level of discretion in deciding whether the infringement is serious enough to assign points. The RVO is in charge of

⁵² Article 1, 4 of the 1950 Economic Offences Act.

⁵³ Article 6 of the 1950 Economic Offences Act.

⁵⁴ Article 7 of the 1950 Economic Offences Act ; Article 90 (6) of the Control Regulation and Article 45 of the IUU Regulation. The publication of the judgment in the press or its display in public places can be ordered by the judge.

⁵⁵ Articles 28 and 29 of the 1950 Economic Offences Act ; Article 91 of the Control Regulation and Article 43 (1) of the IUU Regulation.

⁵⁶ Article 92(1) and (2) of the Control Regulation.

⁵⁷ Article 92(6) of the Control Regulation.

⁵⁸ Annex VIII of the Control Implementing Regulation.

⁵⁹ Article 130 of the 2011 Implementing Regulation on Sea Fisheries.

examining the BEHAVI and for deciding whether or not to assign penalty points for infringements that could be categorised as 'serious'. For such assessments, a number of criteria are taken into account, such as:

- The nature and the value of the damage caused by the violation;
- The economic situation of the person concerned; and
- The extent of the violation.⁶⁰

Even if the violation of a fishing rule is found by a foreign authority, it is the RVO which decides whether to attribute points.⁶¹

The point system does not interfere with the discretionary power of the national judge in assessing the facts of the case and the gravity of the behaviour in question.

Suspension or withdrawal of fishing licences

The idea behind the point system is that once a certain number of penalty points have been accumulated within a three-year period, the RVO suspends the vessel's licence or forbids the master of the vessel to sail as a "captain" for 2, 4, 8 or 12 months, depending on the number of points (see table below).⁶²

Total number of points accumulated within a three-year period.	Suspension of the licence	Prohibition for the master of the vessel to sail as a "captain"
18	2 months	2 months
36	4 months	4 months
54	8 months	8 months
72	12 months	12 months
90	Permanent withdrawal	3 years

In addition to a withdrawal or suspension as a consequence of the point system, the Minister may also suspend or revoke the fishing licence for certain period if, in the opinion of the Minister:

- The fishing vessel has been operating in contravention to fishing opportunities measures laid down in Article 20a, 21(1), (3) (6), 22, 46a, and 46c of the Implementing Regulation on Sea Fisheries; or

⁶⁰ <https://www.rvo.nl/sites/default/files/2016/05/Puntensysteem%20voor%20ernstige%20inbreuken.pdf>

⁶¹ <https://www.rvo.nl/sites/default/files/2016/05/Puntensysteem%20voor%20ernstige%20inbreuken.pdf>

⁶² Article 92(3) of the Control Regulation and Article 129 of the Control Implementing Regulation; Articles 96 and 130 of Implementing Regulation on Sea Fisheries.

- The operator of a fishing vessel to whom a fishing licence has been granted, or their authorised representative, does not comply with the regulations attached to the fishing licence.⁶³

National register of infringements

As required under Article 93 of the EU Control Regulation, all the infringements to the rules of the CFP, the incurred sanctions, and the assigned points (if applicable) must be entered in a national register of infringements, and data must be stored for a period of at least three years.⁶⁴

In the Netherlands, this is done through what is called the "SPIN system". This electronic system gathers the surveillance and inspection reports, the detected infringements, as well as the data relating to the outcomes of the criminal and administrative proceedings (sanctions, cases dropped, out-of-court settlements, etc.). This national register also includes information on the penalty points applied, if any.

2 What is happening in practice?

This case study has so far summarised how the Dutch system of control is meant to work. This section will look at how the Dutch system of control is working in practice, and in particular, how effectively the system is fulfilling the requirements set in the EU Control and IUU Regulations.

2.1 Inspections

In 2014, the Dutch fleet was composed 833 vessels and 827 fishing licences were attributed.

During the reporting period of 2010-2014, the following data were registered:

- There is one surveillance vessel exclusively assigned to fisheries control.
- There is one plane to monitor fishing activities, in particular in fishing prohibited areas.
- The number of inspectors working full time have decreased from 42 to 36.
- The total number of inspections is equivalent to the total number of the inspection reports entered in the fisheries control and surveillance database : 5,483.
- The total number of inspections of vessels at sea was 1,425: 205 in 2011; 466 in 2012; 356 in 2013 and 353 in 2014.
- The total number of inspections of landings was 1,280.

- The total number of infringements reported was 752.
- The total number of infringements detected at sea was 174.
- The total number of infringements in relation to landings was 267.

⁶³ Article 96(3) to (5) of the 2011 Implementing Regulation on Sea Fisheries.

⁶⁴ Article 93(1) and (4) of the Control Regulation.

- The total number of penalty points that have been attributed was 16.

Inspections are very weak in practice, and as a 2014 study on sanctions and enforcement revealed:

*"The NVWA is the product of various institutional mergers throughout the last decade. These mergers united agencies dealing with different areas such as plant diseases, food safety and fisheries inspection. The latest, which took place in January 2012, included fisheries control efforts. The NVWA has decreased in size in recent years due to austerity measures and public administration downsizing. Consequently, the authority has fewer resources while dealing with a wide variety of activities. Its role as inspection authority in combination with its role as export certification authority raises potential concerns. Especially considering that the costs of certification of export products, including fish, are primarily carried by the private sector. Despite the professional integrity of the authority, the situation could expose fisheries infringement inspectors to internal pressure bearing in mind that the authority could subsequently deliver paid services to the industry. This potential conflict of interest risk is countered by the fact that fees charged for certifications are intended to cover basic expenses. In other words, there is no profit perspective when delivering certification services and if there is no need for certification, no expenses are made. Nonetheless, the austerity measures imposed on the authority place pressure on its financial management. Lack of resources could have a negative effect on the effectiveness of its activities as well as on its independence and this might jeopardise its integrity. It is therefore recommended to ensure sufficient resources for the inspection authority and to strengthen monitoring of the implementation of austerity measures."*⁶⁵

2.2 Sanctions

Even though there are relatively high maximum fines and the possibility for imprisonment set out in the legislation, the court usually do not apply such penalties.

The most worrying cases that this study uncovered were cases of repeat offences and the capture of prohibited species, in particular the critically endangered European eel (*Anguilla anguilla*). The sanction for such offences is usually community service.

For minor offences, fines vary in practice between €100 and €300. Common minor offences include fishing in prohibited areas, misreporting of data and use of prohibited gears (in particular net with inner nets). The level of the fine depends on the quantity of fish involved, whether it is a repeat offence, whether the operator/master of the vessel has previous convictions and the species involved.

For the period 2010-2014, only 16 penalty points have been attributed to licence holders; 8 in 2012, 4 in 2013 and 4 in 2014.

The possibility to withdraw or suspend fishing licences or authorisations, available under both criminal and administrative laws,⁶⁶ is not often exercised by the court or the RVO. Prosecutors nonetheless often request this sanction, but judges prefer to avoid this type of sanction as they consider this punishment too heavy.

⁶⁵ Blomeyer & Sanz (2014), The common fisheries policy - Infringements procedures and imposed sanctions throughout the European Union, Study, European Parliament.

⁶⁶ Articles 96 and 130 of 2011 Implementing Regulation on Sea Fisheries; Article 7 of the 1950 Economic Offences Act.

3 Discussion and recommendations

3.1 Introduction of EU requirements into Dutch law

In general, Member States have been slow in adopting the laws needed to give full effect to the Control Regulation,⁶⁷ and this is particularly true in relation to the penalty point system. The Control Regulation Implementing Regulation⁶⁸ states that the penalty point system for fishing licence holders must enter into force on 1 July 2011, whereas the ones for masters of fishing vessels must be adopted at the national level at the latest by 1 January 2012.⁶⁹ Many Member States were delayed in adopting one or both of these systems.

However, the Netherlands seems to be the "good student" in this case. The requirements set by the Control Regulation were incorporated into Dutch law in July 2011, thus quite rapidly when compared to other Member States.⁷⁰ The penalty point system for both the licence holder and the vessel master have been effective since 2012 and the national register of infringements is in place (the "SPIN" system).

3.2 Inspections

While the Dutch legal framework for fisheries enforcement was amended in 2011 to incorporate the EU requirements, the new system does not seem to be very effective in practice.

As mentioned earlier, the NVWA has decreased in size in recent years and has fewer resources with which to carry out its duties. Moreover, its role as an inspection authority in combination with its role as an export certification authority raises concerns regarding potential conflict of interests.

3.3 Sanctions

Once an infringement is detected, Member States have an obligation under the Control Regulation to take appropriate measures, such as administrative sanctions or criminal proceedings, against the offender. In the Netherlands, both criminal and administrative sanctions can be applied.

Even though the maximum penalties set out in the legislation are relatively high, the level of sanctions applied in practice seem to be low and therefore cannot be considered to be effective deterrents. Moreover, while the point system for serious infringements exists on paper, it seems that it is not widely applied in practice, as indicated by the low number of penalty points (only 16) that have been attributed between 2012 and 2014.

Furthermore, as stated in the Control Regulation, sanctions for all types of infringements must be applied *"in such way as to make sure that they effectively deprive those responsible of the*

⁶⁷ ClientEarth, Slipping through the net: The control and enforcement of fisheries in England, France, Ireland and Poland, November 2016, <http://www.documents.clientearth.org/wp-content/uploads/library/2016-12-02-slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland-ce-en.pdf>.

⁶⁸ Control Implementing Regulation.

⁶⁹ Article 134 of the Control Implementing Regulation.

⁷⁰ Articles 91 to 130 of the 2011 Implementing Regulation on Sea Fisheries.

*economic benefit derived from their infringement without prejudice to the legitimate right to exercise their profession".*⁷¹ In addition, in the case of serious infringements, Member States must impose maximum administrative sanctions that are at least five times the value of the fishery product obtained by committing the serious infringement.⁷² However, a minimum level of sanctions is not given and, according to our research, is usually much lower.

The impact on the fish stock and the marine environment concerned must also be taken into account.⁷³ When assessing the seriousness of the infringements, the NVWA is supposed to take into account the value of the damage to the fish stock(s) concerned and marine environment.⁷⁴ However, there is no guidance or guidelines available to the competent administrative authorities or judges with regard to how to take this provision into account when deciding on the amount of a fine or sanction.

Finally, the enforcement of fisheries in the Netherlands relies primarily on the criminal system, with the administrative sanctioning system acting as a complementary tool. Although it should not be problematic, legally, to have the two systems running in parallel and independently from each other, it seems that there is very little cooperation and interaction between the administrative and judicial authorities. The decision of a judge to qualify a behaviour as a crime or a serious offence for example, does not bind the administrative authority to classify the infringement as serious and, as a result, to allocate the corresponding number of penalty points, and conversely. This could lead to incoherence in the sanctions imposed on fishers.

3.4 Transparency of fisheries enforcement information

Article 93 of the Control Regulation, which establishes the requirement for a national register of infringements, does not itself require that the register should be publicly accessible. However, other legal provisions support the right of public access to this register. For example, Article 3 of the CFP Basic Regulation includes transparency of data handling, in accordance with existing legal requirements on confidentiality, as one of the main principles of good governance. Therefore, we argue that transparency should be increased through the publication of the relevant data included in the national register of infringements, such as the number of infringement committed yearly, their nature, the average of sanctions they incurred and whether penalty points were attributed as a result of these violations.

⁷¹ Article 89(2) of the Control Regulation.

⁷² Article 90 of the Control Regulation; Article 44 of the IUU Regulation.

⁷³ Article 90(4) of the Control Regulation; Article 44(2) of the IUU Regulation.

⁷⁴ Article 2(2) of the Dutch policy rule for serious infringements under the CFP.

Conclusion

This case study has examined the legal and institutional framework of fisheries control and enforcement in the Netherlands. Compared to most of the Member States analysed so far by ClientEarth,⁷⁵ the Netherlands seem to have been a "good student" in relation to the timeline of the implementation of the EU Control and IUU Regulations requirements. Yet, in practice, our research has shown that the Dutch control and enforcement system is not as effective as it could be, in particular because of the decrease of staff and funding available for fisheries control and inspections, and to the low level of sanctions applied when infringements are detected.

The Dutch system is mainly criminal, and given the wide discretionary powers of prosecutors and judges, guidance and training should be available to help them determine effective, proportionate and dissuasive sanctions that take into account the economic benefit derived from the infringements as well as the prejudice to the fishing resources and the marine environment.

⁷⁵ <http://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-england-france-ireland-and-poland/>.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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