LDAC ADVICE ON EU COMMISSION PROPOSAL FOR SUSTAINABLE MANAGEMENT OF THE EXTERNAL FISHING FLEET FISHING AUTHORISATION REGULATION (FAR)

State: Approved by the Executive Committee
Date: 31 May 2016
Reference: R-04-16/WG5
Original drafting language: English

The Long Distance Advisory Council,

Noting the relevance of the Fishing Authorisation Regulation (EU) No. 1006/2008 (hereinafter, FAR) for the whole scope of activities of this Advisory Council and the Proposal made public by the European Commission on the 10 of December 2015, the Advisory Council has conducted a number of consultations amongst its Members to agree on a common position. In particular:

1. A Web conference meeting (Webex) between available Chairs and Vice-Chairs of the Working Groups and the Executive Committee was held on 27 January 2016.

2. An Intersessional meeting was organized in Madrid on 11 February 2016 of Chairs and Vice-Chairs who conducted an in depth analysis article by article on the proposed text gathering all views in one single document which is made available as an annex to this advice.

3. A Meeting of the Working Group 5 on Horizontal issues was held in Brussels on 10th of March.

4. A Meeting of the Executive Committee in Lisbon, the 31st of May.

Following this intensive work and consultations, the Advisory Council welcomes European Commission´s proposal considering it gives legal certainty and a common framework for all EU Member States fleets operating outside EU waters. In particular, it provides detailed rules applying to all the typologies of fishing activities conducted by EU fleet in external waters. Although these activities were included already under the scope of FAR currently in force, the current text presents a number of “grey areas” that this new Proposal addresses in a comprehensive manner.

Notwithstanding, the Advisory Council considers that, with the aim of improving clarity and ensuring efficient implementation, improvements should be made in specific areas of concern for the Members.

Therefore, **the LDAC advices the European Commission, the Council of Ministers and the European Parliament to:**

1. Ensure the new mechanism included in the proposed text does not create an unnecessary administrative burden, and in no case new measures result in unnecessary delays in the allocation of the authorisations, resulting in economic losses for the fleet. A system to facilitate the allocation of annual fishing authorisations, whilst maintaining the system's efficiency, for vessels having a proven clean track record of compliance with requirements laid down in the Regulation could be considered.

2. Clarify the inclusion of Northern Atlantic bilateral agreements (e.g. EU-Norway/Faroe Islands) in the relevant articles where it pertains. Proposal lacks clarity on this respect in various articles that should be properly addressed.

3. Provide a clear delimitation of responsibilities of each involved administration (Flag State, Coastal State, EU Commission), with particular emphasis in the fishing authorisation allocation and validation processes. This element has been considered key for an efficient implementation.

4. Ensure legal security to operators through coherence and cross-referencing with IUU Regulation and Control Regulation in each article where it pertains.

A detailed analysis article by article of the Commission´s legislative proposal, provided by the industrial fleet representatives, is included as an Annex to this document for information purposes only. In no case, such Annex should be considered as a consensus position from the LDAC but as a compilation of all the views of the different industrial fleets´ organisations that are members (60%) of this Advisory Council.

ANNEX.
Inter Sessional Meeting
Working Groups and Executive Committee Chairs, Vice Chairs & Other members

Thursday 11 February 2016, 09:30-13:30 h
LDAC Secretariat HQ
28036 Madrid (Spain)

DISCUSSION PAPER – INDUSTRY VIEWS

Last Update: 7 March 2016

BACKGROUND / TERMS OF REFERENCE

1. EC PROPOSAL OF FISHING AUTHORISATION REGULATION (FAR)

1.1. GENERAL REMARKS

1.1.1. The new text increases the geographical coverage being applicable to the whole EU long distance fleet in or outside EU waters, i.e. vessels operating in third country waters, RFMOs and high seas/international waters; as well as third country vessels operating in EU waters. It also extends the scope with respect to the current FAR, including both public and private agreements (hereby called direct authorisations). For the public agreements, it is not fully clear if the FAR applies only to SFPAs or also cover other bilateral agreements such as the Northern Atlantic ones (i.e. EU-Norway/Iceland/Faroe/Greenland). If the latter, any specific provisions applying to bilateral agreements as referred to in Title II of Section VI of the EU Regulation 1380/2013 must be carefully assessed and consistent with it.

1.1.2. The new FAR gives legal certainty and a common framework for all MS of the EU operating outside EU waters but sets a considerable number of additional requirements and obligations too, particularly in the issuing and validations of authorisations to dispatch fishing permits or licenses. In respect of this, it is heavily based on Spanish legislation but seems to go beyond in many aspects.

1.1.3. The Proposal of Regulation on FAR seems to be inconsistent in some areas both with the Control and IUU Regulation and the national laws on MCS (e.g. sanctioning regime). The inconsistencies between the current FAR and the Control Regulations is acknowledged in Recital 11 of the EC Proposal. They should be harmonised and implemented consistently (for example, by including cross references) to ensure there is equal treatment and level playing field between external and internal fleets.

1.1.4. Transparency and a clear delimitation of competencies and responsibilities is demanded between different national and European control authorities and policy makers, particularly in relation to the issuing and validation of fishing authorisations as this might lead to unnecessary additional administrative burden, for example in the case of verification and validation of the eligibility criteria and conditions laid down in articles 5 and 6 by both the flag state and the European Commission.

1.1.5. Excessive bureaucracy and heavy administrative burden are likely to undermine the principle of simplification that underlies EU fisheries policies. Speedy issuing of authorisations is crucial for this Regulation having an effective and satisfactory implementation. The bureaucratic requirements that the new regulation introduces must be both cost-effective and proportional to the expected outcome. Issuing and management of fishing authorisations should not result in unmotivated delays that would negatively affect fishing operators a result of being tied-up at port on hold. Therefore, any proposal that is likely to increase paperwork and bureaucratic requirements should be accompanied by its respective budgetary provision and a dedicated HR capacity allocation that is sufficient to deal with the increase of workload.

1.1.6. More transparency is required to clarify Commission's power to enact delegated acts as established under art. 2 of the New FAR, clearly stating under which circumstances and for which content is feasible to go through this legislative procedure. It must be noted that there is the safeguard that the EP and the Council would control and monitor the proportionate use of these delegated powers to the Commission, being able to withdraw them if they think there has been an extra limitation out of their remit of mandate. This refers to the provisions included in Title V under arts 44 -45.

1.1.7. The setting up of a harmonised system for issuing validations of fishing authorisations in real time, by internal means would be extremely useful. This system could be based on the existing one in relation to customs and exports for commercial products by those appointed as "authorized economic operators" (as defined in the GATT Regulation).

This would mean a "fast track" process for issuing and verification of authorisations while having a guarantee that they meet the eligibility criteria. The idea to have a "one stop shop" for submitting documents and make all necessary paperwork and electronic arrangements in one single platform is strongly supported by the LDAC, including not only data for licenses but also e-logbooks, e-catch certificates, etc.

The implementation of such a system will require a large amount of new information needed that in some cases it is not yet available in the EU fleet register (cf. annex 1). For this reason, it would be necessary to develop a common database/electronic platform compatible at a MS level. To allow a real and effective implementation of the proposed system, the Commission should set up a transitory period (up to2 years) to develop this system and allow streamlining their procedures of issuing and verification of licenses adapting to the new requirements.

1.1.8. The process of both issuing and validating a fishing authorisation must be in all cases clearly identified in terms of who are the competent state (flag State and/or coastal State) and how this is coordinated between them and the European Commission.

1.1.9. The entire proposal is solely focused on a responsible and transparent operation by EU operators in non EU waters. The FAR should acknowledge the need of EU operators to be competitive versus operators from other fishing nations such as China, Russia, Taiwan, etc. It is therefore important that the new Regulation strives to achieve a balance between objectives of responsible and transparent fisheries and economic competitiveness of the European fleet vis a vis the other international fleets.

1.2. SPECIFIC CONSIDERATIONS

1.2.1. Article 1 – Subject matter

Clarification on the material scope of this Regulation under paragraph (a): "Union fishing vessels operating in waters under the sovereignty or jurisdiction of a third country, under the auspices of a regional fisheries management organisation, in or outside Union waters, or on the high seas;"

Does this mean it includes all third country EEZ waters or only those subject to SFPAs?

1.2.2. Article 3 – Definitions

The following amendments additions/should be made (underlined):

(a) The definition of "*support vessel*" should be reviewed to precise that a vessel is not equipped with operational fishing gear <u>ready to catch or attract fish</u>

(f) "*Observer programme*" means a scheme under the auspices of a country or a regional fisheries management organisations that provides observers onboard fishing vessels under certain conditions to collect data and/or verify the vessel´s compliance with the rules adopted by that country or organisation.

1.2.3. Article 5 – Eligibility criteria

There is need for clarification on the extent of the following criteria:

(a) The obligation to have complete and accurate information of the fishing vessel and all support vessels may prove to be a problem, because it will be difficult in practice to know in advance the details of the support vessels (e.g. reefers, crude bulk suppliers, crew change vessels) prior to the fishing season. It is also difficult to know where the fishing season will be and how long it will take (up to an entire year).

(b) The obligation for both fishing vessel and any associated support vessel to have an IMO number. This goes beyond the obligations on the Control Implementing Regulation FAR that exempts vessels under 15 meters outside EU waters. The question is if this will apply to every vessel and will bring administrative burden for small boats (e.g. Spanish vessels operating under the fisheries agreement with Morocco).

d) The concept of serious infringement in relation to Art. 42 of Council Regulation (EC) No 1005/2008 and Art 90 of Council Regulation (EC) No 1224/2009 could result in a “double penalty” as it would be subjected both to the “penalty point system” and additionally would result in the suspension of the fishing activity for 12 months. It also need to be clarified if this only affects to infringements that are under final judgment and is not possible to appeal.

There is an apparent contradiction between the Control Regulation (1224/2009) and the FAR Proposal of Regulation. According articles 6 and 7 of EC Control Regulation, an EU vessel can hold an authorization for fishing in EU waters until its EU license is withdrawn or suspended. This means the EU vessel only be withdrawn or suspended its authorisation after it has been subject to several sanctions incurring in serious infringement. However, in the EC Proposal of FAR Regulation, a vessel cannot get a “FAR authorization” when it has been subject to only one sanction or when another vessel of its operator has been subject to one sanction qualifying as serious infringement.

This does not seem to be a proportional or fair approach and the wording ‘the operator and the fishing vessel have not been subject to a sanction’ discriminates de facto larger ship-owners that operate more than on one vessel. Therefore, harmonization is needed with EC Control Regulation insofar as the sanction regime of the EC Control Regulation should also apply for the “FAR authorisations”.

The disclosure of flagrant serious infringements during the negotiations of FPAs, or in the annual meetings of the RFMOs, has caused in the past important damages to the UE's negotiating position. This kind of additional penalty can only be justified when the rights of the Operator in question are fully respected.

It seems that the intention of the Commission here is to give an exemplar punishment to the Operators involved in such serious infringements, but, as the additional sanction imposed here, is so important, that it will imply in almost all cases the direct elimination of those Operators, this cannot be admissible, unless all the process is supported by enough legal guarantees.

The more, when the serious infringements are a controverted and complex matter and its sanction always should depend on objective and subjective factors like "*the gravity of the infringement in question which shall be determined by the competent authority of the Member State, taking into account criteria such as the nature of the damage, its value, the economic situation of the offender and the extent of the infringement or its repetition*..." (Art 90 of Control Regulation, vid. also art 31 of the FAR's new proposed text).

In summary, to be acceptable here, the above mentioned condition as an eligible criteria for issuing a fishing authorisation, the additional sanction that this will imply should be proportionated, adaptable in time to the qualification of the infringement determined by the MS, in the frame of a process with full legal guarantee, as well as strictly limited to the vessel itself (not to the operator), and to the concrete fishing ground (3rd country or RFMO) in which the infringement has occurred.

1.2.4. Article 6 – Reflagging operations

It is not clear if the conditions under which a flag state cannot issue a fishing authorization in accordance with points 2. (b) and 4. (a). Clarification is needed if a country needs to be identified or listed as a non-cooperating country ("red card") under IUU regulation (EC Reg. 1205/2008) or it is also applicable to a state pre-identified as non-cooperating ("yellow card"). The question is if Article 31 refers to yellow or red card.

For example, the Commission´s Decision of date 1 October 2015 concerning the issuing of a yellow card for Comoros reads as "notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing", being this legislative act based on both articles 31 and 32.

To avoid ambiguity on timing or exact date of commencement and give legal certainty to operators, a possibility would be to refer the commencement date for suspension or not issuing of a fishing authorization to art 35 of IUU Regulation (i.e. publication of list of non-cooperating countries by the Council).

In Paragraph 5. It is proposed to add: "Paragraphs 2 and 4 shall not apply…" to ensure level playing field and consistency of application of this article to all fishing operators.

1.2.5. Article 7 - Monitoring fishing authorisations

Paragraph 5 states that upon a request from the Commission, a flag Member State shall refuse, suspend or withdraw the authorisation in cases of ***overriding policy reasons*** pertaining to the sustainable exploitation, management and conservation of marine biological resources or the prevention or suppression of illegal, unreported or unregulated fishing, or in cases where the Union has decided to suspend or sever relations with the third country concerned.

This article is ambiguous and leaves freedom to the EC to decide on what are "overriding policy reasons". More explanations are needed and a clear deadline/timeline for setting these.

For consistency with wording of Paragraph 5, this paragraph should be amended accordingly to be consistent with Paragraphs 4 and 6 as follows: "*Upon a request from the Commission, a flat Member State shall refuse, AMEND, suspend or withdraw the authorisation in cases of overriding policy reasons…"*.

Paragraph 6 gives power to the European Commission to override the Member States decision and withdraw directly a fishing license issued by a Member State. The EC does not have this power for fishing licenses issued to operators by MS for fishing in Community waters. We would like to know why the FAR proposal foresees this power for external waters.

1.2.6. Article 8 – RFMO Membership

In light to this article, it would be worthwhile to ask what happens with third countries like Guinea Bissau, where there is a mixed bilateral fisheries agreement in place with the EU but this country is not member of ICCAT. Would the requirement stated in this provision be interfering de facto with the sovereignty of the coastal states?

1.2.7. Article 10 – Fishing authorisations

Simplification and minimizing administrative burden is reiterated here. The possibility to develop a common electronic database inspired in the GATT list of "*authorised economic operators*" would be very important particularly for the annual renewal of fishing authorisations for those compliant boats that have neither changes nor sanctions. This would save a lot of administrative work and avoid time delays in the issuing of renewed fishing licenses. However, it is essential that the sector (in particular the Producers Organizations) contribute to the process of definition of simplification and also provide feedback to the development of an electronic database before entering into operation as they will be directly concerned.

1.2.8. Article 11 – Conditions for fishing authorisations by the flag Member State

Point (c) on fees and financial penalties claimed by a third country competent authority over the past 12 months. It is not clear if this comprise sanctions that are disputed or are pending of judicial resolution or under legal appeal procedure? This could put excessive pressure on ship-owners and undermine the presumption of innocence.

1.2.9. Article 12 – Management of fishing authorisations

Par 3: The deadline of 10 calendar days before the deadline for the transmission of application to the Commission is proposed to be removed as it does not foresee the possibility to start a fishing activity in the middle of the year. This cannot also be reported earlier as it is related to payment of the licenses. The following amendment is proposed: "*The flag Member State shall send the application* ***of all its active vessels*** *to the Commission at least 10 calendar days before the deadline…"*

1.2.10. Preamble recitals 16 and 28 and Article 13

Reallocation of unused fishing opportunities in the SFPA framework

There is a need to make the most efficient use of available fishing opportunities under SFPAs. The Commission introduces a possibility of reallocating existing fishing opportunities for SFPAs if unused by some of the EU MS in favour of others. This seems to be in conflict with the relative stability principle.

It is also very important to clarify if this is required if these articles apply only to SFPAs or also comprises Northern Atlantic bilateral agreements (e.g. EU-Norway/Faroe Islands).). If the latter is included, there is the potential for 'domestic' quotas to be impacted. In relation to Paragraph 1, there is a doubt on what procedure will be implemented for allocating unused fishing opportunities for a period longer than a year (i.e. "*any other relevant period of the implementation of a protocol to a SFPA*"). We will need further clarification on this point.

Last, an additional paragraph is proposed to foresee a simplification of the procedures regarding the annual renewal of existing fishing authorisations during the period of implementation of the protocol of a SFPA in force. This might be also considered to be extended to direct agreements. An additional article could be proposed as follows:

Article 13bis

"During the period of validity of an EU sustainable fishing partnership agreement, quicker and easier procedures should be allowed to renew licenses of vessels which status (characteristics, flag, ownership or compliance) has not changed from one year to the next".

1.2.11. Article 15- Allocation of a yearly quota broken down into several successive catch limits

This article gives unnecessary power to the Commission to adopt an implementing act on the allocation of quota to the member states concerned within the year (in the framework of an existing SFPA) in a situation where the annual entitlements of the member states in this SFPA are already defined in a Council Regulation, as stated in paragraph 2 of this article 15. It is better to leave it up to the member states to agree on fish plans and to exchange fishing opportunities under such Protocol among them, if necessary.

Paragraph 1 and 2 can therefore be deleted and be replaced by the following paragraph:

"The allocation of fishing opportunities in a situation where the Protocol to an SFPA sets monthly or quartery catch limits or other subdivisions of a yearly quota, the corresponding fishing opportunities between Member States shall be consistent with the annual fishing opportunities allocated to Member States under the relevant Council Regulation. The only way that this principle will not apply is when the Member States concerned agree on joint fish plans that take account of the monthly or quarterly catch limits or other subdivisions of a yearly quota."

1.2.12. Article 16 – Scope of direct authorisations

It is proposed to add the following text: "*This Section shall apply to fishing activities carried out by Union fishing vessels outside the framework of a sustainable fisheries partnership agreement in waters of a third country or any other multilateral and bilateral agreements*".

1.2.13. Article 18 – Conditions for fishing authorisations by the flag MS

Paragraph c) puts on the operator the burden of the proof to provide a number of documents including administrative certificates and scientific evaluation reports that must be provided by third country authorities. In particular, it seems difficult to understand the extend of submitting a copy of a third country's fisheries legislation as this can be a complex exercise if not provided by the third countries themselves and delay the process of issuing fishing authorisations.

The fishing operators can genuinely make mistakes or submit incomplete or obsolete pieces of legislation. Furthermore, the applicable rules can differ for different gears or fleet segments. Finally, it should be the duty of the European Commission officials / authorities, in coordination with their permanent representations in third countries, to verify the legislative framework and cross check directly with the source (i.e. third country administration).

In view of these reasons, it is suggested that the general reference to "*a copy of the third country's fisheries legislation*" in the third dash is deleted and make an addition instead at the end of the first dash as follows: "*A written confirmation from the third country […] of the terms of the intended direct authorisation to give the operator access to tis fishing resources, including the duration, conditions, and fishing opportunities expressed as efforts or catch limits; as well as the relevant national legislation which is directly applicable to the operator vessels".*

Regarding the second dash, the submission of evidence of the sustainability of the planned fishing activities is positive, but the double requirement of two scientific reports (one evaluation carried out by the third country and subsequent examination or validation by the flag MS) adds a new layer of complexity to the system. This might be seen as the EU questioning the credibility and independency of third country scientific committees, as well as a requirement that might undermine sovereignty and competencies of a coastal Member State. It would also not help to give an accurate picture of the sustainability of fishing operations of straddling and highly migratory stocks (such as tuna and tuna-like stocks) by fleets fishing across different MS EEZ. The scientific evaluation is made by the competent scientific committees of the RFMOS, counting with the contribution and input of national scientific institutes from CPs.

1.2.14. Article 19 – Management of direct authorisations

Paragraph 2 introduces an additional requirement that can create more administrative burden. It establishes a deadline of 15 calendar days for the Flag State to inform the fishing operator to start the fishing activities once it has already been granted the direct authorisation by the third country.

This deadline seems arbitrary and there is no further explanation of the reason in the regulation. In view of this, it is suggested to be removed any reference to deadlines.

1.2.15. Article 23 – Registration by regional fisheries management organisations

Par 3 should indicate a specific deadline for the Commission to request any additional information that it deems necessary from the flag MS within a certain period of time to avoid disrupting their fishing activities. Furthermore, the Commission has to give a reasonable justification for asking such additional information.

1.2.16. Article 24 – Scope of fishing activities by EU fishing vessels on the high seas

This provision only applies to fishing activities carried out on the high seas by Union fishing vessels exceeding 24 meters in overall length. The LDAC would like to seek clarification from the Commission on the reasons for setting such length and why this is not extended to all Union vessels on the high seas regardless their size or length (e.g. does this exclude GFCM vessels in the Mediterranean / Black Sea?).

1.2.17. Article 26 – Conditions for fishing authorisations by the flag MS

The same content should apply to Art 28 for consistency between both provisions. If this is about high seas, it is applicable also to international waters not subject to RFMOs jurisdictions?

1.2.18. Article 27 – Notification to the Commission

Clarification is sought from the Commission on the reason to set up a notification deadline by the MS of "*at least 15 calendar days*" before the start of the planned activities on the high seas.

1.2.19. Article 28 – Principles of Chartering of Union vessels

Par 1: The eligibility criteria laid down in Art 5 should be also mentioned here for consistency reasons.
Par 2: The concept of sub-chartering must be clarified.
Par 3: The redaction could be clearer.

1.2.20. Article 31 – Control and reporting: information to third countries

Par 1: Scope needs to be more precise as it seems to refer to countries under SFPA. It is not clear if this also applies to Northern European bilateral agreements such as the one between EU and Norway. Also the wording "and if the sustainable fisheries partnership agreement with the third country so provides" should be placed at the end of the paragraph.

Par 3 leaves certain discretionary powers to flag Member States to determine what is considered as ***serious infringement*** and therefore goes beyond the definition of Art. 5.d).

It is very important to provide an unambiguous definition that is not subject to interpretation as the consequences and effects (i.e. suspension of license for all fishing activities for the vessel sanctioned for 12 months) can end up in significant economic losses for fishing operators. It would be helpful to add adjectives such as the "*reiterative or persistent and unjustified non-transmission of catch declarations and landing declaration to the third country […] shall be considered a serious infringement*".

1.2.21. Article 32 – General Principles of Fishing Activities by Third Country Fishing Vessels in Union Waters

Par 2: An addition to the current wording of this paragraph is proposed as follows for reinforcing transparency: "*A third country fishing vessel authorised to fish in Union waters shall comply with all the rules governing the fishing activities of Union vessels in the fishing zone in which it operates. If the provisions laid down in the relevant fisheries agreements are different, they have to be explicitly mentioned either in this agreement or by rules agreed with the third country in execution of this agreement*".

1.2.22. Article 34 – Procedure for the issuing of fishing authorisations for third country fishing vessels in Union waters

Par 2 There is a mistake in the Spanish version of the proposal that must be corrected. In the Spanish version, it refers to the flag state instead of third country like in the English original.

1.2.23. Articles 34-36 - Do this apply also to northern bilateral agreements?

1.2.24. Articles 39-43 - Data and information

Regarding verification of fishing authorization, it is required to develop a single system or digital platform for all fisheries operators that allows verifying and validating e-catch certificates, DG SANCO health permits, customs clearance protocols, etc.

Par 2 states that the data base containing all fishing authorisations issued outside EU waters is publicly accessible. It must be assessed to make sure this disclosure does not jeopardize the competitiveness of EU fishing companies Vis a Vis non EU fleets.

-END-