

EXPLANATORY NOTE

IMPLEMENTING REGULATION EC 1005/2008 into Maltese Law¹

1. INTRODUCTION

Illegal, unreported and unregulated fishing (hereinafter referred to as IUU fishing) has been assimilated to the crime of theft from the “poorest people in the world” potentially impacting all countries through the detrimental and transnational impetus it leaves on fisheries’ sustainability and food security.² Its transnational element does not merely stem out of the unity of the seas and oceans but is further strengthened by the budding existing link between IUU fishing and transnational organised crimes.³ Novel developments within this area recognise the effects IUU fishing is having on marine biodiversity, and view IUU fishing as a maritime security and environmental threat.⁴ Nevertheless, there are doubts in categorising IUU fishing as a transnational organised crime.⁵ IUU fishing has become more prevalent largely due to the States’ incapacity or reluctance to implement effective surveillance operations. It is also due to corruption on the part of officials, the profitability of the activity and overcapacity in the world fishing fleet.⁶

¹ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 [2008] OJ L 286 hereinafter referred to as EU-IUU Regulation.

² Martin Tsamenyi and others, *Fairer Fishing?: The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries* (Commonwealth Secretariat 2009) 8.

³ Jade Lindley, Erika J. Techera, ‘Overcoming complexity in illegal, unregulated and unreported fishing to achieve effective regulatory pluralism’ (2017) 81 *Marine Policy* 71.

⁴ ‘There is no argument that some of the IUU fishing activities, such as the use of illegal and destructive fishing methods have severe impacts not only on target stocks but also on by-catch and other associated species, as well on fisheries habitats. See Mary Ann Palma and others, *Promoting Sustainable Fisheries-The international Legal and Policy Framework to combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010) 259. By-catch should be prohibited in the EU by 2019 in accordance with the new Common Fisheries Policy. See Antonia Leroy and others, ‘The EU restrictive trade measures against IUU fishing’ (2016) 64 *Marine Policy* 82.

⁵ During the meeting of the Conference of the Parties to the United Nations Convention Against Transnational Organised Crime the point was raised that IUU fishing could fit into the definition of transnational organised crime. In fact, it has been linked to organised criminal syndicates involving the transportation of drugs. Differing views regarding its categorisation as a transnational organised crime came to the fore at the ninth meeting of UNICPOLOS (United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea) where some delegations did not agree that the link between IUU fishing and other transnational crimes sufficed to assert that it is a transnational organised crime. Further studies need to be conducted particularly as illegal fishing is only part of IUU fishing. See Palma *ibid* 262- 263.

⁶ See Palma (n 4) 11-12.

IUU fishing extends and merges into various areas prescribed by international law. Consequently, an international framework intrinsically dependent on the effective implementation by coastal States, flag States, port States and market States alike has been developed to curb such an intricate issue. The discussion on IUU fishing is linked to conservation measures since IUU fishing negates the aim of conservation.⁷ The conservation measures which are to be adopted by States in their exclusive economic zones and through cooperation on the high seas can be traced back to the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas 1958⁸ and the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS).⁹ Article 61 of UNCLOS places the duty upon coastal States to implement the necessary measures in ensuring that living resources in their exclusive economic zones are not over-exploited, thereby implicitly referring to sustainable uses of the seas and oceans.¹⁰ Fishing on the high seas is categorised as a high seas freedom. However, the duty to take the necessary measures for conservation of marine living resources is required through States cooperation particularly by establishing “subregional or regional fisheries management organisations.”¹¹

⁷ ‘In this regard, a number of delegations noted the problems related to illegal, unreported and unregulated fishing (IUU fishing), which undermined the provisions of the Fish Stocks Agreement. They stressed the need for the prevention of IUU fishing, especially in high seas areas adjacent to areas under national jurisdiction, and for effective enforcement of fisheries conservation and management measures.’ See Second Informal Consultations of the States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 23 – 25 July 2003) ICSP2/UNFSA/REP/INF.1 <http://www.un.org/Depts/los/convention_agreements/fishstocksmeetings/UNFSTA_ICSP2003_Rep.pdf> accessed 5 February 2018.

⁸ Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

⁹ United Nations Convention on the Law of the Sea (signed, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

¹⁰ *ibid* art 61; In the advisory opinion delivered by ITLOS on IUU fishing (Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015 the point was made that the flag State is indeed bound to exercise control over its vessels engaged in IUU fishing in the EEZ of other coastal States: ‘The flag State is under an obligation, in light of the provisions of article 58, paragraph 3, article 62, paragraph 4, and article 192 of the Convention, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention [Convention on the determination of the minimal conditions for access and exploitation of marine resources within the maritime areas under jurisdiction of the member States of the sub-regional fisheries commission (SRFC)] within the exclusive economic zones of the SRFC Member States. The foregoing obligations are obligations of “due diligence”.’ See ITLOS/Press 227 2 April 2015.

¹¹ UNCLOS *ibid* art 118.

The subsequent effort to address conservation issues and potentially the first to shed some light on formulating the wide-encompassing term IUU fishing was Agenda 21.¹² Action and awareness were developed primarily through the introduction of Chapter 17 adopted at the United Nations Conference on Environment and Development (UNCED) which targeted the establishment of precautionary and anticipatory action through cooperation (including capacity-building).¹³ Formal mention of the term illegal and unreported fishing was made during the discussions at the fifteenth session of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The discussion did not use the term “unregulated,” and no definition was formulated on the same.¹⁴

Formal recognition of the term “unregulated” was made in the United Nations General Assembly during the discussion on unauthorised fishing within areas of national jurisdiction.¹⁵ Subsequently, the Food and Agriculture Organisation (FAO) acknowledging the detrimental effect IUU fishing was having on the depletion of fish stocks, commenced discussions on how best to restrain its expansion by focusing on fishing vessels registered under flags of convenience.¹⁶ The International Maritime Organisation (IMO) followed suit by giving priority to this matter initially in the Maritime Safety Committee (MSC), later in the subcommittee on Flag State Implementation (FSI) and finally in the Maritime Environment Protection Committee (MEPC) whereby the need of assisting FAO in regulating IUU fishing was crystallised.¹⁷ The FAO Export Consultation Meeting on IUU fishing held in May 2000 in Australia produced the draft plan known as the International Plan of Action to prevent, deter and eliminate IUU fishing (IPOA-IUU) which was formally adopted at the FAO’s 24th session on 2nd March 2001.¹⁸

¹² United Nations Sustainable Development, ‘Agenda 21’ (United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992).

¹³ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 See <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> accessed on 30 November 2017.

¹⁴ Palma (n 4) 26.

¹⁵ *ibid* 28-29.

¹⁶ <<http://www.fao.org/fishery/iuu-fishing/en>> accessed 9 December 2017. See also *ibid* 31.

¹⁷ The MEPC at its forty-fourth session considered the report of the FSI and concluded that IMO is to assist FAO in combatting and eliminating IUU fishing particularly vis à vis safety and pollution prevention from fishing vessels. See Palma (n 4) 32.

¹⁸ International Plan of Action See <<http://www.fao.org/fishery/code/ipoa/en>> accessed 10 December 2017.

2. THE EUROPEAN UNION'S FRAMEWORK ON IUU FISHING

Article 3(1)(d) of the Treaty on the Functioning of the European Union (TFEU) clearly lists the European Union's (EU) Common Fisheries Policy as one of the areas over which the EU enjoys exclusive competence.¹⁹ The original six members of the European Community²⁰ were not particularly eager to adopt a common fisheries policy since fishery was not their major economic contributor.²¹ In fact, the first step in the direction of adopting a common fisheries policy came with the 'Report on the Situation in the Fisheries Sector of the European Economic Community (EEC) Member States and the Basic Principles for a Common Policy' in 1966.²² In 1983 the official EC system on fisheries management was adopted outlining the allowable catches for each Member State in the form of quotas.²³ The coming into force of UNCLOS brought challenges to the EU's common fisheries policy through the creation of an Exclusive Economic Zone (EEZ), an area over which State parties enjoy the right to explore, exploit, conserve and manage living resources.²⁴

2.1 THE EU-IUU REGULATION

The EU as a regional organisation has been attributed the competence of managing various areas that were previously under the competence of its Member States.²⁵ Within the context of fisheries, the EU enjoys full and exclusive competence. In fact, it has adopted many measures consonant with its objective of maintaining a common fisheries policy.²⁶ The EU officially shed light on IUU

¹⁹ Consolidated Version of the Treaty on the Functioning of the European Union art. [3], 2008 O.J. C 115/47.

²⁰ Belgium, France, Italy, Luxembourg, the Netherlands and West Germany were the first six members of the EC.

²¹ Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (Oxford European Union Law Library 2010) 5.

²² *ibid*, 5.

²³ *ibid*, 9.

²⁴ UNCLOS (n 9) art 56.

²⁵ In accordance with the principle of conferral the EU has been given the competence of acting in given areas by Member States. The Lisbon Treaty divides the EU's competences into three categories: exclusive competences, shared competences and supporting competences. Conservation of marine biological resources forms part of the common fisheries policy, hence, it is an area over which the EU has full competence. See <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>> accessed on 10 December 2017.

²⁶ The common fisheries policy produces work in four main policy areas being; fisheries management, international policy, market and trade policy as well as the funding of the policy. <https://ec.europa.eu/fisheries/cfp_en> accessed 9 December 2017.

fishing by devising a plan to combat IUU fishing through the adoption of the Community Plan of Action for the Eradication of IUU Fishing in 2002.²⁷ The realisation of the need for adopting such a plan originated from the IPOA-IUU issued by FAO and comprised a set of 15 actions which were to be developed by all the EU Member States.²⁸ The Community Plan of Action details the aims which were to be achieved by the EU in the near future. The aim of aiding developing countries to curb and obliterate IUU fishing was amongst the proposals.

In 2007 the EU Commission set out its formal strategy to combat IUU fishing²⁹ acknowledging that the EU policy which had developed to date was not enough to fight the current threats posed by this phenomenon.³⁰ The Commission, therefore, revised its formal strategy by proposing action which had to be taken to move forward and achieve the desired results. It recognised the need for inspecting and verifying imports into the EU market, the taking of unilateral action for the purpose of listing non-compliant countries and vessels, and providing the required assistance to developing countries.³¹

It is against this backdrop that one is to analyse the *raison d'être* behind the adoption of the EU-IUU Regulation.³² This regulation which came into force on the 1 January 2010 is effectively law in

²⁷ Martin Tsamenyi and others, 'The European Council regulation on illegal, unreported and unregulated fishing: an international Fisheries law perspective' (2010) 25(1) International Journal of Marine and Coastal Law 5.

²⁸ Community action plan to eradicate illegal, unreported and unregulated fishing See <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:166008&from=EN>> accessed on 2 December 2017.

²⁹ Tsamenyi (n 27).

³⁰ Commission of the European Communities Brussels, 17.10.2007 COM(2007) 601 final See <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0601&from=EN>> accessed on 2 December 2017.

³¹ Palma (n 4) 246-254.

³² EU-IUU Regulation (n 1).

all the EU Member States.³³ Nevertheless, it is fully effective if properly incorporated and implemented in all Member States particularly in those areas requiring implementation.

The uncoordinated involvement of the various key players in the combat against IUU fishing has given rise to a proliferation of legislation with increased fragmentation and lack of certainty ultimately challenging the enforceability of the relevant laws. Some would argue that the way forward in attaining tangible results rests in the setting up of an institution responsible for bringing all stakeholders in one forum for discussion and implementation thereby increasing uniformity, decreasing duplication of work and strengthening State participation.³⁴

The EU sought to achieve the aim of increasing uniformity by adopting the EU-IUU Regulation which implements a basic common ground in all EU Member States with respect to suppressing and eliminating IUU fishing. The EU Member States could indeed be parties to different Regional Fisheries Management Organisations (RFMOs), adopting different standards to combat IUU fishing. Some of the EU Member States might not be parties to any RFMO whereas others may not have given effect to their obligations under the relevant organisation.³⁵ Prior to the adoption of the EU-IUU Regulation the Council of the EU would modify its measures depending on the measures adopted by RFMOs. The EU realised that the way forward in combatting IUU fishing was to adopt

³³ TFEU (n 19) art 288.

“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

The EU legal framework is made up of regulations, directives, decisions and soft laws enacted to attain the objectives of the EU. Regulations are effectively law in all EU Member States since they are binding and directly applicable in all Member States. Direct applicability has been interpreted to mean that EU citizens can enforce rights under Regulations in their national courts from the moment they are enacted and also does away with the requirement of adopting national incorporating laws for the Regulation to be effective in Member States. Having said that, Member States may decipher the need to pass consequential amendments for the purposes of giving full effect to the Regulation in question. See, Paul Craig and Gráinne De Burca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 105.

³⁴ Tsamenyi (n 27).

³⁵ The UK became a party to the International Commission for the Conservation of Atlantic Tunas (ICCAT) in 1995 whilst France had become a party in respect of St-Pierre et Miquelon in 1968. The EU later became a party in 1997. See <<http://www.iccat.int/en/contracting.htm>> accessed on 20 December 2017.

France is a contracting party to the Western and Central Pacific Fisheries Commission (WCPFC); the only EU Member State to be a full contracting party. The EU became a party to the WCPFC Convention in 2004 and a member in 2005. See <<https://www.wcpfc.int/about-wcpfc>> accessed on 20 December 2017 and Churchill (n 21) 373.

a regulation which would contain a variety of stringent measures adopted by many RFMOs.³⁶ Whether this has created overlapping regimes remains debatable. However, the status given to an EU regulation within all Member States is stronger than that given to instruments adopted by RFMOs.³⁷

The EU-IUU Regulation is far-reaching in its application, in fact, it applies the wide-encompassing definition of IUU fishing found in the IPOA-IUU and in many RFMOs. The Regulation explicitly applies to fishing or associated activities carried out in the Member States' territory, Community waters, waters falling under the jurisdiction of third countries and on the high seas.³⁸ The wide scope of application extends to the definition given to fishing vessels which includes any vessel 'used for the purposes of commercial exploitation of fishery resources, including support ships, fish processing vessels, vessels engaged in transshipment and carrier vessels'. The Regulation merely excluded container vessels.³⁹ The above three scenarios clearly exemplify the comprehensive approach taken by the EU in seeking to ensure that IUU fishing is eliminated.

The EU is amongst one of the highest importers of fishery products followed by the United States, Japan and China.⁴⁰ This means that efforts made by the EU region to prohibit the importation of fish products from vessels suspected to have been engaged in IUU fishing can yield positive results in the fight against IUU fishing.⁴¹ The counter-argument to this could well be that IUU fishing is shifted to other significant importation regions not willing to adopt similar measures. A similar argument could also be advanced in the case of some EU Members States who view taking restrictive measures against such fishing vessels as stifling their economy and suffocating their growth.⁴²

³⁶ Churchill (n 21) 376.

³⁷ See (n 33).

³⁸ EU-IUU Regulation (n 1) art 1 para 3.

³⁹ EU-IUU Regulation (n 1), art 2 para 5.

⁴⁰ Leroy (n 4).

⁴¹ *ibid.*

⁴² *ibid.*

2.2 OVERVIEW OF THE EU-IUU REGULATION

2.2.1 Measures Put Forward in the EU-IUU Regulation to Curb IUU Fishing

The Regulation adopted measures that are intended to curb and eliminate IUU fishing. Some of the salient provisions in the regulation are:

1. The Community IUU fishing vessel list;
2. Effective Scheme of Port Inspections for Third Country Fishing Vessels;
3. The Introduction and Verification of a Catch Documentation Certification Scheme required with every fishery import within the EU;
4. An EU alert system ensuring that adequate knowledge is dispersed amongst all EU member States of any third country fishing vessel or catch suspected to be engaged in or to be the product of IUU fishing;⁴³ and
5. The Introduction of a third country non-cooperating States List .

2.2.2 IUU Vessel Listing

A key element of the EU-IUU Regulation regards the establishment of an IUU vessel list. The list is made up of fishing vessels found to have engaged in IUU fishing under article 27 of the EU-IUU Regulation. The EU seeks to balance conflicting rights and interests by ensuring that prior to listing, the owner or the operator of the vessel, where appropriate, are notified, provided with the reasons justifying listing and given the opportunity to raise their concerns against listing.⁴⁴ Article 37 lists the consequences which ensue as a direct result of being so listed such as, the prohibition of fishing

⁴³ Tsamenyi (n 27).

⁴⁴ EU-IUU Regulation (n 1) art 27 para 2.

within EU waters, withdrawal of fishing authorisations and prohibition from accessing community ports.⁴⁵

2.2.3 Effective Scheme of Port Inspections and Surveillance

Access by third country fishing vessels to the ports of member States is made dependent upon their compliance with the requirements set out in article 6 of the EU-IUU Regulation requiring prior notification of the listed information and the production of a catch certificate.⁴⁶ In addition, transshipments between third country fishing vessels or between a third country fishing vessel and a fishing vessel flagged in an EU Member State are not allowed in Community waters but only in port.⁴⁷ Outside community waters, fishing vessels of an EU Member State are not allowed to tranship catches from a third country fishing vessel unless the latter is registered as carrier vessel under an RFMO.⁴⁸

2.2.4 The Catch Documentation Certification Scheme

The catch certification scheme provides the solid ground for tracking and tracing vessels engaged in IUU fishing by introducing the mandatory rule that all imports of fishery products in the EU are to be accompanied by a catch certificate verified and approved by the flag State in accordance with article 12 of the EU-IUU Regulation.⁴⁹ The latter condition has naturally given rise to concerns regarding the lack of capacity in developing States to give approval.⁵⁰ Consequently, destination States within the EU are cognisant of the fact that they are burdened with the meticulous task of assessing certificate validity.⁵¹ Annex II of the EU-IUU Regulation contains a specimen of the catch certificate which is to be adopted by all Member States. Having said that, the Regulation allows for

⁴⁵ EU-IUU (n 1) art 37.

⁴⁶ *ibid* art 6 and 7.

⁴⁷ *ibid* art 4 para 3.

⁴⁸ *ibid*, art 4 para 4.

⁴⁹ *ibid*, art 12 paras 2-3.

⁵⁰ Leroy (n 4).

⁵¹ *ibid*.

the acceptance of other catch certificates issued by RFMOs which are deemed compatible with this Regulation.⁵²

2.2.5 The EU Alert System

Establishing a Community Alert System under article 23 of the EU-IUU Regulation aims at ameliorating the cooperation regime existing between the Member States by allowing for immediate response to be taken when there are well-founded doubts that a third country fishing vessel or fishery products from third countries are the product of IUU fishing. The alert is published on the website or in the official journal of the EU.⁵³ Member States are to apply rigorous regimes by applying verification procedures to such vessels on the basis of their risk management as outlined in article 24 of the EU-IUU regulation.

2.2.6 The Introduction of a Third Country Non-Cooperating States List

The pinnacle of the EU regulation undoubtedly vests in the creation of the third country non-cooperating States list which employs a card system allowing for provisional warnings (yellow cards) prior to the listing of a State as non-cooperating (red card). If a State is eventually listed as a non-cooperating third State, restrictive trade measures will be implemented against it by all EU Member States in the form of economic sanctions.⁵⁴

Prior to officially listing a State as a non-cooperating third State, the EU undertakes a process of identification allowing non-cooperating third States the possibility of rectifying their situation for the sake of avoiding official listing.⁵⁵ The measures which will be taken into consideration at this stage by the Commission stem mainly out of a procedure entailing the “review of information” submitted to it under the EU-IUU Regulation or ‘any other relevant information.’⁵⁶ The EU-IUU Regulations strives to create a synergy between different key players in the field, not merely by

⁵² EU-IUU Regulation (n 1) art 13 para 1.

⁵³ *ibid* art 23.

⁵⁴ *ibid* art 38.

⁵⁵ *ibid*, art 31.

⁵⁶ See (n 55).

catering for the review of information submitted to RFMOs, but also by taking into account the particular State's international obligations as a flag State, port State, coastal State or market State. Following identification, the State concerned is notified of the EU's potential future listing and a time is stipulated for it to satisfyingly prove to the EU that the situation has indeed been rectified. The absence of such proof will lead to the third State being listed as a non-cooperating State by the Council acting on a qualified majority on a proposal from the Commission.⁵⁷ The action which is to be taken by all EU Member States against non-cooperating third States involves prohibiting the importation of fishery products caught by fishing vessels registered in such States from accessing member States.⁵⁸ An express prohibition on concluding chartering agreements, an outright ban from entering into private trade agreements and the denunciation by the Commission of bilateral fisheries agreements or fisheries partnership agreements with such countries are also included as part of the counter measures to be taken.⁵⁹

The measures imposed on non-cooperating third countries have raised doubts as to their legitimacy and conformity with the obligations outlined by the World Trade Organisation (WTO) by which the EU is bound. It is held that *prima facie* the EU-IUU-Regulation does not extend beyond that allowed by WTO.⁶⁰ However, it is equally imperative for the Regulation to strengthen the cohesion of international law and not to undermine it.⁶¹ Another point which has been debated regards the potentiality of the non-cooperating third country listing to be regarded as discriminatory if the measures adopted against the Member States are not as stringent as those against third States.⁶² The counter-argument raised is indeed that it is non-discriminatory since it is aimed at EU and foreign

⁵⁷ A qualified majority is reached if 55% of member States vote in favour of the proposal by the Commission and the proposal is supported by member States representing at least 65% of the total EU population. See, <<http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed 5 February 2018 See also, *ibid*, art 33 para 1.

⁵⁸ EU-IUU Regulation (n 1) art 38.

⁵⁹ *ibid*.

⁶⁰ Mark Mercedes Rosello, 'Cooperation and unregulated fishing: interactions between customary international law, and the European Union IUU fishing regulation' (2017) 84 *Marine Policy* 306. The EU has been a WTO member since 1 January 1995 See also <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> accessed on 24 February 2018.

⁶¹ Rosello *ibid*.

⁶² Tsamenyi (n 27).

key industry players alike and all actions are justified on the basis of strengthening sustainable fisheries.⁶³

The European Commission listed Cambodia⁶⁴ a non-cooperating third country, after it delivered its decision holding that Cambodia was not merely in breach of the commitments under the EU-IUU Regulation but was also contravening its international obligations stemming out of customary international law; thereby apparently concluding that observance of RFMO rules formed part of customary international law.⁶⁵ It would have been more tenable for the Commission to elicit Cambodia's consent in observing RFMO rules 'under the terms of the IUU Regulation.'⁶⁶

3. THE CURRENT SITUATION IN MALTA

The fisheries industry was described in Malta's Integrated Policy as generating 8 million Euro and 800 jobs. Albeit not amounting to staggering figures, it should be taken into account since the livelihood of some villages depends exclusively on fishing.⁶⁷

A historic milestone for the abolishment of IUU Fishing in the Mediterranean sea was reached in Malta on the 30 March 2017 through the Malta MedFish4Ever Ministerial Declaration.⁶⁸ This declaration recognised the need of battling IUU fishing by focusing on the importance that each State have robust and effective human and technical resources in ensuring compliance with

⁶³ Leroy (n 4); See EU-IUU Regulation (n 1) art 38-40 where measures, sanctions and preventions which are to be taken by nationals and against nationals are outlined, amongst which one finds a general prohibition for nationals to engage in or support IUU fishing as operators or beneficial owners. See also Palma (n 4) 253.

⁶⁴ In 2012, the EU issued yellow cards to eight countries, amongst which there was Cambodia, for failing to comply with international fisheries laws and the EU-IUU Regulation. This was indicative of the fact that amendments to their domestic fisheries management laws were needed. Cambodia did not rectify its situation and was formally listed as a non-cooperating third State by the EC Commission in November 2013. In reviewing whether a State should be so listed reference is made to its domestic laws and policies enforcing inspections and sanctions so as to ensure that deterrence against IUU fishing is effective. See <http://www.iuuwatch.eu/wp-content/uploads/2015/06/Case-Study1.2pp.FIN_1.pdf> accessed on 7 February 2018.

⁶⁵ See Rosello (n 60); Such an assertion would undoubtedly entail an in-depth examination of state practice in conjunction with the element of *opinio juris*, necessitating that the State practice in issue is recognised as mandated by law.

⁶⁶ *ibid.*

⁶⁷ Integrated Maritime Policy, Making Malta a Centre of Excellence, the waves that shape us make us stronger 22.

⁶⁸ Ministerial Conference on the Sustainability of Mediterranean Fisheries Malta, 30 March 2017 Malta MedFish4Ever Ministerial Declaration.

international agreements.⁶⁹ Reference was made to the General Fisheries Commission of the Mediterranean (GFCM) for the purpose of aiding with the development of the appropriate infrastructure across different States.⁷⁰ The necessity of having surveillance on the high seas was found to be indispensable to eliminate IUU fishing and the vehicle chosen to achieve this was through joint schemes of international inspection.⁷¹

3.1 MALTESE LAWS DEALING WITH FISHING

The most relevant Maltese legislation dealing with fishing for the present discussion is the Fisheries Conservation and Management Act, Chapter 425 of the Laws of Malta (2001). The Act deals with two main areas: Conventional fishing and Aquaculture. Amongst the regulations adopted under the Fisheries Conservation and Management Act, subsidiary legislation (S.L. 425.08)⁷² provides for the enforcement of conventions to which Malta is a party.⁷³ In fact, S.L. 425.08 applies to the conventions mentioned in the schedule which explicitly refers to the EU-IUU Regulation. This subsidiary legislation gives a definition of IUU fishing which coincides with the definition provided in the EU-IUU Regulation.⁷⁴ S.L. 425.08 implements the sanctions listed in the EU-IUU Regulation precisely under article 44(1) and (2).

The lacunae present in Maltese law revolve mainly around the need of identifying the ratios used to inspect fishing vessels and to verify catch certificates.⁷⁵ The EU has identified risk criteria for conducting verifications in article 31 of Commission Regulation (EC) No 1010/2009 which lays down the rules for the implementation of the EU-IUU Regulation; however, Member States are given leeway to adopt their very own risk criteria.⁷⁶

⁶⁹ MedFish4Ever Ministerial Declaration para 41.

⁷⁰ *ibid.*

⁷¹ *ibid* para 42.

⁷² Subsidiary Legislation 425.08 Enforcement of Sea Fishing Conventions Order (2011).

⁷³ *ibid* art 1(2).

⁷⁴ *ibid*, art 2.

⁷⁵ EU-IUU Regulation (n 1) refer to art 9 and 16(1).

⁷⁶ Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing OJ L 280.

3.3 THE NEED TO IMPLEMENT THE EU-IUU REGULATION DOMESTICALLY

The EU-IUU Regulation is without doubt Maltese Law. Having said that, its outcome can only be achieved through the establishment of robust implementing provisions particularly in areas which specifically require the Member States to exercise their own discretion for setting the infrastructure. This explanatory note provides a rendition of the articles enshrined in the Regulation which require such further implementation and for which there is currently no reference to in domestic legislation. In addition, the amendment act proposes amendments to the current laws in force, establishes the cross-references needed for ease of reference and repeals existing laws.

A major aspect which requires implementation on the part of Malta regards the notion of criteria developed on the basis of identifying and managing risk. Reference to national criteria on risk management is found in article 16(1) of the EU-IUU Regulation referring to risk management for the purposes of checking and verifying the authenticity of the catch certificate and under article 9(1) of same providing for third country fishing vessels' port inspections. Establishing the national criteria adopted by Malta for the purposes of determining risk ensures certainty. The current prevailing situation in the EU indicates that different States are applying different criteria in conducting inspections. Whilst some of the criteria are basic, others are more stringent.⁷⁷ Verifications of catch certificates in terms of the rigour employed also vary across the different Member States.⁷⁸ The proposed amendments should clarify Malta's position in this regard by clearly outlining its position.

Throughout the Regulation, reference is invariably made to the sanctions applicable under domestic laws. Article 11(4) of the EU-IUU Regulation requires the port member State to apply its sanctions. Similarly, article 39(3) and article 44 refer to the applicable punishments. In this case, reference has to be made to the penalties and administrative sanctions already present under the Fisheries Conservation and Management Act as well those stipulated in S.L. 425.08. In conclusion, article 47(3) of the EU-IUU Regulation stipulates that setting up a legal person will not prevent action being taken against the responsible natural person. The latter requires specific reference to the

⁷⁷ Environmental Justice Foundation, *Risk Assessment and Verification of Catch Certificates under the EU-IUU Regulation* (2016) 2.

⁷⁸ *ibid.*

applicable section in the Criminal Code.⁷⁹ One of the measures to be taken against vessels listed in the Community IUU vessel list requires member States to deny such vessels the opportunity to fly their flag.⁸⁰ The latter would need implementation in the respective articles dealing with the registration of fishing vessels in Malta. Actions taken in respect of listed non-cooperating third countries involve the prohibition of allowing an EU registered fishing vessel to be reflagged under the registry of such a country.⁸¹ This would necessitate specific stipulation by amending the fishing vessel registration laws in Malta.

Article 7(3) of the EU-IUU Regulation allows the member States to confiscate or dispose of the landing in question upon the expiration of 14 days from landing where verification is still pending. Confiscation or disposal is subject to the Member State's national laws. Article 18(3) of the EU-IUU Regulation also provides member States with this choice allowing them to determine how best to utilise the profits from the sale.

4. THE IMPLEMENTATION OF REGULATION EC 1005/2008

The Maltese legal system has absorbed elements of the civil law system and the common law system. It is for this reason that the legal system in Malta is described as being a mixed legal system in the sense that it has its roots in Civil Law and 'has absorbed many features of the Common Law tradition.'⁸² This amalgamation is clearly seen in the manner in which the laws of Malta are organised in the Statute book. In fact, under Maltese law one does not merely find Codes but also numerous Acts, regulations, rules and subsidiary legislation.⁸³

⁷⁹ See Criminal Code, Chapter 9 of the Laws of Malta, art 121D.

⁸⁰ EU-IUU Regulation (n 1) art 37 para 8.

⁸¹ *ibid*, article 38 paragraph 3.

⁸² David Joseph Attard, *The Maltese Legal System* (Malta University Press 2012) 41.

⁸³ Attard (n 83) The Criminal Code is taken as an example for the purposes of exhibiting civil and common law traces in the same Code; "For example, while the rules on theft in the Maltese Criminal Code are inspired by the Civil law approach, the English law institution of the jury system has been grafted onto the Maltese Criminal Code.

Parliament has the power of delegating a legislative function to another person or body, for example, the Minister responsible for a particular sector.⁸⁴ Such legislation would be subsidiary in the sense that it is subject to the Parent Act which constitutes primary legislation.

The optimum manner of implementing the EU-IUU Regulation in Maltese Law would be through amendments made to the Fisheries Conservation and Management Act.⁸⁵ This drafting project also intends to repeal S.L 425.08 since its aim of enforcing Malta's obligations on the international level domestically is undermined through the establishment of the exhaustive list of instruments in the Schedule. This means that the adoption of new instruments by Malta is excluded from its application and any instrument not listed thereunder is not given effect to under the subsidiary legislation unless the Order is amended.⁸⁶ It has also been criticised by the judiciary who are called to apply the law as lacking practicality.⁸⁷ Hence, the suggestion is that an umbrella provision covering all existing instruments, any amendments thereto and the adoption of new instruments by Malta be introduced in the Fisheries Conservation and Management Act.

⁸⁴ *ibid* 56.

⁸⁵ Fisheries Conservation and Management Act, Chapter 425 of the Laws of Malta.

⁸⁶ S.L. 425.08 art 3; 'These regulations apply to the conventions related to sea fishing listed in the Schedule and any amendments thereto.'

⁸⁷ This point emerged from a meeting held with representatives working at the Department of Fisheries and Aquaculture in Malta.

A Bill entitled

AN ACT to amend the Fisheries Conservation and Management Act,
Chapter 425 and to amend and repeal laws ancillary thereto

BE IT ENACTED by the President, by and with the advice and consent of
the House of Representatives, in this present Parliament assembled, and by
the authority of the same, as follows:-

Short title. **1.** (1) The short title of this Act is Fisheries Conservation and Management (Amendment) Act,
Cap. 425 2018, and this Act shall be read and construed as one with the Fisheries Conservation and
Management Act, hereinafter referred to as “the Act”.

Coming
into
force (2) This Amendment Act shall come into force on such date as the Minister or the Parliamentary
Secretary responsible for fisheries shall by order in the Gazette establish and different dates and
transitory provisions may be established in respect of different purposes of the said coming into
force.

Amendment
to article 2
of the
Act **2.** In article 2 of the Act immediately after the definition “vessel” there shall be added the
following new definitions:

“ “Illegal, unreported and unregulated fishing" or "IUU fishing" means fishing activities which
are illegal, unreported or unregulated;

"illegal fishing" means fishing activities:

(a) conducted by national or foreign fishing vessels in the maritime waters under the
jurisdiction of a state, without the permission of that state, or in contravention of its laws and
regulations;

(b) conducted by fishing vessels flying the flag of states that are contracting parties to a
relevant regional fisheries management organization, but which operate in contravention of

the conservation and management measures adopted by that organization and by which those states are bound, or of relevant provisions of the applicable international law; or

(c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating states to a relevant regional fisheries management organization;

"unreported fishing" means fishing activities:

(d) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

(e) which have been undertaken in the area or competence of a relevant regional fisheries management organization and have not been reported, or have been misreported, in contravention of the reporting procedures of that organization;

"unregulated fishing" means fishing activities:

(f) conducted in the area of application of a relevant regional fisheries management organization by fishing vessels without a nationality, by fishing vessels flying the flag of a state not party to that organization or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

(g) conducted in areas or for fish stocks in relation to which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with state responsibilities for the conservation of living marine resources under international law;

“Designated port” refers to the port where landing or transshipment operations of fish and port services are permitted;

“Landing” means the unloading of all or any fish on board a fishing vessel onto shore;

“Third country fishing vessel” means a fishing vessel flying the flag of a non-EU Member State

Cap.492. “Charitable purpose” shall have the same meaning assigned to it under the Voluntary Organisations Act;

Cap.16. “Persons” shall have the same meaning assigned to it under article 1A of the Civil Code with the exception of States or public bodies in the exercise of State authority and public organisations."

“EC Regulation 1005/2008 is COUNCIL REGULATION (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999;

“Non-cooperating third States shall have the same meaning and be identified in accordance with EC Regulation 1005/2008.”

Amendment to article 3 of the Act

3. Part II of the Act shall be amended as follows;

The title of Part II shall be amended to read “Fishing Waters and Designated Port”;

Following article 3 of the Act there shall be added article 3A which shall read as follows:

“ (1) Designated Port for the purposes of EC Regulation 1005/2008 is Valletta (Deepwater Quay, Laboratory Wharf, Magazine Wharf).

(2) Access to port services and landing and transshipment operations by all fishing vessels shall exclusively take place at the port mentioned under sub-article (1) of this article.

Addition of new article 21A to the Act

4. Following Article 21 of the Act there shall be added article 21A which shall read as follows;

(1) All landing and transshipment operations by all fishing vessels at the designated port shall be inspected by the fisheries protection officers.

(2) (a) All landing or transshipment operations conducted in the fishing waters of Malta by any fishing vessel must take place against the presentation of a catch certificate which shall be submitted at least 3 working days prior to the landing or transshipment in question to the Fisheries Protection Officers.

(b) All the criteria in the catch certificate shall be rigorously examined by the fisheries protection officers

5. Following article 29A of the Act there shall be added article 29B which shall read as follows;

(1) Any person who does not comply with any restriction or obligation relating to sea fishing contained in any of the conventions and instruments to which Malta is a party shall be guilty of an offence against the Act.

(2) Any person found guilty having committed, or held liable for an offence that is shown to be serious against the Act or any other relevant law for the time being in force, shall be liable to a fine (multa) of five times the value of the fish obtained by committing the serious infringement.

(3) Any person found guilty of having committed, or held liable for, a repeated offence within a five-year period, that is shown to be serious in terms of the Act or any other relevant law for the time being in force, shall be liable to a fine (multa) of eight times the value of the fish obtained by committing the serious infringement.

(4) Any person found guilty of having committed, or held liable for, an offence, that is shown to be serious in terms of the Act or any other relevant law for the time being in force, where no fish was obtained by committing the said serious infringement, shall be liable on conviction to a fine (multa) of not less than one thousand euro (€1000) and not more than ten thousand euro (€10,000). In determining the amount of the fine which is to be imposed, regard shall be had to the prejudice caused to the fishing resources and the marine environment, as well as to the economic situation of the offender and any repetition of an infringement.

(5) Any person found guilty of having committed, or held liable for, an offence, that is shown to be minor in terms of the Act or any other relevant law for the time being in force, shall be liable to a fine (multa) equivalent to the value of the fish obtained by committing the infringement.

(6) Any person who is found guilty of having committed, or held liable for, an offence, that is shown to be minor in terms of the Act or any other relevant law for the time being in force, where no fish was obtained by committing the said offence, shall be liable on conviction to a

fine (multa) of not less than fifty euro (€50) and not more than one thousand euro (€1,000). In determining the amount of the fine which is to be imposed regard shall be had to the prejudice caused to the fishing resources and the marine environment, as well as to the economic situation of the offender and any repetition of an infringement:

Provided that where any such convention provides for a further or more specific penalty in respect of a violation of any of its provisions, such penalty shall be applicable in respect of violations to such provisions.

Addition of
proviso
to article 29B
of the Act

6. Following the new article 29B there shall be added a further proviso;

Provided further that an offence shall be deemed to be serious when a fishing vessel:

(a) has fished without a valid license, authorisation or permit issued in accordance with this Act ; or

(b) has not fulfilled its obligations to record and report catch or catch-related data, including data to be transmitted by satellite vessel monitoring system, or failed to provide prior notices;
or

(c) has fished in a closed area, during a closed season, without or after attainment of a quota or beyond a closed depth; or

(d) engaged in directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited; or

(e) used prohibited or non-compliant fishing gear; or

(f) falsified or concealed its markings, identity or registration; or

(g) concealed, tampered with or disposed of evidence relating to an investigation; or

(h) obstructed the work of fisheries protection officers in the exercise of their duties in inspecting for compliance with the applicable conservation and management measures; or

(i) taken on board, transhipped or landed undersized fish in contravention of the legislation in force; or

(j) transhipped or participated in joint fishing operations with, supported or re-supplied other fishing vessels identified as having engaged in IUU fishing, in particular those included in the Community IUU vessel list or in the IUU vessel list of a regional fisheries management organisation; or

(k) conducted business directly connected to IUU fishing including the trade in/or the importation of fishery products; or

(l) falsified documents or used such false or invalid document; or

(m) carried out fishing activities in the area of a regional fisheries management organisation in a manner inconsistent with or in contravention of the conservation and management resources of that organisation and is flagged to a State not party to that organisation, or not cooperating with that organisation as established by that organisation; or

(n) has no nationality and is therefore stateless vessel, in accordance with international law

Provided that the above infringements shall be deemed to be serious depending on the gravity of the infringement, considering criteria such as the damage done, its value, the extent of the infringement or its repetition. The following criteria should also be taken into account;

(i) where the master or the captain or the owner of the fishing vessel failed to transmit a landing declaration or a sales note when the landing of the catch took place in the port of a third country; or

(ii) the master or the captain or the owner of the fishing vessel manipulated an engine with the aim of increasing its power beyond the maximum continuous engine power according to the engine certificate; or

(iii) the master or the captain or the owner of the fishing vessel failed to land any species subject to a quota caught during a fishing operation.

7. Following the new article 29B there shall be added article 29C which shall read as follows;

Addition of article 21B to the Act

The provisions of article 121D of the Criminal Code shall, mutatis mutandis, apply to an offence referred to in article 29B.

Cap.9.

Amendment
to article 25
of the Act

8. The following sub-article shall be added to article Article 25 of the Act immediately after article 25(b) and shall read as follows;

(c) cause the release of the proceeds for charitable purposes.

Addition of
proviso to
article 5(2)
of S.L.
425.07

9. A further proviso shall be added after the first proviso to article 5(2) of the Fishing Vessels Regulations (S.L. 425.07);

Provided further that vessels engaged in IUU fishing shall not be allowed to be registered in the Maltese fishing vessel register and a fishing vessel registered in the Maltese fishing vessel register shall be prohibited from reflagging to a non-cooperating third country.

Repeal

10. (1) This (Amendment) Act hereby repeals the Enforcement of Sea Fishing Conventions Order, S.L. 425.08.

(2) Subsidiary legislation S.L.425.08, repealed by this Act shall, until other provision is made under or by virtue of the Act, continue in force and have effect as if made under this Act.

Savings

11. The new article 21(1) of the Act shall read as follows and all the other sub-articles of article 21 shall be renumbered so that the current 21(1) shall become article 21(2), article 21(2) shall become article 21(3), article 21(3) shall become article 21(4) and article 21(4) shall become article 21(5);

For the purpose of this Act all existing conventions and instruments and amendments thereto, and any future conventions and instruments relating to sea fishing entered into by the Government of Malta shall be enforceable with all their restrictions, obligations and penalties as the case may be, and any infringements of such conventions and instruments shall constitute an offence against this Act.

Objects and Reasons

The object and reason for this bill is to implement the provisions contained in EC Regulation 1005/2008 by amending the Fisheries Conservation and Management Act and any other laws ancillary thereto and by repealing S.L.425.08 thereby ensuring that Malta prevents, deters and eliminates IUU fishing.

Annex A- EC Regulation 1005/2008

Annex B-Fisheries Conservation and Management Act, Chapter 425 of the Laws of Malta

**Annex C-Enforcement of Sea Fishing Conventions Order, S.L.
425.08**

Annex D-Fishing Vessels Regulations S.L. 425.07

