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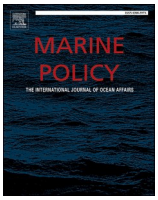

The prosecution of fisheries crime in Spanish criminal law: The impact of European Union regulations

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A B S T R A C T

This contribution offers a critical reflection on fisheries crime as described in the Spanish Penal Code. It sets out the reasons why its treatment is considered ineffective, and why the administrative offences and sanctions provided for in Law 3/2001 on Maritime Fisheries are more effective and dissuasive. However, it also considers that a legislative policy relying on the severity of administrative sanctions for its effectiveness may be counterproductive. The most recent judgements of the ECtHR consider that a disproportionate administrative sanction is equivalent to a penalty and should therefore be imposed with the same procedural and substantive safeguards. Finally, it is concluded that in order to avoid impunity for serious crimes in the field of IUU fishing activities, often managed by transnational and organised criminal networks with links to other criminal activities, the contribution of criminal jurisdiction is essential. Therefore, a reform of the Spanish Criminal Code is required, extending the conducts punishable as fishing crimes, increasing the penalties and establishing the criminal liability of legal persons.

1. Introduction

Faced with the challenge of illegal, unreported, and unregulated (IUU) fishing, regulations have been developed to prosecute fishing infractions in which public and private (environmental NGOs) agents collaborate in drawing up soft and hard laws and international, regional, or national standards. Within this legal framework, the FAO's Committee on Fisheries has taken on a leading role, particularly in relation to its International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). This voluntary instrument coined the term IUU fishing to encompass a wide variety of fishing activities that violate the rules of conservation and management of living marine resources, differentiating between illegal fishing, unreported fishing, and unregulated fishing.

The IPOA-IUU provides a wide range of measures that can be adopted by States and Regional Fisheries Management Organisations (RFMOs) against IUU fishing. Among these measures, States may impose sanctions (including criminal sanctions) that are severe enough to effectively prevent, deter and eliminate IUU fishing and deprive offenders of the benefits derived from such fishing. Although the IPOA-IUU does not abandon the criterion of the flag State (principle of territoriality) as the main basis of jurisdiction, it should be highlighted that it also recommends that States employ the principle of personality to sanction their nationals regardless of the exclusive jurisdiction of the flag State (Art. 2) for IUU fishing practices [1]. In addition, States are encouraged to pass national legislation which should address, inter alia, evidentiary standards and admissibility including, as appropriate, the use of electronic evidence and new technologies, and should cooperate with each other in the investigation of IUU fishing [2].

However, the prosecution of fisheries offences is problematic due to the peculiarities of the management of living marine resources [3]. The complexity of international and European fisheries management leads to such crimes being committed in very different contexts: small-scale fishing in internal waters (in the case of Spain, prescriptive jurisdiction is divided between the State and the Autonomous Communities); fishing in EU waters (regulatory powers are assumed by the European Union); fishing in maritime zones under the sovereignty or jurisdiction of a third State or on the high seas within the framework of the RFMOs. In the latter case, as demonstrated by the Judgement of the Supreme Court of Spain, No 974/2016, of 23 December 2016 in the *Vidal Armadores* Case, known as "Operation Yuyus", impunity is frequent [4].

In view of the difficulties in penalising IUU fishing, this paper will focus on analysing the extent to which Spanish criminal law allows for the effective prosecution of fishing crimes, considering the impact of

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European Union regulations in this area.

2. Combatting IUU fishing in EU law: the relevance of sanctions

EU action against IUU fishing is entrusted to a set of independent but related Community Regulations adopted within the framework of the Common Fisheries Policy (CFP). Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing[1] and Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy[2] are notable examples of such regulations.

Both of these Regulations provide detailed rules regarding the introduction of catches from third States into the intra-community market and establish rules which must be fulfilled by vessels in order to access a port or in the case of transhipment or landing [5]. Likewise, they define the conditions to be respected by imports, exports, transit or re-export of fish and fisheries products originating from third States. As far as these regulations are concerned, the definition of illegal fishing encompasses a broad variety of illicit activities: fishing without a licence or during a closed season; the use of prohibited fishing gear; not respecting the assigned catch quotas; the catch of prohibited species or of those subject to a moratorium or which have not reached the authorised maturity; and not having fulfilled the obligation to record and report catch or catch-related data (including data to be transmitted by the satellite vessel monitoring system). The concept of illegal fishing also includes any other activity related with fishing as an economic activity, from landing to the final production chain (canning, production of feed or medication), sale or consumption, i.e., the whole fisheries value chain.

Council Regulation (EC) No 1005/2008, specifically describes the list of activities which lead to the presumption that a vessel is involved in IUU fishing (Art. 3), classifying them as serious infringements in accordance with Article 42. This list of IUU activities included in Article 3 is to be taken into account when monitoring and inspecting unloading in EU ports via the "risk management" system or when prohibiting the importation of fisheries products. This is the case even when the catch certificates issued by the flag State are those which accredit that the activity has been carried out correctly (Art. 20). This list should also be taken into account by the member State in the activation of the Community alert system, the intensification of inspections of landings and the verifications of importations (Art. 24) and, most importantly, for the Commission to include fishing vessels in the Community list of vessels presumed to be involved in IUU fishing, resulting in the application of the measures stated in Articles 37 and 38.[3] These are also the same types of activities that nationals of member States are not permitted to carry out or support, even when working on third country vessels.

For serious infringements (Art. 42), Regulation (EC) No 1005/2008 establishes fines of at least five times the value of the fishery products obtained through the commission of the serious infringement. In such a way, those responsible for the infringement will be deprived of the economic benefits derived from their illicit activities. These fines may be complemented by other sanctions, particularly those described in Article 45 (suspension or prohibition of activity, the withdrawal of rights or licences, the sequestration or temporary or permanent immobilisation of the fishing vessel involved in the infringement, the reduction or withdrawal of fishing rights, etc.). According to Article 45.3, the confiscation of prohibited fishing gear, catches or fishery products is established as a possible complementary sanction. In relation to serious forms of IUU fishing, the EU paves the way for a double sanctioning regime, stating that "member States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions" (Art. 44.3).

Likewise, Council Regulation (EC) No 1224/2009 establishes a global and integrated system for control, inspection and enforcement so as to ensure compliance with all the rules of the CFP, thus providing for the sustainable exploitation of living aquatic resources. This Regulation also describes serious infringements of the CFP in a much broader way than Regulation (EC) No 1005/2008 and obliges member States to incorporate them into their domestic law (Art. 90). Thus, a uniform system of effective dissuasive sanctions proportional to the severity of such infringements is established. These sanctions are aimed at annulling the economic benefit derived from the illicit act and discouraging any repetition of the infringement. In this regard, the Regulation requires member States to take into account the value of the damage to the fishing resources and the marine environment concerned when calculating the severity and amount of the sanction to be applied (Art. 90.4).

Regulation No 1224/2009 develops a points system for severe infringements as detailed in Article 42 of Council Regulation (EC) No 1005/2008, according to which an appropriate number of points are to be imposed upon the holder of the fishing licence and the captain of the fishing vessel as a consequence of the infringement of CFP rules. The sanction imposed and the number of points assigned are to be entered in a national register of infringements committed by fishing vessels flying their flag or by their nationals.

According to these Regulations, member States should appropriately punish legal persons suspected of having infringed the rules of the Common Fisheries Policy in accordance with their national legislations. Making use of the same legislative technique as a significant number of Directives,[4] Article 47 of Council Regulation (EC) No 1005/2008 stipulates that the criteria for attributing infringing conduct on legal persons are based on the benefit and action of any natural person with a determining position based on a power of representation, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person. This rule makes it possible to attribute liability to the shipping company, which is the ultimate authority in terms of controlling the fishing operations of its fleet and which holds the corporate control of the companies of the group. Furthermore, the legal person could be sanctioned due to a lack of supervision and control of the natural persons who have made possible the commission of an infringement for the benefit of the legal person. The liability of the legal person is autonomous and fully compatible with that demanded of the natural person.

Ultimately, the conservation of marine biological resources under the CFP is an exclusive competence of the EU (Art. 3.1 and 43 TFEU), in which member States play a subordinate role. They should adopt coercive measures and sanctions for infringements of the rules of the CFP in their waters, by their vessels and by their nationals (based on the principles of territoriality and active personality). Furthermore, one important nuance is that they also have the obligation to punish fishing carried out by foreign vessels which use their ports as a point of landing contravening that rule both in EU and international waters. The member States assume obligations of result, i.e., they should be able to fulfil the EU rule and apply it effectively. If a member State is aware of an infringement of the rules of the CFP and does not act to repress it, this may imply the infringement of EU legislation.

Council Regulation (EC) No 1224/2009 adopts the same approach as Council Regulation (EC) No 1005/2008, giving member States the freedom to decide whether they adopt administrative and criminal sanctions simultaneously or alternatively in order to guarantee the

[1] Official Journal of the European Union L 286 of 29.10.2008.

[2] Official Journal of the European Union L 343 of 22.12.2009.

[3] See, Commission Implementing Regulation (EU) 2020/269 of 26 February 2020 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

[4] See, e.g., Article 6 (liability of legal persons) of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008, on the protection of the environment through criminal law.

fulfilment of EU fisheries legislation (Art. 90.5). Thus, the Community Regulations have established a uniform system of sanctions for infringements of EU fishing legislation, particularly in cases of IUU fishing. However, there are still significant differences among member States as far as types of infringements and levels of sanctions are concerned.

Some member States specifically punish certain serious infractions of IUU fishing through a dual criminal and administrative procedure. This is the case of Italy, where Legislative Decree 4/2012, of 9 January, No 4 includes activities related with IUU fishing within the catalogue of criminal sanctions in the field of professional fishing [6].[5] Likewise, in France, the *Code Rural et de la p ê che maritime et aquaculture marine* establishes a mixed system of administrative and criminal sanctions and, although the use of administrative sanctions seems to be the preferred choice here, criminally sanctioned conducts are in line with Article 42 of Council Regulation (EC) No 1005/2008.[6] In Spain, the prosecution of IUU fishing is fully entrusted to administrative sanctioning, despite the fact that fisheries crime is included in the Criminal Code. However, for reasons which will be outlined below, the criminal sanctioning procedures for these crimes lack efficiency in terms of the repression of the most severe infringements of CFP regulations.

3. The Spanish administrative sanctioning system in the field of illegal fishing

The fulfilment of EU rules relating to the CFP in Spain and the repression of IUU fishing have been entrusted almost exclusively to administrative sanctioning law set out in Law 3/2001, of 26 March, on Maritime Fishing of the State. This Law is complemented by the legislation of the Autonomous Communities regarding fishing in internal waters, shellfishing and fish farming. In addition, the National Register of serious infringements of the CFP was set up in 2013, along with the system of penalty points for fishing vessels responsible for serious infringements.[7]

Along general lines, the Spanish sanctioning model is based on the Community Regulations. This is a "two-way" model which, in principle, does not prevent administrative sanctions from being accumulated to criminal sanctions, according to Article 92 of Law 3/2001. This law includes significant fines, which aim to annul illicit earnings and discourage repetition of the offence. They are accompanied by accessory sanctions which can even be imposed as a precautionary measure at the beginning of the sanctioning proceedings: embargos, the temporary or permanent immobilisation of the offending vessel, the confiscation of fishing gear, catches or prohibited products, suspension or prohibition from carrying out fishing activities, the reduction or annulment of fishing rights and licences, the prohibition of obtaining public assistance or subsidies or certain tax benefits, etc.

The advantage of these accessory sanctions is that, as they are mandatory, they cannot be amortised as an economic cost (unlike fines) by way of the creation of venture funds or via insurance policies. They possess a higher degree of dissuasive and general preventive power both for natural and legal persons, as they imply a significant financial cost which cannot be insured in any way, and they prevent all of the sanctioning weight from falling upon the natural person. They also have a strong impact on companies' turnover and long-term success and may even lead to their closure [7]. Therefore, the system of infringements and sanctions stipulated in Law 3/2001 on Maritime Fishing is decisive in guaranteeing the effective protection of marine biological resources and is highly effective in the prevention of these conducts.

However, there are flaws in this sanctioning system. The minimum and maximum amounts of the fines are extremely high and certain accessory sanctions can be extremely long in duration as they can be subject to the accumulation of several infringements due to their compatibility with the points system.[8] According to the jurisprudence, the accessory sanctions of the suspension of professional activity or of fishing activities imposed by participation in the exploitation, management and ownership of a vessel recorded in the EU IUU vessel list [serious infringement of Article 101 (l) of Law 3/2001] may add up to 23 years in duration if the owner of the vessel or the captain have directly or indirectly participated in the management or exploitation of several vessels included in the IUU vessel lists. These professional suspensions may be imposed for conduct unrelated to IUU fishing activity and are much greater than those which correspond to criminal law for cases of criminal liability of legal persons.[9] The severity and duration of some of the accessory sanctions included in Law 3/2001 (e.g., the immobilisation or confiscation of a vessel according to Article 105.1 (j) and (k)[10]) brings them closer to criminal sanctions, despite their administrative nature [8,9]. However, they have the disadvantage of being imposed with a standard of evidence more appropriate to administrative proceedings, which have less guarantees than would correspond to a criminal case. In this regard, the Spanish administrative sanctioning model in the field of maritime fishing, independently of its legal denomination (administrative sanction/penalty), falls within what the European Court of Human Rights (ECtHR), following the decision in the case of Engel and others v. The Netherlands of 8 June 1976, has considered as a criminal case for the purposes of Article 7 of the European Convention on Human Rights (ECHR). Therefore, in the long term, the Spanish administrative sanctioning model will be confronted with the procedural and substantive guarantees offered in criminal cases by the ECtHR (the right to a fair trial, legality, proportionality, *ne bis in idem,* etc.) [10–12]. This will possibly give rise to the revision of a significant number of contentious administrative judgements due to the lack of observance of those protective principles. This has already occurred in the area of market abuse following the ECtHR's significant decision in the Grande Stevens v. Italy case of 4 March 2014 [13].

Likewise, accessory administrative sanctions run the risk of being applied with the same intensity to illicit conduct with differing degrees of seriousness (e.g., via the application of the sanctions for the infringements included in Article 42 of Regulation (EC) No 1005/2008, for IUU fishing to infringements of regional legislation in the area of shell-

[5] Legislative Decree 4/2012 No 4, reformed by Law No 154 of 8.07.2016.

[6] Text of the Code available at http://www.codes-et-lois.fr/code-rural-et-de-la-peche-maritime/toc-peche-maritime-aquaculture-marine-controles-sanctions-sanct-a5c6688-texte-integral.

[7] Royal Decree 114/2013 of 15 February (BOE No 51 of 23.02.2013) in accordance with the provisions of Article 134 of Council Regulation No 404/2011, of 8 April.

[8] Law 3/2001 on Maritime Fishing of the State does not contain specific rules for calculating the amount of fines and accessory sanctions. It describes a catalogue of sanctions which do not correspond to a correlative infringement (as is the case in Italy and France). It merely indicates certain maximum durations in relation to the nature of the infraction. However, the accessory sanctions mandated for minor infringements are extremely severe (for example, the suspension of the status of authorised economic operator for a period of two years). Neither are specific criteria contemplated, as occurs in Article 66 *bis* of the Spanish Criminal Code (rules on the imposition and extent of penalties imposed on legal persons), which can be taken into consideration in establishing which specific accessory sanction for the deprivation of rights should be imposed upon the natural or legal person for the commission of the infringement. As there are no clear rules, control of proportionality of the sanction and its appropriateness to the specific case remains entrusted to the motivation, which is established in the administrative sanctioning resolution.

[9] In this regard, see the Judgements of the National High Court (Audiencia Nacional). Contentious-Administrative Chamber, of 24 September 2021, JUR 2021/334798 [ECLI:ES:AN:2021:4230], and of 22 March 2019, JUR 2019/114019 [ECLI:ES:AN:2019:836].

[10] The confiscation of a vessel can be imposed for extremely serious infringements, e.g., those described in Article 104 of Law 3/2001, considering conduct such as: a) The obtention of the necessary authorisations based on false documents or information; b) Resisting or seriously disobeying inspection authorities, preventing them from carrying out their work.

fishing activities)[11] via the analogous or extensive application of EU IUU fishing rules. Therefore, an uneven distribution of sanctions can occasionally be observed in the repression of illegal fishing.

Other flaws in the administrative sanctioning procedure for the repression of fishing infractions in foreign waters are derived from different factors, such as the limited capacity for investigation of certain forms of IUU fishing. This is particularly true when attempts are made to sanction actions carried out within the context of complex corporate structures or inside organisations created outside the law; an extremely common occurrence in IUU fishing operations, which are often managed by transnational organised crime networks, with possible links to other criminal activities [14].

Last of all, the weakness of the administrative sanctioning procedure in terms of fishing is linked to issues relating to the maximum time allowed for processing the case. According to Article 94, the deadline established for the resolution and notification of the sanction is nine months for serious and extremely serious infractions. This period of time is counted from the moment when the decision to begin the proceedings is adopted. It is well known that such short processing deadlines make it impossible to prosecute complex organised schemes.

4. Fisheries crime in the Spanish Criminal Code

So-called fisheries crime is included in Chapter IV of the Spanish Criminal Code of 1995, among criminal offences related to flora, fauna and pets (Articles 332–337 bis) [15–17].[12] The current Criminal Code (CC) jointly punishes hunting and fishing conducts carried out on animal species (fauna) in the same provisions. However, it distinguishes between protected species or species at risk of extinction, the hunting or fishing of which is always illegal (Art. 334), and other species not classified as endangered or at risk of extinction. Hunting or fishing of the latter is only considered a crime "when this is expressly prohibited by specific regulations on the hunting and fishing of those species" (Art. 335). Therefore, two groups of crimes can be differentiated depending on the species caught:

A. *The fishing or hunting of protected species or those at risk of extinction.*

Art. 334 punishes the following actions with prison sentences of between 8 months and 2 years and the special barring of the right to hunt or fish:

a) Hunt, fish, acquire, possess or destroy protected species of wild fauna;.

b) Traffic with them, their parts or derivatives thereof, or;.

c) Carry out activities that prevent or hinder their reproduction or migration;.

d) Destroy or seriously alter their habitat.

The penalty shall be imposed in its upper half in the case of species or sub-species at risk of extinction.

B. *The fishing or hunting of unprotected species or those which are not in danger of extinction.* Here, a distinction is made between:

– Regulated *fishing or hunting* of unprotected species (Art. 335.1): The fishing of these species is only punished when this is expressly prohibited by the specific rules on their fishing.

– *Fishing, hunting or shellfishing without the necessary licence* (Art. 335.2): Hunting, fishing or participation in relevant shellfishing activities on public or private land pertaining to others, subject to special hunting regime, is punished when it is carried out without due permission by their owner, or in an area subject to a shellfish or fishing concession or authorisation without the necessary licence.

Penalties become more severe if the hunting, fishing or shellfishing activities cause serious damage to hunting property, on an estate subject to a special hunting regime, or to the sustainability of resources in zones subject to a fishing or shellfishing concession or authorisation. This is also the case if the fishing activity is perpetrated by groups of three or more persons using tackle or means that are prohibited by laws or by-laws. Both cases are punishable by imprisonment (maximum of two years) and the prohibition of exercising the right to hunt, fish and undertake shellfishing activities (for a maximum of five years).

Article 336 punishes individuals who, without being legally authorised, use poison, explosive devices or other instruments or tackle of a similar destructive, non-selective effect on fauna to hunt or fish. Penalties in these cases are alternative: imprisonment between four months and two years or fines of eight to 24 months and, in all cases, special disqualification from profession or trade and prohibition from the exercise of the right to hunt or fish for a term of one to three years.

5. The ineffectiveness of the notion of fisheries crime defined in Article 335 to punish IUU fishing

5.1. On the grounds of the activities punished

Article 335.1 gives equal treatment to fishing and hunting activities in terms of punishment. However, in the second paragraph of Article 335, punishment is added for participating in relevant shellfishing activities in an area subject to a shellfish or fishing concession or authorisation without the necessary licence, which suggests the possibility of considering that shellfishing is a separate and distinct activity from hunting and fishing. The criminalisation of illegal hunting and fishing as comparable conducts falling within the realm of the same criminal precept contrasts with the fact that hunting is a merely recreational (not professional) activity, whereas fishing can be both professional and recreational, and can have impacts on marine resources of extremely different intensities.

Article 335.1 punishes the conduct of *fishing*. In this case, the literal sense of the verb used in the definition of the crime is of decisive importance in determining the scope and the moment of the commission of these offences. The most common meaning of the term "fishing" in Article 355.1 is "the capture of fish or other aquatic animals using any procedures available", i.e., the harvesting of fish from marine, river or lake environments. This restriction implies the impunity of a whole series of activities linked to fishing, such as the landing, transhipment, transformation and commercialisation of illicit products, etc. Of course, the breeding and cultivation of living marine resources (fish farming) is not included within the definition of fisheries crime.

Consequently, if an individual is intercepted driving a vehicle with illegally-caught fish, he/she cannot be punished, unless illegal fishing activities have been perpetrated by this individual, alone or in collaboration with other people. Of course, this does not discard the possibility of punishing the individual transporting illegal fish for some kind of participation (cooperation or complicity), but only if it can be proved that he/she has taken part in the commission of the crime [18]. If the individual intervenes in the phase following the commission of the crime, a charge could be considered for a crime of concealment, contraband or money laundering but only if it is demonstrated that the individual stopped knows that he/she is transporting or selling an illegal product harvested from the sea [19–21].

5.2. It is not a crime for which legal persons are criminally liable

Corporate criminal liability is only foreseen in the Spanish Criminal Code for crimes against natural resources and the environment (Art. 325–331). The type of corporate criminal liability in illegal fishing activities of endangered species or those at risk of extinction is not foreseen, which partly contradicts Directive 2008/99/EC of the European Parliament and of the Council, of 19 November 2008, on the protection

[11] In this regard, see the Judgement of the Galician High Court of Justice (HCJ) Contentious-administrative Chamber No. 87/2021 of 15.02.2021 [ECLI: ES:TSJGAL:2021:1171].

[12] Organic Act 10/1995, of 23 November, of the Criminal Code. Available at: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf.

of the environment through Criminal Law, which requires the responsibility of legal persons for crimes against protected species of flora and fauna (Art. 6).

The liability of legal persons is limited exclusively to administrative sanctions. The absence of corporate criminal liability constitutes a significant loophole as fisheries crime is one of the particularly serious cases of socio-economic delinquency and it is debatable whether a legal person can be punished for money laundering when the crime which generates the illicit earnings, namely illegal fishing, is not applicable in the case of corporate entities.

It is true that certain forms of illegal fishing carried out by legal persons (undeclared fishing) could be sanctioned via Organic Law 12/1995 on the suppression of smuggling, which does indeed contemplate the criminal liability of legal persons. However, this criminal response is insufficient in the context of EU fisheries legislation as some of the conducts which should be penalised are not.

5.3. Limitations on punishment

The maximum penalty for the crime of illegal fishing in Spanish law is two years' imprisonment. To this can be added the corresponding professional suspensions when serious damage is caused to the sustainability of the resources of the zones subject to a fishing or shellfishing concession or authorisation, when the conduct is perpetrated by groups of three or more persons or when prohibited or non-selective poison, explosive devices or other instruments or tackle are employed. Fines which are dissuasive or proportional to the value of the product, the profit obtained or the damage caused to the fishing ground are not included among the penalties for this crime.

Therefore, punishment is extremely light, with fines not proportional to the enormous profits obtained. This seems to indicate that the criminal offences defined in the field of fishing are aimed at the repression of individual fishermen or those who fish recreationally. The level of monetary sanctions must be adjusted in such a way as to make them truly dissuasive. However, this would require the adoption of a different legislative technique focused on the repression of illegal professional fishing and some of its related activities.

Prison sentences do not exceed two years in length, thus impeding the putting into practice of different means of investigation, which limit fundamental rights, such as the new technology-related investigative measures established in Organic Law 13/2015 amending the Criminal Procedure Law.[13] According to Articles 579 and 588 *quater* (b), these measures can only be authorised in the case of intentional crimes punished with a sentence of a maximum of three years' imprisonment or in the case of crimes of terrorism or crimes committed as a member of a criminal group or organisation.

5.4. The confusing definition of the notion of fisheries crime in Article 335.1

Perhaps the most serious problem concerning fisheries crime in the Spanish Criminal Code is the imprecision and ambiguity in the description of the punishable conduct, i.e., in the meaning of fishing *when this is specifically prohibited by the specific rules on their fishing*.

The previous wording of Article 335, prior to the 2015 reform, punished fishing when it was not expressly authorised by specific regulations of this activity. This wording was declared unconstitutional by Judgement 101/2012 of 8 May of the Spanish Constitutional Court, due to its violation of the principle of legal certainty and of the legality principle in criminal law (Article 9.3 and 25.1 of the Spanish Constitution) [22,23]. However, the new wording of this Article has not dispelled the doubts previously raised by this crime. Rather, it has merely increased such misgivings. Thus, the few judgements handed down by Spanish courts regarding this crime have generated a clear division of opinions resulting in the punishment or impunity of the same events, with the consequent erosion of legal certainty [24].

Thus, the constituent elements of fisheries crime (Art. 335.1), a blanket criminal clause, should be interpreted in accordance with the rules of administrative fisheries law, as it is upon these rules that the criminal sanction leans.[14] It is administrative legislation that influences the level of intensity of criminal protection dispensed to marine species of commercial interest. The criminalisation of fishing is not dependent on the lack of authorisation (as is the case in Article 335.2 CC), but on the existence of a prohibition in the administrative regulations in force, which is the requirement of Article 335.1.

Likewise, it should be clarified that prohibitions on the fishing of specific marine species have different scopes. They may be absolute in nature, but may also have a relative scope, reducing the prohibition to limits of a temporal or geographical nature or related to the size or weight of the specimen. The administrative sanctioning legislation clearly punishes prohibited fishing activities which are perpetrated on species the fishing of which is not permitted in accordance with these rules. It also punishes fishing when it is carried out outside of the temporal or geographical limits established in the regional legislation or, if appropriate, in State or EU legislation in relation to the species in question. However, for the purposes of interpreting the criminal rules, what does it mean for the species to be specifically prohibited by the specific laws on their fishing? How should this legislative remission be interpreted? As a remission of the rules on the species or also on the rules, which regulate the methods, tackle, times or spaces to fish the said species? In other words, it is necessary to clarify whether the criminal offence extends to serious conducts which are also damaging for unprotected species, such as fishing in a prohibited zone or closed season or without having a quota, continuing to harvest having exhausted the quota or fishing at a greater depth than is permitted (conducts classified as extremely serious infringement according to Article 99 of Regulation 1224/2009). Depending on which interpretation is adopted, the practical consequences vary substantially. If it is considered that the prohibitive rules of Article 335 refer only to the prohibition of fishing certain species, which are classified as *prohibited* (clashing in part with the protected species mentioned in Article 334 CC), the catching of species the fishing of which is authorised with a licence or permit cannot be considered to be a fisheries crime, even if it is carried out outside of the geographical, temporal or quantitative limits established in administrative law. In all cases, these conducts shall constitute an administrative infringement of Law 3/2001 on Maritime Fishing and of the applicable EU legislation, although they cannot be criminally prosecuted according to Art. 335 CC.

The majority of the judicial resolutions have clearly declared that the fishing of unthreatened species, which are not the object of an express prohibition applicable in all times and places, does not constitute a fisheries crime.[15] If the fishing is the object of administrative authorisation in certain times or places, the conduct shall not be punished, even if the accused have fished outside of the permitted geographical or temporal limits. The courts have based their decision on the fact that Article 335.1 CC cannot be downgraded to a purely formal crime of disobedience of administrative legislation, as the principle of minimum

[13] Organic Law 13/2015, of 5 October, amending the Criminal Procedure Law to strengthen procedural guarantees and regulate technology-related investigation measures (BOE No 239, of 6.08.2015).

[14] A list of the laws which integrate State and regional criminal offences can be found in Judgement of the Supreme Court of Spain, No 570/2020, of 3 November. [ECLI: ES:TS:2020:3566](3rd Paragraph).

[15] This matter is deal with by Judgement of the Provincial Court of Barcelona No 759/2011, of 31 October [ECLI:ES:APB:2011:12197].

intervention imposes the need to reserve a criminal response for the most serious offences.[16]

Only a few judgements have opted to punish fishing in the closed season or that prohibited by particular circumstances. The most recent case was Judgement of the Supreme Court No 570/2020, of 3 November, which states that hunting (but which can also be applied to fishing) in closed seasons fits into Article 335.1 CC, maintaining that "the establishment of closed seasons or any other type of limitations does not respond to a purely conventional and capricious distribution, but rather to reasons of a biological order in order to facilitate the reproduction of the species and sustainable use, preserving the ecosystems of which the target animals of these activities form part. The definition of prohibitive cycles of a cyclical nature has a strategic value for the protection of animal life" (paragraph 3.4).

6. High seas fishing carried out by Spanish nationals on board vessels flying flags of convenience

The weakest point for the repression of IUU fishing is the use of flags of convenience, as demonstrated by the acquittal in the Vidal Armadores Case [25,26].

To my view, the most effective resource in the repression of IUU fishing on the high seas on board vessels flying flags of convenience is currently being carried out in the administrative sanctioning field. Many sanctions have been handed down for the extremely serious infringement described in Article 101 letter l) of Law 3/2001 on Maritime Fishing. This article refers to the participation in harvesting, management and ownership of stateless vessels or vessels from third countries identified by the RFMOs or other international organisations as having committed IUU fishing activities or others contrary to initiatives for the conservation and management of fishery resources or the exercise of mercantile, commercial, corporate or financial activities related to them.[17] This infraction leads to considerable monetary fines and, as has previously been mentioned, accessory sanctions, such as the impossibility of receiving loans, subsidies and public assistance (of great importance in the fishing sector) and long-term barring from exercising or carrying out fishing activities (even longer than those foreseen in the CC) (Art. 105.1 Law 3/2001).

Given the variety of conducts included in the administrative offence, Article 101 letter l) of Law 3/2001 sanctions any activity implying participation in the ownership of a vessel, its management or use or any other type of mercantile, commercial, corporate or financial activity in relation to a vessel included in the European list of IUU vessels, independently of whether or not they carry out any fishing activity (e.g., the procurement or negotiation of insurance, sales operations, repair operations, etc.). This is the case even when the owner appears as a mere *de facto* administrator in the network or corporate group. The initiation of these sanctioning proceedings is often facilitated by the abundance of documentation sent by the authorities of other States in the framework of the mechanism of mutual assistance foreseen in Council Regulation (EC) No 105/2008 obtained in the course of inspections in foreign waters.[18]

7. Conclusions

Criminal sanctions in the field of fishing have a marginal nature in Spanish Law and the inversely proportional relationship between administrative sanctions and the criminal offences of Articles 334, 335 and 336 of the CC are characterised by a total lack of continuity and of earnestness: the administrative fines and other accessory sanctions that may be imposed under Law 3/2001 on Maritime Fishing are higher and more severe respectively than the penalties established in the CC. Neither is the legal procedure employed to punish the fishing crime satisfactory. In Spanish criminal law, only natural persons are punished for so-called crimes against flora and fauna. Hunters and those who fish professionally and recreationally are affected equally and the conducts subject to punishment are not accurately defined, with legal persons not being criminally liable. Consequently, they are not effective in sanctioning serious offences in the field of professional maritime fishing, especially in cases of IUU fishing activities carried out in an organised manner beyond waters under Spanish sovereignty or jurisdiction or on board vessels flying a flag of convenience.

The duration and complexity of the criminal proceedings applicable compared with the flexibility and lesser duration of the administrative sanctioning proceedings is a positive factor which should be taken into consideration with regard to the decision to opt for criminal prosecution. However, the contribution of the criminal jurisdiction of each State to the investigation and criminal repression of the most serious conducts relating to IUU fishing seems to be fundamental.

The Common Fisheries Policy is a field which requires an in-depth evaluation to determine whether it is necessary to have certain minimum rules regarding the definition of fisheries crimes and criminal sanctions in order to guarantee the effective enforcement of EU legislation. Sometimes, the European Commission has stated its intention to undertake zero tolerance campaigns in the fight against IUU fishing [27]. Therefore, the appropriateness of adopting a Directive on this matter should be assessed. This Directive could find a legal basis in Article 83.2 of the TFEU, which authorises the European Parliament and the Council, at the proposal of the Commission, to establish "minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures".[19]

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[16] Among them: the Judgements of Provincial Courts of Madrid No 36/2014, of 17 January; of Girona No 37/2015, of 22 January [ECLI:ES:APGI:2015:215]. As the judgement of Provincial Court of Córdoba No 121/2018 of 4 April [ECLI:ES:APCO:2018:296] points out, the interpretation of Art. 335 CC was (and still is) a legal matter subject to discussion, in which the majority opinion is inclined towards a restrictive interpretation.

[17] In this regard, see the Judgements of the National High Court (Audiencia Nacional). Contentious-Administrative Chamber, of 16 April 2021 [ECLI: ES: AN: 2021:1773], of 7 January 2020 [ECLI:ES:AN:2020:522], of 23 May 2019 [ECLI:ES:AN:2019:2383], of 22 March 2019 [ECLI:ES:AN:2019:836].

[18] Of particular interest is Section 8, Articles 34, 35 and 36 of Royal Decree 182/2015 of 13 March (BOE, 14 March 2015) approving the regulation of the sanctioning procedure of maritime fishing in foreign waters. Specifically, Articles 34, 35 and 36 are dedicated to the sanctioning procedures linked to vessels flying flags of convenience.

[19] This accessory power has been developed by the jurisprudence of the Court of Justice of the European Union in the field of environmental crime and pollution originating from vessels. CJEU Judgement of the Court of 13 September 2005, case C-176/03, Commission v. Council. CJEU of 23 October 2007, case C-440/05, Commission v. Council.

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Declarations of interest

None.

Data availability

No data was used for the research described in the article.

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