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## **Case Study on Dysfunctions of the European Union: The Example of Electric Pulse Fishing <sup>1</sup>**

by

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<sup>1</sup> This article is the English version of the article “Etude de cas sur des dysfonctionnements de l’Union européenne : l’exemple de la pêche électrique”, published in the Annuaire de Droit Maritime et Océanique, vol. XXXVI (June 2018), edited by the Centre de Droit Maritime et Océanique, Nantes University (France) and published by Editions Pédone, Paris. The only difference is an additional footnote, n° 39, concerning a delegated regulation adopted by the Commission on 2 March 2018 and rejected by the European Parliament on 14 June 2018. »

On 17 August 2017, the weekly newspaper *Le Marin* devoted three pages to the controversy surrounding electric pulse fishing. In this technique, developed by Dutch fishers, electric pulses are sent through a trawl which scrapes along the seabed. The aim is to disturb the flatfish buried in it, so that they can be caught more easily. This technique was first authorised in 2007, by derogation from the ban on any fishing using an electric current in Article 31 of Regulation n° 850/98 on technical measures for fishing<sup>2</sup>. The authorisation was limited to 5% of each Member State's beam trawling fleet. In reality, this primarily concerns the Netherlands. The subsequent Amending Regulation n° 227/2013, applicable from 1 January 2013, integrated this derogation into Regulation 850/98, as Article 31a.

The debate intensified with the discussions at the European Parliament (EP) on the Commission's proposal for the regulation designed to replace Regulation n° 850/98<sup>3</sup>. On 16 January 2018, with a large majority (402 votes for, 232 against and 40 abstentions), the EP adopted several amendments to the Commission's proposal, which would have the effect of banning this technique.

The article in *Le Marin* on 17 August 2017 outlined the highly favourable arguments put forward by Dutch fishers, and conversely, the entirely opposing position of fishers from the north of France and NGOs (Bloom, Seas at Risk). It should also be noted that according to this article, the European Commission seemed to support the development of this technique. This fishing practice is used in ICES zones IVb and IVc of the North Sea, south of a broken line from 55° N on the east coast of the United Kingdom to 56° N on the west coast of Denmark, and southward as far as the southern edge of zone IVc, which corresponds to the 51° N parallel connecting a point south-west of Dover in the United Kingdom to a point level with Gravelines (between Calais and Dunkirk) in France. This technique is therefore practised in the coastal waters of six EU Member States: the United Kingdom, Denmark, Germany, the Netherlands, Belgium and France.

From the perspective of a legal expert, the newspaper article said both enough and too little. Enough to arouse curiosity, due to the lack of transparency surrounding the conditions in which this technique would have been authorised<sup>4</sup>, when in theory, the relevant procedure is

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<sup>2</sup> Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms, known as the technical measures regulation.

<sup>3</sup> Proposal for a regulation of the EP and of the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures, COM/2016/134 of 11 March 2016.

<sup>4</sup> "It was authorised with great discretion, dispatched like a letter being posted, without debate. Without even featuring on the agenda at Brussels, the day before Christmas Eve, at the end of the annual marathon between European fisheries ministers discussing quotas for 2007" (*Le Marin*, 17 August 2017, p. 17).

very clearly laid out. Too little, because the newspaper's assertions were not precise enough for a jurist. This inevitably raises concerns and makes us want to look deeper into the matter.

Moreover, the promoters of this technique laud its many supposed virtues<sup>5</sup>. They claim that it is more selective than traditional trawl fishing (otter or beam trawl), as if in the era of robotics, drones, home automation, etc., electric pulse trawls are a kind of "smart" trawl capable of sorting the halieutic wheat from the chaff. They present the development of this technique as a concrete response to the EU's desire to prioritise selective fishing gears<sup>6</sup>. However, although we are not specialists in fishing technology, it seems to us that the electric pulses from this trawl will affect all of the fauna subjected to them. They will certainly have stronger impacts on small organisms than on larger organisms of the same species, even including lethal consequences. Thus, in these conditions, it is interesting to seek the truth about the selectiveness of this technique and about any studies on this subject, to find out how it is dealt with in the explanation for the derogation authorising it.

We should add that despite the authorisation of this technique by derogation being for a limited number of ships (5% of the beam trawl fleet), in reality, a much larger number have actually been using it for several years. It is currently practised by 84 ships, when the number of Dutch beam trawlers according to the EU fishing fleet register<sup>7</sup> was 320 on 1 January 2018. This makes the percentage of equipped ships 26.25%: far above the 5% authorised. This figure of 84 ships is not contested. It is even published in the Dutch press<sup>8</sup>. That means that the limit in Article 31a of Regulation n° 850/98 is clearly being infringed.

It seems, then, that there are grey areas in this affair.

In our examination of the subject, we have sought to analyse the legal procedures and instruments that have allowed the use of this fishing practice, in order to clarify these grey areas. Through our research, we have discovered a set of dysfunctions within the EU institutions. This begins with the authorisation granted for 2007 as a condition associated with fishing opportunities (§ I), and continues with the 2009 regulation authorising it as a transitional technical measure (§ II), then with the 2013 regulation incorporating it as a technical measure equal to the other technical measures in Regulation n° 850/98 (§ III). This

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<sup>5</sup> See the article by P. Visser, director of Visnet, the Dutch fishers' organisation, published in *Le Marin* on 12 October 2017, p. 35.

<sup>6</sup> See for example the following phrase from Recital 29 of Regulation n° 1380/2013, on the Common Fisheries Policy (the Basic Regulation): "*To this end, improvements of selective fishing techniques to avoid and reduce, as far as possible, unwanted catches must have high priority.*"

<sup>7</sup>The fishing fleet register can be searched here: <http://ec.europa.eu/fisheries/fleet/index.cfm?method=home.Welcome&lg=EN>

A few figures on Dutch beam trawlers: on 1 January 2007, they accounted for 385 of a total 826 ships under the Dutch flag; on 1 January 2013, there were 332 out of a total of 848, and on 1 January 2018, there were 320, again out of a total of 848 (register consulted on 24 January 2018).

<sup>8</sup> See for example the following articles dated 16 January 2018 and published the evening of the EP vote in *DutchNews* <https://www.dutchnews.nl/news/archives/2018/01/dutch-trawlers-may-face-pulse-fishing-ban-as-eu-parliament-says-no/> or in the regional newspaper *Leeuwarder Courant*, <http://www.lc.nl/economie/Wat-is-pulskorvisserij-en-waarom-wil-het-Europese-Parlement-het-verbieden-22827196.html> (newspapers consulted on 4 February 2018).

integration seemingly incited the Netherlands to encourage the expansion of this technique well beyond authorised levels (§ IV). Finally, we will evoke the relevant provisions of the Commission proposal for the new regulation on technical measures (§ V).

## **I. The 2007 authorisation as a condition associated with the management of fishing opportunities**

In 2007, as *Le Marin* newspaper indicates, this technique was authorised for the first time by Council Regulation n° 41/2007 of 21 December 2006, fixing the fishing opportunities and associated conditions for 2007, for certain fish stocks and groups of fish stocks<sup>9</sup>. The authorisation appears in Annex III, part A, point 4 of the regulation in question. This point states that by way of derogation from Article 31 of Regulation n° 850/98, this fishing method is allowed in ICES zones IVb and IVc, for a maximum of 5% of the beam trawler fleet of each Member State. Point 4 also establishes various technical conditions to be respected by ships practising this technique (maximum electrical power, equipment of the ship with an automatic computer management system which records the maximum power used per beam and the effective voltage between electrodes, etc.) This authorisation is justified by Recital 28, which indicates that “*In the light of advice from STECF, fishing with beam trawl using electrical pulse current should be allowed in ICES zones IVc and IVb south under certain conditions*”. The analysis of this regulation gives rise to observations concerning: 1) the advice from the STECF, 2) the relevance of including these provisions in this regulation, and 3) the fact that the Commission’s proposal on the matter was adopted without any change by the Council.

### 1) The advice of the Scientific, Technical and Economic Committee for Fisheries (STECF)

The STECF is a committee of scientific experts instituted by decision of the Commission, which it consults when necessary on matters concerning the conservation and management of fisheries resources<sup>10</sup>. Recital 28 suggests that the Commission, when it made its proposal for a regulation, and in turn the Council when this regulation was adopted, were sufficiently informed by the STECF’s advice. Thus, this fishing technique could be authorised by derogation, provided that certain conditions defined according to this advice were respected.

However, this was not the case<sup>11</sup>. Quite the opposite. In its advice, after observing that electric pulse fishing causes severe injuries to fish and that there are various unknowns from an

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<sup>9</sup> Annex III, part A of Regulation n° 51/2006 on the fishing opportunities and associated conditions for the preceding year (2006) nevertheless contained a point 14 stating that “*fishing with beam trawl using electrical current shall be allowed under conditions to be established by the Commission, ... in the light of advice from STECF*”. Given that the EUR-Lex database does not mention any Commission decision setting out these conditions, this fishing technique was theoretically not practised during that year 2006.

<sup>10</sup> This committee was originally instituted by Commission Decision 79/572 of 8 June 1979, as a “*scientific and technical committee for fisheries*”. In 2006, it was established by Decision 2005/629 of 26 August 2005, which in turn was repealed. It currently comes under Decision 2016/C 74/05 of 25 February 2016.

<sup>11</sup> The STECF’s reports can be accessed on its website: <https://stecf.jrc.ec.europa.eu/meetings>. However, only those from 2007 onward are available. That provided to the Commission was dated

ecological point of view about the effects of this method, the STECF recommends that this trawl should not be used in its current form for professional fishing<sup>12</sup>. It further concludes that although the development of this technology should not be halted, various issues must be resolved before any derogation can be granted<sup>13</sup>. In other words, okay for research, but no derogation yet for professional use of this technique.

Despite this unfavourable verdict, the Commission considered itself sufficiently informed to propose to the Council that derogations be accorded for the use of this technique. Of course, neither the Commission in its proposal nor the Council in its regulation are bound by the advice of the STECF; these institutions have a right to take a different position. Nevertheless, as indicated by the Basic Regulation of the CFP, resource management measures must be based on scientific advice<sup>14</sup>. In this context, the words “*in the light of advice from STECF*”, which wrongly suggest that the Commission and Council were acting in accordance with the STECF’s advice, are totally insufficient as a justification. The preamble to the regulation should have indicated why this advice was not followed. Had legal action been brought about the measures adopted for this electric pulse fishing, based on a lack of justification, there would have been a major risk of them being annulled.

## 2) The place of these measures in the regulation on fishing opportunities

Point 4 of this part A of Annex III to Regulation n° 41/2007 indicates that the measures concerning this fishing method are adopted by way of a derogation from Article 31, paragraph 1 of Regulation n° 850/98 on technical measures for fishing. Paragraph 1 states that “*The catching of marine organisms using methods incorporating the use of explosives, poisonous or stupefying substances or electric current shall be prohibited.*” Why do the derogations from this ban on fishing using electricity appear in the regulation on fishing opportunities and not in Regulation n° 850/98 (into which they were however incorporated later, in 2013)?

Before the Lisbon Treaty came into force (1 December 2009), the Council was competent to adopt the annual regulation on fishing opportunities, in application of Article 20 of Regulation n° 2371/2002 (20 December 2002) on the Common Fisheries Policy (Basic Regulation of the CFP). Paragraph 1 of this article states that “*The Council, acting by qualified majority on a proposal from the Commission, shall decide on catch and/or fishing effort limits among Member States as well as the conditions associated with those limits.*” Thus, this annual

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November 2006, and is not published on the website. The NGO Bloom found it at the address [https://stecf.jrc.ec.europa.eu/documents/43805/99464/2006-11\\_23rd+report+of+the+STECF.pdf](https://stecf.jrc.ec.europa.eu/documents/43805/99464/2006-11_23rd+report+of+the+STECF.pdf), mentioned in its press release of 8 January 2018 (accessible at <http://www.bloomassociation.org/en/news/>). For electric pulse fishing, see pages 58 and 59 of this report.

<sup>12</sup> “..., therefore STECF recommends that trawl in its current form should not be promoted at a commercial level”.

<sup>13</sup> “ ..., STECF concludes that although the development of this technology should not be halted, there are a number of issues that need to be resolved before any derogation can be granted”.

<sup>14</sup> Article 2 (2), of Regulation 2371/2002 in force at the time: “*The Common Fisheries Policy shall be guided by the following principles of good governance: (...) (b) a decision-making process based on sound scientific advice...*” Currently, this principle appears in Article 3, point c) of Regulation n° 1380/2013 (“*the establishment of measures in accordance with the best available scientific advice*”).

Council regulation was an implementing measure for the basic regulation (which was later replaced by Regulation n° 1380/2013).

In Regulation n° 41/2007 on fishing opportunities for 2007, the measures on electric pulse fishing appear in an annex entitled “*Transitional technical and control measures*”, among a very diverse set of technical measures. This situation arose from the established habit of adopting such measures via this regulation, even if they were not directly connected to fishing opportunities. As the Commission says in the explanatory memorandum for its proposal for a regulation of the EP and of the Council, which is currently under discussion and destined to replace Regulation n° 850/98: “*Before the entry into force of the Treaty on the Functioning of the European Union (TFEU) technical measures were also included in Fishing Opportunities Regulations setting annual TACs and quotas in the Northeast Atlantic, Baltic, and the Black Sea as well as for deep-sea species. These were a mixture of supposedly temporary technical measures with a mixture of regionally specific measures and derogations from general provisions contained in other regulations. Following the adoption of the TFEU such measures could no longer be included in the Fishing Opportunities Regulations except for those measures with a direct functional link to the catch limits for a particular stock or stocks.*” This is the Commission’s admission that before the Lisbon Treaty came into force, technical measures were integrated into the regulation on fishing opportunities, when they had no direct functional link with these opportunities. Despite this, they were incorporated as “*associated conditions*”.

It is worth noting that Regulation n° 850/98 does not stipulate that derogations from its Article 31 can be accorded via a Council regulation adopted directly on proposal of the Commission. Any derogation from this Article 31 must theoretically follow the same procedure as that which led to the adoption of this Council regulation, namely the procedure outlined in Article 37 establishing the European Community (TEC), which at that time included the consultation of the EP.

Thus, in practice and contrary to the requirements of Regulation n° 850/98, at the time (before the TFEU came into force on 1 December 2009), treating technical measures as conditions associated with fishing opportunities allowed the adoption of measures such as those concerning electric pulse fishing, directly on proposal of the Commission, i.e. without consulting the EP, during the Council session at the end of December adopting the regulation on fishing opportunities. As the delegations to the Council were focusing on total allowable catch (TAC) levels, it is certain that little attention was given to these supposedly associated measures, even when they could hardly be described as such. Moreover, as the competent institution was the same (the Council), the procedure followed probably appeared legally compliant, and provoked no comments. However, had an action for annulment been brought against these measures, either by the EP or by a Member State, this would also have been a strong motive to annul them.

### 3) The adoption of this measure by the Council

Despite these procedural anomalies, the Council adopted these measures with no changes to the Commission’s proposal<sup>15</sup>. As stated above, this took place at the December Council

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<sup>15</sup> It is impossible to know whether the question was debated between Member States at the Council, because the meetings of this EU institution are not public.

meeting, where the attention of the Member States was focused on TAC levels for each species. In this context, it is possible that States that were not necessarily in favour of implementing this technique, particularly some States around the zone in which it would be authorised (ICES zones IVb and IVc in the North Sea), were not vigilant enough, because they were concentrating on TACs and quotas.

This lack of vigilance on the part of Member States is also visible in the rather cursory fashion in which these provisions are written. They state that use of this fishing method is authorised for no more than 5% of the beam trawler fleet of each Member State. How is this 5% limit applied? The provisions do not specify that the Member State must provide specific authorisations. For example, they do not stipulate that in application of Regulation n° 1627/94<sup>16</sup>, a special fishing permit will be granted to the beam trawlers that will actually use this method, although this type of trawler belongs to a category of ships subject to strict operating conditions requiring them to have such a permit to carry out certain types of fishing (Article 29 (2) of Regulation n° 850/98 and Commission Implementing Regulation n° 1922/1999). In these conditions, how does the Member State control the implementation of this derogation? Is it left to the discretion of the professionals, for them to organise matters between themselves to decide who will actually use this fishing technique? And given that it is “no more than 5% of the beam trawler fleet by Member State” that is authorised to use the electric pulse trawl, can this be interpreted as meaning not that a maximum of 5% of the fleet that can be equipped with electric pulse trawls, but that a maximum of 5% of the fleet can fish using them at any one time? The second possibility would implicitly authorise a higher percentage of ships to be equipped. As we can see, there are uncertainties as to how this derogation should be implemented.

Thus, we can observe that the initial 2007 authorisation for electric pulse fishing was not given in legally sound conditions. That said, the way was open for this fishing practice to be used.

## **II. The 2009 authorisation as a transitional technical measure**

Contained in the annual regulation on fishing opportunities for 2007, theoretically as an “*associated condition*”, this authorisation by derogation was valid for that year only. Nothing indicated that it might have been accorded on an experimental basis: for example, it was not stipulated that there would be a report on the positive or negative consequences of this fishing technique on target species, other species or the environment. Nothing of the sort. Like the other “*transitional technical and control measures*”, this provision is identically reproduced in Regulation n° 40/2008 of 16 January 2008 on fishing opportunities for 2008, then in Regulation n° 43/2009 of 16 January 2009 on fishing opportunities for 2009. Just like for 2007, the presence of this derogation in these regulations is explained by the lapidary expression, “*in the light of advice from STECF*”.

When the TFEU from the Lisbon treaty came into force on 1 December 2009, this led to a change in the legal framework surrounding the establishment of fishing opportunities and the associated conditions. From an implementing measure for Article 20 of the CFP Basic

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<sup>16</sup> Regulation n° 1627/94 of 27 June 1994 laying down general provisions concerning special fishing permits (regulation later abrogated by Regulations n° 1224/2009 and n° 404/2011 concerning CFP control).

Regulation n° 2371/2002, the fixing and allocation of fishing opportunities became a measure to be adopted directly by the Council under the TFEU (Article 43, (3)). However, the formulation of the TFEU does not give the Council competence over the associated conditions for this fixing and allocation. From this, the Commission deduced that the only measures which could now appear in the regulation on fishing opportunities were those with a direct functional link with catch limits for a specific stock or stocks<sup>17</sup>. This was clearly not the case of the derogation for electric pulse fishing.

The Commission and the Council resolved the problem in rather a surprising manner (§ 1), again dismissing the scientific advice (this time from ICES) without justification (§ 2).

### 1) The adoption of Regulation n° 1288/2009 of 27 November 2009

The Council adopted Regulation n° 1288/2009 on 27 November 2009 (a few days before the TFEU came into force), under the title “*Regulation establishing transitional technical measures from 1 January 2010 to 30 June 2011*”. The preamble to the regulation (Recitals 3 and 4) indicates that on 4 June 2008, the Commission presented a proposal for a regulation intended to replace Regulation n° 850/98, but that this proposal would not be adopted before the date on which the transitional measures in Annex III of Regulation n° 43/2009 ceased to apply (i.e. before the end of the year 2009). For this reason, it was necessary to continue these transitional technical measures for an additional 18 months. Thus, the first article of Regulation n° 1288/2009, entitled “*Transitional technical measures*”, states that “*Points 1, 2, 3 (including 3.1-3.2), ..., 20 and 24 of Annex III and the Appendices to Annex III to Regulation (EC) No 43/2009 shall apply until 30 June 2011.*” Given that, in Regulation n° 43/2009, the authorisation by derogation of electric pulse fishing was contained in point 3 (part A) of Annex III, it was extended until 30 June 2011.

Regulation n° 1288/2009 could not be adopted based on Article 20 of Regulation n° 2371/2002, because none of its provisions dealt with the fixing and allocation of fishing opportunities. It was instead adopted on the basis of TEC Article 37, like any ordinary CFP regulation, as was the case for Regulation n° 850/98<sup>18</sup>, for example. In concrete terms, this regulation changed the status of these measures from conditions associated with fishing opportunities to the ordinary status of technical measures, like those found in Regulation n° 850/98. According to Recital 4 of this regulation, this was justified “*for the reasons of legal certainty as well as of maintaining the proper conservation and management of marine resources*”.

Like all Council regulations, Regulation n° 1288/2009 was therefore adopted on proposal of the Commission. According to the Eur-Lex database, the Commission’s proposal did not correspond to the regulation eventually adopted by the Council at all: it was actually the proposal that the Commission made to the Council on 4 June 2008 to replace Regulation n° 850/98<sup>19</sup>. Therefore, there was a total substitution of the content of the Commission’s

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<sup>17</sup> Cf. extract from the explanatory memorandum cited above in paragraph I. 2).

<sup>18</sup> As a result, the EP had to give its opinion on the Commission’s proposal and the existence of this opinion is cited in this regulation.

<sup>19</sup> Eur-Lex page accessible at [https://eur-lex.europa.eu/procedure/EN/2008\\_112](https://eur-lex.europa.eu/procedure/EN/2008_112) ; Commission proposal adopted as COM (2008) 324 of 4 June 2008.



proposal, to generate Regulation n° 1288/2009. This substitution led to the complete distortion of the proposal.

Following a procedure based on TEC Article 37, the Commission's proposal was submitted for approval to the EP. At this time, the EP had not shown opposition to electric pulse fishing. Quite the opposite. It is interesting to note that the Commission's initial proposal, which was a proposal designed to replace Regulation n° 850/98, reproduced for electric fishing the same total ban found in Regulation n° 850/98. However, on 22 April 2009, the EP had adopted the Commission's proposal, amending various points, including the point concerning electric fishing, by introducing "*pulse trawl fishing*"<sup>20</sup> as an exception to the general ban on this fishing technique. In this way, the EP had introduced an exception which largely annulled this general ban, because it would apply to the whole trawl fleet (beam trawlers benefiting from the derogation within the 5% limit or not, and other types of trawlers). However, this amendment subsequently disappeared, like the Commission's entire initial proposal, when it was replaced by the text later adopted as Regulation n° 1288/2009.

This Regulation n° 1288/2009 was due to expire on 30 June 2011, but was extended until 31 December 2012, by Article 2 of EP and Council Regulation n° 579/2011 of 8 June 2011. Since the TFEU was in force, the adoption of Regulation n° 579/2011 followed the ordinary legislative procedure (co-decision), as described in Article 294 of this treaty. In the course of the procedure, the EP, in its new function as co-legislator, after observing that it was only a question of extending the validity of Regulation n° 1288/2009 for the transitional measures previously included in an annex of the regulation on fishing opportunities, agreed to this extension until a new legislative framework could be established for measures of this kind. Thus, with these two successive regulations (n° 1288/2009 and n° 579/2011), electric pulse fishing became a true technical measure, adopted via a regular procedure, but it still had the status of "*transitional technical measure*".

## 2) ICES advice

The STECF was not consulted on the matter. As we will see later, it was only consulted in 2012. However, the Netherlands, in agreement with the Commission, asked ICES<sup>21</sup> to evaluate the studies conducted by a Dutch research institute (IMARES). The advice from the experts commissioned by ICES is rather critical: their conclusions do not dispel the uncertainties about the effects of this fishing technique. These experts raised methodological questions about the research conducted. For example, they considered that the possible effects of the electric current on certain species were still poorly understood, and thought it necessary to improve understanding of how the fish which received these electric shocks behaved in real conditions. ICES concluded by indicating that additional research was required and that the conditions for this fishing under derogation would need refining<sup>22</sup>.

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<sup>20</sup> See Amendment 22 in Resolution P6\_TA(2009)0256, accessible at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0256+0+DOC+XML+V0//EN>. The rapporteur on this Commission proposal was a Dutch parliament member.

<sup>21</sup> ICES provides scientific advice in the framework of a memorandum of understanding between ICES and the Commission.

<sup>22</sup> ICES Advice 2009, Book 1, § 1.5.6.3, p. 157.

Like the STECF in 2006, ICES therefore did not give a green light to practice this kind of fishing. There is no indication of the precise date on which ICES provided this advice to the Netherlands and the European Commission. Only the date of the request to ICES to evaluate the IMARES studies is stated: September 2009. Was this advice delivered before the Council adopted Regulation n° 1288/2009 on 27 November 2009? If so, by prolonging the validity of the derogation concerning this “transitional technical measure” until 30 June 2011, the Council did not take this advice into account. If not, it extended this validity when it should have known that a consultation with ICES was ongoing, and that in the absence of favourable scientific advice, it would be difficult to extend the authorisation of electric pulse fishing without a sound reason.

### **III. Authorisation as a technical measure in Regulation n° 850/98 on technical measures**

The next stage was the integration of this transitional technical measure as a technical measure equal to the others in Regulation n° 850/98. This was done by adopting EP and Council Regulation n° 227/2013 of 13 March 2013, which modified Regulation n° 850/98. Among other things, it inserted an Article 31a, which identically replicated the provisions on electric fishing initially adopted in the regulation on fishing opportunities for 2007.

In the explanatory memorandum for its proposal, dated 21 June 2012 (COM/2012/298), the Commission notes that stopping these technical measures would have negative consequences on the conservation of the stocks concerned. There are no specific indications regarding electric pulse trawling. As with the other measures, the aim is to guarantee stock conservation<sup>23</sup>. As in 2007, it is “*in the light of advice from STECF*” that according to the regulation, there can be a derogation from the general ban on fishing using electric current under Article 31. In the official documents regarding this procedure, there is no trace of any reaction from either the EP or the Member States within the framework of the Council.

However, the STECF again provided advice on the issue in April 2012<sup>24</sup>: two months before the Commission adopted its proposal for a regulation. Although this committee recognised that some matters had been clarified, once again, we cannot say that it was giving the green light to electric pulse trawling. In particular, it considered that the questions regarding the control and implementation of this technology were a major obstacle to removing the derogation and allowing its use to be extended. According to the committee, these questions would need to be resolved before the number of trawlers using this technique could be increased. It also recommended conducting an impact study on the effects of electric pulse

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<sup>23</sup> Explanatory memorandum, § 1, subsection 5: “*The technical measures contained in Regulations (EC) No 43/2009 are important for sustainable fishing, and their continuity needs to be ensured. Discontinuation of these measures (even temporarily) would have negative consequences for the conservation of the stocks they concern as well as for ecosystem of vulnerable deep-sea habitats and seabirds – including in a number of NATURA 2000 sites established by Directive 92/43/EEC[6] in the European territory as well as in areas closed to protect vulnerable deep-sea habitats in international waters. Their discontinuation would also imply that a number of justified and accepted derogations from provisions of Regulation (EC) No 850/98 would cease to apply.*” Documents accessible via Eur-Lex for this procedure, under n° 2012/158/COD.

<sup>24</sup> STECF, 39th Plenary Meeting report, 16-20 April 2012, § 5.8.6, p. 71.

trawling on the ecosystem, particularly if this technology would be used on other fishing gears and for species on which the effects of this technique had not yet been studied.

That said, the derogation, made permanent and not contested before the Court of Justice, this time had a solid legal basis. Nevertheless, it was limited to 5% of beam trawlers, yet was developed well beyond this percentage.

#### **IV. An extension of the use of this fishing technique under control of the authorities**

The information in this paragraph is taken from an article in the ICES scientific journal, which was written by three social sciences researchers from the Netherlands. Two of these were from IMARES: the institute that helped to develop this technique (notably, the advice from ICES was given based on studies conducted by this institute)<sup>25</sup>. We therefore consider this information to be reliable.

These social sciences researchers took the example of the appearance and development of this fishing technique to study fishers' attitudes towards technical change. They showed how fishers initially had reservations about this new technique, and how they later took cultural ownership of it ("*Fishing with electricity is nowadays part of the Dutch fishing culture*"<sup>26</sup>). This study in no way focuses on the legal aspects connected to the authorisation of this technique, but it does contain interesting information on the economic and legal context of its development: it shows how the authorities intervened by granting financial aid and making decisions that allowed the use of this fishing technique to be extended. We can map out three phases in this development: 1) the feasibility phase up to around 2005-2007, 2) following the derogation which initially appeared in Regulation n° 41/2007, a first phase in the growing use of this technique, already resulting in the authorised number of ships being exceeded, 3) a large-scale development phase going even further beyond the authorised number.

##### 1) The feasibility phase

In this article, we learn that the first electric pulse trawl trials took place in the 1970s, in the Netherlands, Belgium, Germany and the United Kingdom. In 1987, a prototype designed for professional fishing was tested on a ship, but the research was stopped following the ban on this fishing technique in 1988 by the EU (the EEC at the time)<sup>27</sup>. Research resumed in the Netherlands in 1992, with support from the authorities, because they considered it necessary to find an alternative to conventional beam trawling, which faced harsh criticism. However, this research struggled to make headway, because the professionals showed little interest in it.

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<sup>25</sup> T. Haasnoot, M. Kraan, S. Bush *Fishing gear transitions: lessons from the Dutch flatfish pulse trawl* in ICES Journal of Marine Science (2016), 73(4), pp. 1235-1243.

<sup>26</sup> Id., p. 1240.

<sup>27</sup> This date astounds us, because from the first regulation on technical measures in 1983, fishing using electricity was banned, with a narrow exception for catching tuna and basking shark in the Skagerrak and the Kattegat (Article 15 (4) of Regulation n° 171/83 of 25 January 1983, then Article 9 (11) of Regulation n° 3094/86 of 7 October 1986, and Article 10 (12) of Regulation n° 894/97 of 29 April 1997). It was then totally banned by Article 31 of Regulation n° 850/98 of 30 March 1998. Does this mean that this fishing technique, which was apparently practised professionally (although for the purposes of testing a prototype) was used in breach of Regulation n° 171/83, which was in force at the time?

The fleet in question began to change its attitude after fuel prices rose in the early 2000s. This increase severely damaged the profitability of beam trawlers, which consume very large amounts of fuel. In 2004, a ship was chosen to use this technique in a pilot project. The authors report the positive attitude of the European Commission, which indicated that the ban on electric pulse trawling could be lifted if ICES approved. In fact, as we saw above, it was not ICES but the STECF which gave its advice in 2006, stating that various problems needed to be resolved before offering derogations from the general ban on fishing using electricity. Despite this advice, the derogation was granted for the first time in the regulation on fishing opportunities for 2007.

## 2) The first phase in the growth of electric pulse trawl usage

Interest within the profession grew when in 2008 the Dutch ministry in charge of fishing established, for five ships, an aid programme covering 40% of the investment costs for an electric pulse fishing system. The maximum authorised investment per ship was 176,000 euros. With this program, the ministry wanted to stimulate use of this technique. The profitability of the equipped ships quickly grew, and other shipowners invested, so the 5% limit was rapidly reached.

The professionals of the fleet in question asked for more licenses. According to the authors of the article<sup>28</sup>, this was when an agreement was made during the December 2010 Agriculture and Fisheries Council, to increase the maximum number of licenses to 42, based on Article 43 of Regulation n° 850/98.

This very precise indication in this article written by highly informed authors is troubling. This December Council is where fishing opportunities are fixed and distributed between Member States, and there were no other fishing matters on the agenda. This Council session concluded with the adoption of Regulation n° 57/2011, dated 18 January 2011. In this regulation, we found absolutely no indications concerning these licenses. Nor does the Council press release mention any agreement of this kind<sup>29</sup>.

As for the possibility of increasing the number of ships authorised to use this technique, based on Article 43 of Regulation n° 850/98, this also raises questions. This article states that “*this Regulation shall not apply to fishing operations conducted solely for the purpose of scientific investigations which are carried out with the permission and under the authority of the Member State concerned and of which the Commission and the Member State in the waters of which the research is carried out have been informed in advance*”. The authors of the article indicate that the licenses granted were experimental. So the question is whether the fishing conducted thanks to these supposedly experimental licenses can be described as “*fishing operations conducted solely for the purpose of scientific investigations*”. There are major doubts about this, since the licenses were granted because the fishers concerned suddenly showed their interest in equipping their ships with electric pulse trawls after realising that their colleagues whose ships were already equipped were making very good profits. In these

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<sup>28</sup> Article cited, p. 1238: “During the Agriculture and Fisheries Council (AGRIFISH) of December 2010, it was decided that the number of experimental licenses could be expanded to 42 based on Article 43, 850/98 1998 ...”

<sup>29</sup> Accessible at [http://europa.eu/rapid/press-release\\_PRES-10-347\\_fr.htm?locale=EN](http://europa.eu/rapid/press-release_PRES-10-347_fr.htm?locale=EN)

conditions, the fishing activity carried out by the ships looks like professional fishing, and cannot be described as scientific research.

So what happened at the December 2010 Council? Should we imagine that the Commission might have given verbal agreement to the Dutch minister in charge of fisheries for 42 beam trawlers to be equipped with electric pulse trawls? Or did this minister interpret oral statements made by the Commission very broadly and in his favour, even though these did not go so far as to give such approval? This number of 42 vessels that could be equipped went well beyond the authorised 5%. According to the EU fishing fleet register, there were 350 beam trawlers on 1 January 2011, which meant that 17.5 (so 17 or 18) ships could be equipped. To exceed this number, a derogation would have been needed from Regulation n° 1288/2009, which was in force at the time, to modify the 5% limit.

Whatever the content of the discussions at the Council, by allowing far more than the authorised 5% of ships to practice this fishing technique, the Dutch authorities very clearly infringed EU law. As for whether or not the Commission agreed to this, we only have the information reported by the Dutch authors of the article that we draw on here, and it is highly probable that they got it from the Dutch authorities. The matter of whether or not the Commission agreed to this goes beyond the scope of our article.

As the authors state, this expansion began to worry the other Member States and the European Commission. This did not stop the Netherlands wanting to grant even more licenses, for up to 40% of their beam trawlers<sup>30</sup>.

### 3) A strategy for a large-scale development of the usage of this technique

The Netherlands did not abandon their project to see this fishing practice authorised on a larger scale. They first attempted to introduce a provision concerning electric pulse trawling into the regulation on the future European Maritime and Fisheries Fund (EMFF), which was under discussion at the time<sup>31</sup>, as part of aid for fleet modernisation. However, this attempt failed with both the Commission and the EP<sup>32</sup>.

So the Netherlands adopted a different strategy, based on Articles 14 and 15 of the CFP Basic Regulation n° 1380/2013. Article 14 stipulates that, to facilitate the fulfilment of the obligation described in Article 15 to land all catches, the Member States can carry out pilot projects. This was what the Netherlands did to expand electric pulse trawling. This strategy was adopted in 2014. According to the Netherlands, it was approved at the highest institutional level between this Member State, the Commission and the EU Council

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<sup>30</sup> Article cited, p. 1239: *“Furthermore, efforts to expand the derogation from 5% to a proposed 40% also encountered resistance from other EU member states and the EC”*.

<sup>31</sup> The European Maritime and Fisheries Fund (EMFF) was instituted shortly afterwards by Regulation n° 508/2014 of 15 May 2014.

<sup>32</sup> Article cited, id. p. 1239: *“At the time, the European Council was discussing a subsidy scheme for the modernization of the European Fisheries Fund (EMFF). A provision was taken up, following a Dutch proposition, in the regulation of the EMFF to alter the technical measures. ... However, as the EMFF has no relation to the technical measures this unusual proposal was met with little sympathy in Brussels. ... Still the EP also had to vote on the provision in the regulation. The parliament's rapporteur decided not to include the expansion in the EMFF, as it had no place in these negotiations.”*

Presidency.<sup>33</sup> With this pilot project, the number of available licenses was increased to 84, which matches the number that recently appeared in the press<sup>34</sup> during the EP debates on the future regulation on technical measures.

The ships participating in this pilot project certainly benefited from EMFF aid. The operational programme established by the Netherlands made provision for aid under Article 39 of Regulation n° 508/2014 on the EMFF: an article on fishing method innovation. According to this operational programme, the aid granted in application of Article 39 concerns, among other things, the development of electric pulse trawl fishing<sup>35</sup>.

Thus, the extension beyond the 5% of ships authorised to practice electric pulse trawling seems to be justified by participation in this pilot project. However, nowhere is it stated that operations funded under Article 39 could benefit from derogations from the rules in other regulations, for example that on technical measures. Operations aiming to develop or introduce new fishing techniques, or (as in this case) to facilitate the fulfilment of the obligation to land all catches, must respect the technical measures in Regulation n° 850/98. Moreover, as we have already seen, nothing indicates that these pilot projects would qualify as “*fishing operations conducted solely for the purpose of scientific investigations*”, in which case they would be covered by Article 43 of this regulation, which allows derogations from the restriction in Article 31a (5% of ships authorised). At first glance, it therefore seems that this funding benefits ships engaged in fishing operations which (except for this 5%) are not authorised.

Consequently, according to the information in this article in the ICES scientific journal, the extension of electric pulse trawl usage to 84 ships occurred with the active participation of the Dutch authorities. Was this done with the agreement of the European Commission, as indicated in the statement by the Dutch government? We have no evidence to disprove or confirm this assertion.

In any event, we can observe that from the initial derogation granted in 2007, when this technique was authorised as a condition associated with the management of fishing opportunities, to the large-scale development seen in recent years, the management of this derogation from the general ban on electric fishing has been highly irregular in several ways.

## **V. What of electric pulse fishing in the future regulation on technical measures?**

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<sup>33</sup> Id., p. 1239: “*The State Secretary for the Ministry of Economic Affairs then decided to schedule a meeting with the European Commissioner of Maritime Affairs and Fisheries and the president of the European Fisheries Council (Rijksoverheid, 2014). During that meeting it was agreed that the expansion to 10% of the Dutch cutter fleet could be granted, based on Article 14... This meant that now approximately 84 licenses were made available for using the pulse trawl technique*”. In the citation from the article, the word and date “*Rijksoverheid, 2014*” are a hyperlink to a statement from the Netherlands government on 18 February 2014, containing the following phrase: “*With the approval of the European Commissioner Damanaki for Maritime Affairs and Fisheries, Minister Dijkssma will undertake an extensive pilot programme into the pulse trawl technique, and as a result 42 extra cutters may use the pulse trawl to catch flatfish*”.

<sup>34</sup> Cf. *supra* note 8.

<sup>35</sup> Operational programme accessible at <https://ec.europa.eu/fisheries/cfp/emff/country-files>; see pp. 54-55.

The Commission adopted its proposal for a new regulation on technical measures on 11 March 2016<sup>36</sup>. Our analysis raises the following issues: 1) again, the scientific advice relating to this proposal, and 2) the formal nature of the electric pulse trawl in this proposal for a regulation and the purpose of Article 24.

#### 1) The content of the prior scientific advice

Regarding the full integration of the practice of electric pulse trawling into this proposal for a regulation, we might have expected this to come from the fact that the reservations expressed by the STECF and ICES in the various advice given over ten years had finally been resolved. However, this is clearly not the case.

On France's request, ICES gave new advice on 4 February 2016<sup>37</sup>. In this advice, while recognising the interest of using this trawl, which has much less impact than ordinary beam trawls on the seabed, ICES notes that key questions remain unanswered. These include questions regarding the frequency and power of the pulses, which must be answered to determine whether the use of this trawl has an impact on marine organisms and benthic communities. As already mentioned, ICES notes the lack of information about the precise configurations of the pulse systems used.

This is astonishing for research operations conducted on the initiative of the Netherlands, and which aimed to demonstrate that these systems posed no risk to the environment and could be used professionally. Had the Netherlands truly been convinced that using electric pulse trawls was a valuable technological step towards more selective fishing which would not damage marine fauna, why were the terms of reference of the studies conducted by the country's research institutes not better defined, in order to offer clear results on which the EU could have based an authorisation to extend the technique?

Despite this very reserved advice of 4 February 2016, just over a month later, on 11 March 2016, the Commission adopted the proposed regulation. We know the rest of the story: the issue came before the EP, which with a large majority amended the Commission's proposal such as to entirely ban electric pulse trawling, as had been the case under Regulation n° 850/98 until 31 December 2012.

#### 2) The formal nature of the electric pulse trawl according to the Commission's proposal, and the purpose of Article 24 of this proposal

It seems that those who wrote this proposal considered the electric pulse trawl to be a specific category of fishing gear. This is not explicitly stated, but we believe it should be interpreted in this way, given the exhaustive enumeration of the different fishing gears in Article 6 of the proposal, from point 11 to point 29.

In this list, the "electric pulse trawl" (addressed in point 16) appears as a category of trawl on the same level as the demersal trawl (point 12), the demersal pair trawl (point 13), the pelagic trawl (point 14) and the beam trawl (point 15). This implies that the electric pulse trawl automatically fits into the category in point 16, whatever the type of trawl on which the electric pulse system is installed. Thus, in this proposal for a regulation, the use of electric

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<sup>36</sup> Cf. *supra* note 3.

<sup>37</sup> ICES Advice 2016, Book 1, § 1.6.7.1.

pulses is no longer restricted to beam trawling, in contrast to the current situation with Article 31a of Regulation n° 850/98.

Furthermore, in Article 24 on “*Innovative fishing gears*”, the electric pulse trawl is cited as the only example of an innovative fishing gear.

The fact that no other examples are provided gives the impression that the writers could find no other examples of innovative fishing gears. This is hardly surprising, because the list of fishing gear categories in Article 6 seems exhaustive enough (points 11 to 29). It is unlikely that a fishing gear could be developed which would not fit into one of the existing categories.

In reality, in our opinion and contrary to what is implied by the inclusion of the electric pulse trawl in the list of fishing gears, the pulse trawl is not a specific category of fishing gear. Rather, it is a device which can be installed on all types of fishing gears for which this is technically feasible, even though this is currently restricted to beam trawls. For this reason, rather than calling Article 24 “*Innovative fishing gears*”, it would have been more appropriate to use a title such as “*Innovative fishing devices*”. Then, Article 24 would truly have made sense. The installation of an “innovative device” on a given fishing gear could thus be subject to a recommendation to the Commission by the Member States concerned, with the aim of its authorisation in a specific marine basin.

However, in reality, this poses the question of the purpose of Article 24, because an innovative device can be installed without problems on a fishing gear, as long as it does not infringe regulations. For example, if a device installed on a trawl helps to make it more selective, there is no legal obstacle to its installation if it does not go against any regulations. Moreover, if it were proven that this device made the fishing gear on which it was installed more selective than an identical fishing gear not equipped with it, and that it thus met the objectives of the CFP, it could be made mandatory via a specific provision integrated into the regulation on technical measures. The procedure is hence entirely different from that concerning the authorisation to install a non-mandatory device, as laid out in Article 24<sup>38</sup>. Therefore, we do not see the utility of this article, unless it is to authorise, without explicitly stating it, derogations from the rules within this regulation on technical fishing measures.

This leads us to think that this Article 24, with no examples besides the electric pulse trawl, aims to suggest that this fishing technique is *in abstracto* “innovative”, with the generally positive connotations of this term, and that for this reason, it should be authorised. By doing this, the writers have gone against the principle of the general ban on electric current set out in Article 7, point b) of the proposal, and they have ignored the negative effects of this fishing technique as described in the various advice from the STECF and ICES.

Following the amendments adopted by the EP on 16 January 2018, the inter-institutional discussions will continue, and as we close this article, we will refrain from making hypotheses about the final result of the debates<sup>39</sup>. If these amendments are confirmed in the regulation

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<sup>38</sup> It is also worth noting that Article 7 (1), point h), of the CFP Basic Regulation (Regulation n° 1380/2013) already provides the possibility of adopting measures concerning pilot projects “*on alternative types of fishing management techniques and on gears that increase selectivity or that minimise the negative impact of fishing activities on the marine environment*”.

<sup>39</sup> In the meantime, since the closure of this article, in accordance with Article 290 TFEU and on the basis of Articles 11(2) and 46(5) of the Basic Regulation n° 1380/2013, the Commission adopted a



eventually adopted by the co-legislators, point 16 of Article 6 defining the electric pulse trawl of course becomes useless and should disappear. The same goes for Article 24, the purpose of which seems to us to be intrinsically connected to the electric pulse trawl.

## VI. Concluding remarks

**1.** There is one constant in this affair. Whereas, as we described above, the Basic Regulation of the CFP indicates that the decision-making process on the matter must be based on sound scientific advice, we are looking at a situation where the very reserved scientific advice from either the STECF or ICES has been largely ignored, particularly by the European Commission, which in the EU inter-institutional system is the only body which can propose regulations or directives (Article 17 (2), TEU). So why has the Commission not heeded these reservations? Why does it seem to have shown so little rigour, firstly by treating this fishing technique as a condition associated with the management of fishing opportunities, then by not reacting against a Member State which encouraged an extension of this fishing practice well beyond the authorised number of ships?

**2.** This gives the impression of a laissez-faire attitude on the part of the Commission, then lastly, with the 2016 proposal, of a headlong rush in which the Commission adroitly introduced a provision which would mean that the origin of any future authorisation of this fishing technique would be based on a recommendation from the Member States concerned: a recommendation which it would then endorse via a delegated act (Article 19 (1)). Thus, it would no longer be the Commission which would be directly behind the proposal to authorise this fishing technique, but the group of Member States that made a recommendation to it. However, the scientific unknowns about this fishing technique have led the EP to react as it has, thwarting this scenario.

**3.** At the start of this affair, in the framework of the Council, in 2006 and the following years, the Member States seem to have been satisfied to read in the proposals for regulations on fishing opportunities that the derogation was accorded to electric pulse fishing “*in the light of advice from STECF*”, without checking the content of this advice. Or if they did check, they then thought that the contradiction between this advice and the Commission’s proposal was not worth raising as an issue. It was only in 2015 that a Member State other than the Netherlands (France) reacted, by asking ICES for its opinion. This led to the advice of

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delegated regulation on 2 March 2018 (documents concerning the related procedure are accessible at

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2614\(DE A\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2614(DE A))). This had the effect of amending Delegated Regulation n° 2017/118 establishing fishing conservation measures for the protection of the environment in the North Sea and its very purpose was to allow fishing with “*alternative seabed-impacting fishing gear*”. In its Recital 11, it refers to the ICES advice given upon request of Belgium, but this advice points out the lack of information about the alternative gears which could be used, the sea areas concerned and the scientific and technical parameters against which the testing would be carried out, and cannot be understood as giving clearance for fishing with any possible alternative gear (See ICES Technical Services 2016, Book 11, § 11.2.1). When this delegated regulation was presented to the EP, its members became aware that it would have actually applied to electric pulse fishing (See the newsletter dated 11 June 2018 of the weekly newspaper *Le Marin*). Eventually, by a clear-cut vote on 14 June 2018 (484 to 77 with 15 abstentions), the EP adopted a resolution objecting to this delegated act, which could then not come into force.

February 2016 cited above. However, from the start of this derogation, France was concerned, because part of its coastal waters is situated in zone IVc, and because in this sector, Dutch fishers have access to the 6 - 12 NM zone (Article 5 (2), and Annex I (6), of Regulation n° 1380/2013). This is of course a very small section of the coast, but local fishers work there, which explains their strong reactions during the debates on the subject at the EP.

**4.** From a more general perspective, this affair seems to indicate poor functioning of the community method, the special nature of which lies in the existence of the institutional triangle between the Commission, the Council and the EP. In this case, our analysis shows that it was more a Commission – Council duo that was at work. In this pairing, the Commission seems to have given in to the will of one of the Member States of this Council, when as guardian of the treaty, it should have taken a strong stance. How should we interpret the fact that it ignored scientific advice to this extent, then turned a blind eye to the illegal extension of this electric pulse fishing? As for the EP, with its belated discovery of the STECF's 2006 advice, it gives the impression that it felt duped, so its reaction by this vote of 16 January 2018 is unsurprising.