

# Rechtsanwälte Günther

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## Legal opinion:

**The enforcement obligation of Member States based on the IUU Regulation: effective checking of all catch certificates as a prerequisite to halt illegal fishing and to protect natural marine resources**

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## Summary

Illegal, unreported and unregulated fishing, referred to in short as "IUU", destroys marine habitats, disadvantages legal fishing and weakens coastal communities, particularly in developing countries. The worldwide volume of IUU fishing is estimated to be around 10 billion euros annually, which equals approximately 15% of the currently recorded catches worldwide. This means that, in real terms, between 11 and 26 million tonnes of fish are taken "illegally" from the oceans each year. In 2008, the EU adopted IUU Regulation No. 1005/2008, which has been in force since 2010, to effectively deter IUU fishing. This is a special regulation regarding the trade and import of fishery products - in particular, it prescribes an absolute prohibition of importing any IUU products (Art. 12 IUU Regulation).

Catch certificates, which should guarantee that the supply chain of fishery products is checked, are an essential tool for enforcing this prohibition. This is because it is not possible to detect the origin of a fish from the fish itself or from processed fishery products, or whether the catch was taken in accordance with the relevant legal framework. These catch certificates, which must be submitted before the arrival of fishery products at the external borders of the EU, must be checked as a first step (Art. 16). Subsequently, further verifications take place pursuant to Art. 17, such as the actual inspection of catches transported via container vessels, or enquiries regarding the content of the catch certificates.

This legal opinion comes to the conclusion that the Member State, Germany, has not sufficiently fulfilled its enforcement obligations so far, and henceforth violates EU law. In particular, Germany must (like all other Member States):

- check **all** catch certificates submitted, at least as to whether they fulfil the formal requirements (correct issuing authority, no obvious errors, no excluded flag State, etc.);
- check **all** catch certificates submitted with regard to the explicit list of reasons for mandatory verification listed in Art. 17 (4) (e.g. fraud); as well as
- apply a conclusive risk management system to **all** catch certificates, i.e. to ensure that catches at special risk (according to some criteria of Implementing Regulation 1010/2009) can be at least selected for further verification and are not selected randomly; and
- carry out further verifications of catch certificates and shipments/consignments in line with the principles of Art. 17, particularly where inconsistencies have been detected when checking the catch certificates.

The current practice in Germany, as implemented by the competent Federal Office for Agriculture and Food (BLE), namely that they carry out checks and verifications practically at random, does not comply with the system stipulated by the IUU Regulation, which, on the one hand, is very detailed and thus specifically restricts the Member State's discretion when enforcing the Regulation and, on the other hand, intends, by prescribing a risk management system, to create the same conditions in all EU Member States for implementing the prohibition of imports.

There is urgent need for action and reforms, with respect to both personnel resources in the enforcement process and the enforcement method applied.

The table below shows the enforcement system at Member State level, resulting from a legal analysis of the IUU Regulation.

Inter alia, it is compulsory to check "at a desk" every catch certificate submitted, initially as to whether it complies with the formal requirements, and then on the basis of risk criteria, so that further

verifications of the consignment or the information contained in the catch certificate can follow on from this initial checking (discretion afforded).

The current practice in Germany is not in line with this. The BLE as competent authority currently does not check all catch certificates, nor does it select the catch certificates to be verified in line with conclusive and sufficient selection criteria.

Legal basis	Object of enforcement	What is checked/verified
<b>Checking phase</b>		
Art 16 (1); Art. 12 (4); - Art. 20 in connection with Annex III Art. 18 (1) c, d, f and g	All incoming catch certificates undergo checks for plausibility and completeness of formal requirements	<ul style="list-style-type: none"> <li>· all formal requirements of the form in Annex II (everything filled in, all necessary catch certificates available, confirmation acc. to Annex IV (processing) if applicable, transshipment certificates, etc.)</li> <li>· validated by the correct authority / flag State</li> <li>· correct seal, etc.</li> <li>· flag State is not excluded pursuant to Art. 31 "red card", not a vessel on IUU list (Art. 29 and 30)</li> </ul>
Art. 17	Screening of all catch certificates submitted regarding <b>content/risk of fraud</b>	<ul style="list-style-type: none"> <li>· all criteria of Art. 17 (4)</li> <li>· some risk criteria pursuant to Art. 17 (3) (own national criteria) and/or Art. 31 Regulation 1010/2009</li> </ul>
<b>Verification phase</b>		
Art. 17 (4)	Catch certificates selected in the screening pursuant to Art. 17 (4) regarding the <b>content of the catch certificate and the accuracy of information contained</b>	<ul style="list-style-type: none"> <li>· compulsory verification, no own discretion ("whether")</li> <li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li> </ul>
Art. 17 (3)	Catch certificates selected in the screening on the basis of Art. 16 or 17 (3) regarding the <b>content of the catch certificate and the accuracy of the information contained</b>	<ul style="list-style-type: none"> <li>· "whether" of the verification at (restricted) own discretion</li> <li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li> </ul>

Art. 17 (5)	Further catch certificates which were not conspicuous in the screening	<ul style="list-style-type: none"><li>· "whether" of the verification at full discretion</li><li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li></ul>
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## I. Facts and aim of this legal opinion

Illegal, unreported and unregulated fishing,<sup>2</sup> referred to in short as "IUU", destroys marine habitats, disadvantages legal fishing and weakens coastal communities, in particular in developing countries. The worldwide volume of IUU fishing is estimated to be around 10 billion euros annually, which equals approximately 15% of the currently recorded catches worldwide. This means that, in real terms, between 11 and 26 million tonnes of fish are caught "illegally" from the oceans each year.<sup>3</sup>

The term IUU (= illegal, unreported and unregulated) dates back to the FAO "International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" from 2001.

In this respect, illegal means, inter alia, fishing activities carried out without permission in the economic zone (EEZ) of a state or in waters at high sea governed by international law; unreported means fishing activities which were not reported to the corresponding national authority or a fisheries management organisation (RFMO) despite corresponding requirements; and unregulated are, in particular, such fishing activities carried out in territories or of stocks that are not subject to conservation and management measures.

IUU fishing destroys fish stocks and therefore its legal aspects have already been discussed under the heading of the "State of Necessity",<sup>4</sup> i.e. in the context of the question as to whether it would also be justifiable to apprehend IUU vessels outside the territories of competence of individual countries under international law. In the meantime, there also seems to be evidence that IUU fishing forms part of organised crime, with the corresponding planning and global approach.<sup>5</sup>

In addition to checking its own fishing fleet as a "flag State" via several legal instruments<sup>6</sup>, in 2008 the EU adopted the IUU Regulation No. 1005/2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing – inter alia, in the context of complying with the EU's obligation arising from the Convention on the Law of the Sea (UNCLOS).<sup>7</sup> This deserves special attention because, at the same time, there is a chronic shortage of fishery products, above all in the EU, as well as continuously increasing demand. As the worldwide biggest

<sup>2</sup> Definition in Art. 2 No. 2 ff IUU Regulation 1005/2008.

<sup>3</sup> COM 2015/480, p. 1; see: EU Commission: Handbook for the Practical Application of Council Regulation (EC) No. 1005/2008 from 29 September 2008 regarding a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, version 10/2009.

<sup>4</sup> Bender: A State of Necessity: IUU Fishing in the CCAMLR Zone, 13(2) Ocean and Coastal Law Journal 233 (2008).

<sup>5</sup> See: Oanta, New Steps in the Control of IUU Fishing, in: Koch/König/Sanden/Verheyen (eds.), Legal Regimes for Environmental Protection, 2015, p. 229.

<sup>6</sup> 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; Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters.

<sup>7</sup> See the reasoning in the Commission's proposal: COM(2007) 601. With regard to EU fishing policy comprehensive information in: Markus, Die EU Fischereihandelspolitik: Analyse und Handlungsbedarf, WBGU 2012, available at: [http://www.wbgu.de/fileadmin/templates/dateien/veroeffentlichungen/hauptgutachten/hg2013/Expertise\\_Markus.pdf](http://www.wbgu.de/fileadmin/templates/dateien/veroeffentlichungen/hauptgutachten/hg2013/Expertise_Markus.pdf) and idem: Wege zu einer nachhaltigen Fischereiaußenpolitik, EuR 2013, 697. Comprehensive information regarding the situation before 2010: Churchill/Owens, The EC Common Fisheries Policy, 2010, in particular: Chapter 7: Trade in fishery products.

market for fishery products and largest importer, the European Community sees itself as having a special responsibility to ensure that the fishery products imported into its territory do not originate from IUU fishing.

Consequently, para. 3) of the Preamble of the IUU Regulation states:

"Illegal, unreported and unregulated (IUU) fishing constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources;"

The IUU Regulation applies to fishery products *de facto* as a special regulation in addition to the Union Customs Code<sup>8</sup> and its corresponding implementing legal act<sup>9</sup>, and it supplements the regulations on fishery products generally applied to the external borders of the EU<sup>10</sup>. It has been in force since 1 January 2010 (Art. 57), which means that experience with its implementation has already been gained.<sup>11</sup>

The Regulation is based mainly on three tools which are complementary to each other: (i) pursuant to Art. 25 ff, the EU Commission can put known IUU fishing vessels on a prohibited list, and in addition (ii) pursuant to Art. 31 ff it can generally exclude States from trade, if they evade their flag, coastal, port and/or market State obligations (see Art. 31 (3)). The subject matter of this legal opinion is however (iii) the system of import controls (Art. 12 ff) to be implemented and/or enforced by the Member States, which is meant to ensure that the supply chain for fishery products (definition in Art. 2 (8)) imported into the Community is subject to checks. As a consequence, legal trade with the Community is both promoted and protected against unfair competition from illegal products.<sup>12</sup>

In general, the IUU Regulation – like Regulation 995/2010 on illegal timber trade or the CITES Regulation (EC) No. 338/97 on wildlife protection, for example – is an instrument of trade restrictions based on the origin and/or production conditions of tradable goods, and is thus a so-called PPM (process and production method) regulation according to the WTO system.<sup>13</sup>

The IUU Regulation – now an integral part of the new Common Fisheries Policy, based on CFP Regulation 1380/2013<sup>14</sup> – lays down in Art. 12, as a first step, an absolute prohibition<sup>15</sup> on importing IUU fishery products:

Art. 12 - Catch certificates: (1) The importation into the Community of fishery products obtained from IUU fishing shall be prohibited.

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<sup>8</sup> UCC, Regulation (EU) No. 952/2013, in force since 30 October 2013. It must be noted that approx. 2/3 of imported fishery products are "largely or fully" exempt from the Union Customs Code, see Markus, *Wege zu einer nachhaltigen Fischereiaußenpolitik*, EuR 2013, 697/705. There is only very limited reference to this fact in the IUU Regulation itself, see e.g. Art. 2 (8) and 19 (1) and COM(2007) 601, p. 9.

<sup>9</sup> Implementing Regulation (EU) 2015/2447 from 24 November 2015, containing details of the UCC provisions.

<sup>10</sup> For example Council Regulation (EC) No. 1224/2009 from 20 November 2009 on the introduction of a common control system for ensuring compliance with the rules of the Common Fisheries Policy.

<sup>11</sup> The recent report of the Commission is included in the COM 2015/480 communication ("On the application of Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing"), see also: EJF-Oceana-Pew-WWF. *The IUU Regulation of the EU*, February 2016, <http://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/IUU-Report.pdf>.

<sup>12</sup> Fn. 3, Handbook, p. 10.

<sup>13</sup> See for a summary in: Buck, *Internationales Handelsrecht*, in: Koch (eds.) *Umweltrecht*, 2014.

<sup>14</sup> Regulation (EU) No. 1380/2013 of 11 December 2013 on Common Fisheries Policy, see there, in particular, Art. 36.

<sup>15</sup> For timber products, Art. 4 of Regulation 995/2010 determines in parallel: "Importing illegally harvested timber and timber products is prohibited".

Catch certificates, which should guarantee a control of the supply chain for fishery products, are an essential tool for enforcing this prohibition. This is because it is not possible to detect from a fish itself either its origin or the origin of processed fishery products, or whether the catch was taken in accordance with the relevant legal framework. In some cases, it is known which flag States do not carry out effective checks of their fishing vessels and, in some cases, IUU vessels are known by name. However, in Germany in particular, approx. 70-80% of the products arrive as indirect imports<sup>16</sup> - i.e. the products for import are not landed in port by the fishing vessel that caught the fish. As such, import controls (in the context of a catch certificate scheme) are a vital tool when carrying out checks in ports – both for direct landings and indirect imports, e.g. via container vessel - thus partly implementing the FAO Agreement on Port States Measures from 2009<sup>17</sup> for the EU Member States (see in particular Art 4 ff. IUU-Regulation).

Since the adoption of the IUU Regulation, both the European Commission and interested parties have expressed concern as to whether this import prohibition is sufficiently enforced by the provisions of the Regulation as applied by the Member States. To this end, several technical surveys have already been carried out.

According to Art. 55 (1) IUU Regulation, the EU Member States are obliged to submit to the European Commission a report on the application of the IUU Regulation every two years. These reports show that Germany is one of the major importers of fishery products worldwide and also the EU Member State to which importers submit the highest number of catch certificates on the basis of the IUU Regulation, but that, on the other hand, with more than 120,000 catch certificates received during the period 2012-13, only ten imports were refused between 2010 and 2015.<sup>18</sup>

As a comparison, other countries with a lower number of catch certificates refused clearly more consignments. Spain, with almost 95,000 (94,718) catch certificates, and the Netherlands, with only 16,788 catch certificates, refused 44 and 50 imports respectively in 2012-13. Great Britain and the Netherlands refused 16 and 50 consignments, respectively, in the years 2012-2013 alone with almost the same import quantity (volume in tonnes) as Germany received on average per year<sup>19</sup>.

The German Government admits that:

"it is not feasible to check any and all fishery products [ ] because of the large number of fish and fishery product imports from third countries. For this reason, the German Government has not been able to completely prevent consignments of fish and fishery products from IUU fishing from entering Germany in individual cases since the IUU Regulation has come into force."<sup>20</sup>

When referring directly to the enforcement of the IUU Regulation, the German Government is of the opinion that this is sufficient:

"The IUU Regulation does not contain any precise objectives concerning the frequency and quality of checks. The Federal Office for Agriculture and Food (BLE) checks around one third of all import

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<sup>16</sup> See <http://dip21.bundestag.de/dip21/btd/18/069/1806948.pdf>.

<sup>17</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Agreement has been valid since 5 June 2016, but is only binding for the contracting States, among others the EU. Status of ratifications: [http://www.fao.org/fileadmin/user\\_upload/legal/docs/037s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf).

<sup>18</sup> EJF/OCEANA/PEW/WWF, issues paper: Der Fortschritt im Kampf gegen illegale, nicht gemeldete und unregulierte Fischerei (IUU). Deutschland – ein wichtiger Akteur im weltweiten Kampf gegen illegale Fischerei, May 2016, p. 4, table 1), <http://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/IUU-Themenpapier-Deutschland-Mai-2016.pdf>; see also: German Bundestag printed paper 18/4034, 18/6948 and 18/6597.

<sup>19</sup> Germany: 370,000 tonnes; Netherlands: 340,000 tonnes; UK: 385,000 tonnes (Eurostat)

<sup>20</sup> Quotes from the German Government's response, German Bundestag printed paper 18/6948.

declarations for fishery products. From the German Government's point of view this is appropriate to comply with the targets of the IUU Regulation."<sup>21</sup>

The EU Commission sees actual enforcement gaps in its evaluation report from 1 October 2015.<sup>22</sup> The coalition parties also see the need for improvement and requested sufficient budgetary resources already in 2015, in order to:

"send out a clear signal against IUU fishing by effectively implementing the EU Regulation on 'illegal, unreported and unregulated fishing' (IUU), and by employing sufficient staff for verification purposes, applying the risk-based approach when verifying the catch certificates. Fish imports without sufficient proof of legality should be consistently refused. The EU-wide introduction of an electronic central database of catch certificates should be supported; the same applies to the introduction of obligatory IMO numbers for the labelling of fishing vessels at international level;"<sup>23</sup>

During consultations in the German Bundestag, Member of the Bundestag, Kruse, confirmed concerns that IUU products continue to land in Germany despite the validity of the IUU Regulation.

"A lot of fish from illegal fishing arrives in Germany, one half of it probably at Frankfurt Airport and the rest in Bremerhaven and Hamburg. This must be refused, because it is illegal, because our carefully negotiated goals regarding fish catch quotas are being rendered obsolete, and because illegal fishing takes place under the most inhumane conditions for the crew members. According to general estimates, this activity is connected with human trafficking and other crimes accounting for sales of up to 15 billion euros..."<sup>24</sup>

In view of the large number of imported fishery products and the very low number of refusals, the initiators of this expert opinion assume that the enforcement of the abovementioned import prohibition in Germany has gaps, or is even enforced using an approach that is methodically and legally incorrect, meaning that the enforcement obligation vis-à-vis the EU is not complied with. The aim of the legal opinion is to examine and/or define more precisely the legal obligations resulting from the IUU Regulation.

Recently, the International Tribunal of the Law of the Sea (ITLOS) also emphasised in its advisory opinion the important role of all States involved (flag, coastal, port) in fighting IUU fishing.<sup>25</sup> According to ITLOS, the States' obligations necessarily also include the enforcement of international and national rules.

## II. The IUU Regulation - content and enforcement system

### 1. General

EU Regulations always have a direct effect in each Member State (Art. 288 of the Treaty on the Functioning of the European Union (TFEU)).<sup>26</sup> It is also acknowledged that the Regulations must be applied and enforced by the Member States. This obligation is mostly seen to fall under the general duty of loyalty, but is also now laid down in Art. 291 (1) TFEU and Art. 4 (3) sub-paragraph 2 TEU. From the general duty of loyalty and cooperation, it results that the Member States must take the measures in their area of responsibility to implement and enforce European Union Law, whereas,

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<sup>21</sup> Quotes from the German Government's response, German Bundestag printed paper 18/6948.

<sup>22</sup> COM (2015) 480 final.

<sup>23</sup> Request from the parliamentary groups CDU/CSU and SPD: Die maritime Wirtschaft stärken und ihre Bedeutung für Deutschland hervorheben, German Bundestag printed paper 18/6328.

<sup>24</sup> German Bundestag – 18<sup>th</sup> legislative period – 130<sup>th</sup> session. Berlin, Thursday, 15 October 2015, 12633

<sup>25</sup> ITLOS case 21- REQUEST FOR AN ADVISORY OPINION - SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) - ADVISORY OPINION of 2 April 2015, [www.itlos.org](http://www.itlos.org)

<sup>26</sup> See also: ECJ, judgement of 14 Dec. 1971, C-43/71- [www.curia-eu.int](http://www.curia-eu.int)



there is also the principle that the Member States may and should maintain their own administrative system. Furthermore, there is the general principle of subsidiarity which says that the Community should only take (legal) measures in the scope necessary for achieving the goal set. The principle of subsidiarity is always taken as a standard of review when the Union "undertakes any action"<sup>27</sup> (Art. 5 (1) TEU).

The IUU Regulation goes back to the FAO "International Plan of Action to prevent, deter and eliminate IUU fishing (2001)". Due to a resolution by the European Parliament<sup>28</sup>, the Commission submitted inter alia a proposal for a Regulation<sup>29</sup> in October 2007, which quickly resulted in the IUU Regulation, which was then adopted by the Council. The main idea behind this proposal was "to [close] the gaps in national and international systems which illegal operators take advantage of. These are flag registrations, the coordination between States and international organisations, as well as the monitoring, checking and supervising systems".

In view of the "scale and urgency of the problem" the Community was prepared "to substantially enhance its action against IUU fishing" (Preamble No. 5) – this also referred to enforcement and to port controls in the Member States from the very beginning.

The IUU Regulation was adopted on the basis of the Treaty establishing the European Economic Community, and in particular on the basis of Art. 37 TEU (now Art. 43 TFEU), i.e. as a measure that falls within the EU agricultural competences. According to the explicit clarification in Art. 3 (1) d) TFEU, the Community has exclusive responsibility in this area (conservation of marine biological resources under the Common Fisheries Policy).<sup>30</sup>

The Preamble (No. 39) of the IUU Regulation expressly refers to the principle of proportionality (Art. 5 TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.") and to Art. 5 (3) of TEU, i.e. the subsidiarity principle (which does not apply in areas of exclusive competence but is applied *de facto* wherever EC legislation regulates enforcement frameworks), but then includes very detailed regulations (as often in the area of EU agricultural law)<sup>31</sup>. This means that the Member States have acknowledged that the common system of the IUU Regulation with its Implementing Regulation 1010/2009 is necessary to achieve the goal (combating IUU).

## 2. Summary of the content and regulations on import control

### 2.1 Substantive Law

The IUU Regulation – as complemented by the Implementing Regulation 2009<sup>32</sup> – applies to any and all fishing vessels, independently of whether they are operated under the flag of a Member State or a

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<sup>27</sup> Grabitz-Hilf-Nettersheim, EUV 2016, Art. 5 marginal note 51.

<sup>28</sup> European Parliament Resolution on the implementation of the common action plan against illegal, unreported and unregulated fishing, adopted on 15 February 2007 (2006/2225(INI)).

<sup>29</sup> Notification from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions from 17 October 2007 regarding a new Community strategy to prevent, deter and eliminate illegal, unreported and unregulated fishing [[COM\(2007\) 601](#) final - not published in the Legal Gazette].

<sup>30</sup> For the historical legal situation, see: ECJ, legal case [804/79](#), Col. 1981, [1045](#), marginal note [17](#) (Commission /United Kingdom – sea fisheries conservation measures)

<sup>31</sup> The new regulation of Art. 5 (3) TEU pertaining to the subsidiarity principle and the special complaint mechanism of the subsidiary protocol is not applicable to the IUU Regulation since there is no divided responsibility.

<sup>32</sup> Commission Regulation 1010/2009 from 22 October 2009 with Council Implementing Regulation (EC) No. 1005/2008 on a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

third country. The catch certificate provisions relevant here may therefore also apply to catches by EU fishing vessels that are exported from the Community, if the country of destination requires a catch certificate. However, the certificates are primarily used if catches from third countries are to be imported by fishing vessels or via other trade channels.

The starting point for the IUU Regulation is the body of catch restrictions and rules which are set by regional or global institutions all over the world (see Art. 2 (9) IUU Regulation), as well as the regulations of countries of origin of fishery products regarding the marine territories under their jurisdiction (in particular the EEZ).<sup>33</sup> The IUU Regulation is a mere trade instrument and is meant to support external management measures – it does not introduce any new conservation or management measures. It complements already existing approaches for EU controls at external borders which were previously responsible for ensuring compliance with environmental and animal protection regulations, in addition to the actual calculation of customs due (payment) when importing products.

When importing products into the EU, a distinction must generally be made between direct landing (the fishing vessel itself lands in an EU port and distributes goods) and indirect import (container goods on a vessel, truck or airplane). Art. 12 and 16 ff do, however, apply to both avenues into the EU, i.e. the catch certificate is the general basis for ensuring the enforcement of the import prohibition.

#### **Fishing vessels**

Fishing vessels from third countries [that means non-EU] must, first of all, provide prior notice in the landing country pursuant to Art. 6 and provide information concerning which landing location is their destination. In Germany, these are the ports of Bremerhaven, Cuxhaven, Rostock and Sassnitz/Mukran.

Art. 4 ff creates the legal basis for port States to check the fishing vessels of third countries. According to Art. 9, the Member States should "inspect" at least 5% of all landings and transshipments conducted by fishing vessels from third countries "using benchmarks" which "are established according to the principles of risk management". In addition, Art. 9 (2) establishes mandatory criteria as to when such checks must take place ("The following fishing vessels shall be inspected in all cases... "). In addition, chapter III of the IUU Regulation (catch certificate scheme) applies as a rule. This includes control of any transshipment (Art. 2 (10) and Art. 4).

#### **Processed fishery products**

The majority of the goods landed in Germany are, however, processed container freight – which are not subject to the obligation resulting from Art. 9 IUU Regulation, because they did not arrive on a fishing vessel. The general scheme of verification applies, the core of which is the submission of catch certificates in line with Art. 12 ff. However, special regulations must be observed here to collect the freight from different catches (one consignment, several catch certificates, etc.) and to govern cases of processing and transshipment.

The term "catch certificate" is not defined in the IUU Regulation. However, the term "fishing authorisation" is defined:

Art. 2 (7). "fishing authorisation" means entitlement to engage in fishing activities during a specified period, in a given area or for a given fishery;

These terms are not identical: the catch certificate pursuant to Art. 12 is clearly "more" than this authorisation, since a catch certificate requires the fishing authorisation, but also includes precise information regarding the catches and the validation by the flag State.

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<sup>33</sup> EEZ – exclusive economic zone.

According to Art. 12, first of all, the general prohibition already explained applies. Then, the catch certificate is introduced as an instrument. In general, fishery products should only be imported, "when accompanied by" a catch certificate (Art. 12 (2)). The catch certificate fulfils the following function:

Art. 12 (3): The catch certificate referred to in paragraph 2 shall be **validated** by the flag State of the fishing vessel or fishing vessels which made the catches from which the fishery products have been obtained. **It shall be used to certify that such catches have been made in accordance with applicable laws, regulations and international conservation and management measures.** [emphasis added by the author]

The Regulation contains in Annex II a sample form of the catch certificate which is filled in by the importer. It contains information about the fishing vessel that originally conducted the fishing activity (catch), the fishing ground and period, and the conservation and management measures applicable to this fishing ground or stock. It also includes information about the product and the processing site(s), as well as about transshipments at sea or in another port.

In principle, the flag State is the validating body (i.e. it confirms the content of the catch certificate). Catch certificates are, however, only accepted, if the flag States have proceeded in line with Art. 20 of the IUU Regulation and proven vis-à-vis the Commission that legal provisions are applied in their country which are sufficient to ensure that IUU fishing is combatted at national level. In addition, the flag States must have designated authorities at the national level and confirmed that these have the actual authorisation to intervene. Annex III indicates the minimum requirements to be contained in this "notification" by the flag State to the Commission.

Art. 14 contains further requirements in addition to the catch certificate, in the event that the goods were shipped via a third country and/or processed. This is linked to a "consignment".

Art. 2 (23). "consignment" = means products which are either sent simultaneously from one exporter to one consignee or covered by a single transport document covering their shipment from the exporter to the consignee.

For consignments which are transported in their original form to the EU via a different third country (to the flag State of the original fishing vessel), the third country must certify the origin of the consignment (Art. 14 (1)).

For consignments which have been processed in a third country other than the flag State, the importer shall submit a statement established by the processing plant in that third country that is endorsed by its competent authorities (Art. 14 (2) in connection with Annex IV).

Art. 16 also contains the "basic standard" for enforcement and the checks conducted by the Member States. It is entitled: "Submission and checks of catch certificates":

- (1) The validated catch certificate shall be submitted by the importer to the competent authorities of the Member State in which the product is intended to be imported at least three working days before the estimated time of arrival at the place of entry into the territory of the Community. ... **Those competent authorities shall, on the basis of risk management, check the catch certificate in the light of the information provided in the notification received from the flag State in accordance with Articles 20 and 22.** [emphasis added by the author]

Art. 20 and 22 refer to the suitability of the flag State in terms of validation and the "formal" information in Annex III, see above.

Only such importers that are recognised as "approved economic operators" are not obliged to submit the validated catch certificate to the competent authorities of the Member State before the estimated arrival of the catch (Art. 16 (2) and (3) IUU Regulation). Applying Art. 9 ff Regulation 1010/2009, these importers receive a so-called APEO certificate – the main requirement is the particular reliability of the importer regarding compliance with the conservation and management regulations.<sup>34</sup>

Art. 17 refers to the next step of enforcement on the basis of Art. 16 and describes the system of "verification" following the first "**check of the catch certificate**". According to Art. 17 (4), in some (severe) cases, it is compulsory to verify the products and/or the content of the catch certificates, regardless of the discretion that is generally afforded to the enforcement authorities of the Member States.

Art. 17 (4) includes five cases of a compulsory further verification: (a) if there are grounds to question the authenticity of the validation of the catch certificate; (b) if information exists that the original fishing vessel has violated management requirements; (c) if the fishing vessel originally indicated in the catch certificate or companies otherwise involved are suspected of taking part in IUU activities or are on a specific IUU black list; (d) if precise measures by a regional fisheries management organisation (RFMO) exist against a flag State; and/or if – which has not yet occurred to date – (e) a precise alert notice has been published by the Commission pursuant to Art. 23 (1) regarding a fishing vessel. For the remaining volume of catch certificates, the Member States are to proceed in line with Art. 17 (3) (risk management) in order to determine whether further verifications are necessary.

Apart from that, the method, i.e. the 'how' of the verification, is at the discretion of the Member States (Art. 17 (1) and (2)). As the Commission already made clear in 2007, strengthening the enforcement is the essential motivation of the Regulation:

"The current EU framework already provides for a comprehensive system of control, inspection and enforcement of fisheries rules. Implementing those provisions fall within the competence of Member States. In that respect, the first step towards better compliance with Community law is an improvement of Member States' actions to address illegal fishing in their waters or committed by their vessels or nationals beyond EU waters."<sup>35</sup>

Therefore, the regulatory body (the Council) stipulated already in the Preamble of the IUU Regulation that it is "appropriate to lay down the conditions, procedure and frequency according to which checking, inspection and verification activities shall be carried out by Member States on the basis of risk management" (para. 12).

The Preamble also includes the statement that the "Member States should be able to check the validity of the catch certificates accompanying a consignment and be entitled to refuse importation where the conditions laid down in this Regulation with respect to the catch certificate are not met".

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<sup>34</sup> In addition, the applicant must already be an economic operator under the Customs Code, Art. 9 a) Regulation 1010/2009. So far, this instrument has been seldom used. Note that APEO status is only available to importers incorporated in the EU.

<sup>35</sup> COM 2007/ 601, p. 10.

In Art. 2, the legislator defines the "risk management" mentioned in Art. 16 and 17 as follows:

21. "... the systematic identification of risk and the implementation of all measures necessary for limiting exposure to risk. This includes activities such as collecting data and information, analysing and assessing risk, prescribing and taking action, and regular monitoring and review of the process and its outcomes, based on international, Community or national sources or strategies;"

This means that risk management is an instrument for selecting the documentation to be verified, making the enforcement more effective.

Implementing Regulation 1010/2009 complements the IUU Regulation here through its chapter III (Art. 31 ff "Verifications related to catch certificates"). Art. 31 Implementing Regulation 1010/2009 contains the list of Community criteria for special risks referred to in Art. 17 (3) IUU Regulation, which indicate that a further verification of the information contained in the catch certificate might be required. These criteria are set out for application by Member States, in addition to national criteria – see further information below.

In any case, the Commission, as legislating body, assumes that it is "appropriate to lay down common risk management criteria for checking, inspection and verification activities in order to allow timely risk analyses and global assessments of relevant control information. The common criteria aim at ensuring a harmonised approach to inspection and verification in all Member States and to establish a level playing field for all operators." (Preamble Implementing Regulation 1010/2009, para. 4).

## **2.2 Responsibilities and actual enforcement in Germany**

The Federal Office for Agriculture and Food (BLE) is the competent authority "for the monitoring of importation, exportation and re-exportation of fishery products" subject to the IUU Regulation, in line with No. 20 of the Annex to Art. 2 (1) SeeFischG [Marine Fisheries Act]. The Federal Ministry for Food and Agriculture (BMEL) carries out the legal and technical surveillance for the German Government.

In accordance with the service regulation of the finance administration (SV 08/72), the customs offices cooperate in monitoring the importation, exportation and transit of fishery products which are subject to an importation or exportation regulation, among other things, pursuant to the IUU Regulation. "This cooperation mainly consists of examining the customs declarations for goods subject to the so-called catch certificate regulation in chapter III of the IUU Regulation." This is in line with the cooperation obligation as laid down in Art. 47 of the EU Customs Code.

In reality, enforcement in Germany is conducted as follows – on the basis of recent replies from the German Government to a parliamentary question in the German Bundestag, and on the basis of the German report to the EU Commission pursuant to Art. 55 IUU Regulation<sup>36</sup>:

Around 18,000 import declarations for fishery products are presented in the area of application of the IUU Regulation each year, and these are accompanied by around 45,000 catch certificates. Germany (only) assigns five staff members in the BLE to carry out checks of documents at first level as well as verifications of catch certificates (which includes contacting third countries to obtain additional information to verify the validity/authenticity of the catch certificate).

The procedure for importing fishery products consists, in the first instance, of a prior electronic checking of all catch certificates to determine whether the information contained therein is complete. At this stage, the only check carried out is whether all boxes on the catch certificate are filled in. No further checks are carried out regarding the validation, correct authority, correct stamp,

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<sup>36</sup> Questionnaire to be used for biennial reporting on the application of the IUU Regulation, BLE, 18 May 2016, available from the author.

conclusiveness of information, etc. The risk-based criteria of Art. 31 Implementing Regulation 1010/2009, for example, are not applied to any incoming catch certificates.

According to information provided by the BLE, around 30-35% of import declarations (whether this means the actual catch certificates remains unclear) are checked manually<sup>37</sup>, with a particular focus on consignments that have been imported indirectly. These are usually container goods which were initially transported from the fishing vessel of a third country (the flag State) into another third country, and which are then processed in that country or transhipped before being imported into Germany. This processing/these transhipments are deemed, by the BLE, to pose an increased risk of illegal activities. However, as described above, these indirect imports account for around 70-80% of fisheries imports received by Germany, meaning that there is effectively no selection.

In all cases which are not manually checked, the electronic verification (as to whether all obligatory boxes have been completed in the catch certificate for the import consignment, e.g. importer name, quantity, origin and type of fishery product to be imported, etc.) is followed by an automatic release. Catch certificates arriving outside the BLE office hours are checked on the following working day on a random basis. Normally, these are consignments which have not been cleared under customs legislation: that means, if the check detects inconsistencies, the importation might be suspended. Spot checks undertaken by the BLE during non-working days did not identify any special irregularities on these days, according to the BLE.<sup>38</sup>

During manual checks (of 30-35% of all catch certificates) the relevant data boxes in the catch certificates are checked as to whether they are complete and plausible. This check is also described as the "identity check", a term from customs law – a formal check of plausibility<sup>39</sup>. It is unknown how this percentage of 30-35 is selected. As to whether risk-based criteria are applied, the BLE answered in its 2016 report to the Commission as follows:

Special focus is placed on checking catch certificates for consignments from third countries about which the Commission has communicated an increased risk in an information letter pursuant to Art. 50 (3) IUU Regulation. Furthermore special attention is drawn to consignments from countries which have already been notified by the Commission that they may possibly be classified as non-cooperating third countries in future. Information provided by other EU Member States may also result in more detailed checks of catch certificates for consignments from certain countries.

This focus seems only to be applied in the manual check of the 30-35% of catch certificates which are otherwise selected on a random basis.

According to the BLE, attention is also paid to the complete documentation of the traceability of consignments which are processed or transhipped, i.e. attention is focused on the completeness of the processing and transhipment papers. This is to try to ensure that the imported products actually correspond with the attested catch certificate. If questions arise during this check, these are discussed with the importer or the authorities of the country of origin of the products, and the importation is suspended until clarification. In 2014/2015 approx. 60-70 enquiries were made to third States.

Around 20% of the import declarations that were processed manually (i.e. 1/5 of said 30-35% of all catch certificates) have been suspended each year. In almost 100% of these cases, missing documents leading to the suspension were handed in later, or an enquiry to the authorities of the respective flag State led to a satisfactory answer, i.e. temporary suspensions pursuant to Art. 17 (7) IUU Regulation only seldom led to a refusal pursuant to Art. 18 of the IUU Regulation.<sup>40</sup>

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<sup>37</sup> German Bundestag, printed paper 18/6948 from 7 Dec. 2015

<sup>38</sup> German Bundestag, printed paper 18/6948 from 7 Dec. 2015

<sup>39</sup> See: Wolfgang, Zollrecht, in: Schulze/Zuleeg, Europarecht, 2006, : p. 1488 f.

<sup>40</sup> German Bundestag, printed paper 18/6948 from 7 Dec. 2015

### 3. The checking system in detail

An analysis of the text and an interpretation of the intent and purpose of the IUU Regulation result in a step-by-step and very comprehensive system, under which the Member States are required, to check, verify and monitor catch certificates and/or their content, as well as the actual products available for importation. If, during the first checking phase, there is clear evidence of any of the circumstances described in Art. 18 (1) the fishery products must be rejected. This, however, will be the exception of the cases in practice.

The system is as follows:

Legal basis	Object of enforcement	What is checked/verified
<b>Checking phase</b>		
Art. 16 (1); Art. 12 (4); - Art. 20 in connection with Annex III Art. 18 (1) c, d, f and g	All incoming catch certificates undergo checks for plausibility and completeness of formal requirements	<ul style="list-style-type: none"> <li>· all formal requirements of the form in Annex II (everything filled in, all necessary catch certificates available, confirmation acc. to Annex IV (processing) if applicable, transhipment certificates, etc.)</li> <li>· validated by the correct authority / flag State</li> <li>· correct seal, etc.</li> <li>· flag State is not excluded pursuant to Art. 31 "red card", not a vessel on IUU list (Art. 29 and 30)</li> </ul>
Art. 17	Screening of all catch certificates submitted regarding <b>content/risk of fraud</b>	<ul style="list-style-type: none"> <li>· all criteria of Art. 17 (4)</li> <li>· some risk criteria pursuant to Art. 17 (3) (own national criteria) and/or Art. 31 Regulation 1010/2009</li> </ul>
<b>Verification phase</b>		
Art. 17 (4)	Catch certificates selected in the screening pursuant to Art. 17 (4) regarding the <b>content of the catch certificate and the accuracy of information contained</b>	<ul style="list-style-type: none"> <li>· compulsory verification, no own discretion ("whether")</li> <li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li> </ul>

Art. 17 (3)	Catch certificates selected in the screening on the basis of Art. 16 or 17 (3) regarding the <b>content of the catch certificate and the accuracy of the information contained</b>	<ul style="list-style-type: none"> <li>· "whether" of the verification at (restricted) own discretion</li> <li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li> </ul>
Art. 17 (5)	Further catch certificates which were not conspicuous in the screening	<ul style="list-style-type: none"> <li>· "whether" of the verification at full discretion</li> <li>· "how" of the verification, all means of Art. 17 (2) and Art. 17 (6) (inspection of goods, checks, consultations with the flag State) at discretion ("how")</li> </ul>

Prior to the detailed analysis, a short description of the regulations of the Customs Code is provided to aid an adequate understanding of the provisions of the IUU Regulation.

### **Excursus: Customs Code - checks and risk management**

The IUU Regulation with its Implementing Regulation is, regarding import checks of catch certificates and verification upon arrival in the EU, a de facto *lex specialis* to the general control of goods to be imported by the customs authorities on the basis of the Customs Code<sup>41</sup>. This means that the catch certificate, which must be submitted pursuant to Art. 16 IUU Regulation, is in fact often combined with the declaration of goods pursuant to Art. 127 Customs Code (summary entry declaration)<sup>42</sup>.

According to Art. 3 Customs Code, the duties of the customs authorities include, inter alia, "ensuring the security and safety of the Community and its residents, and the protection of the environment, where appropriate in close cooperation with other authorities." According to Art. 134 (customs supervision) the following applies:

(1) Goods brought into the customs territory of the Union shall, from the time of their entry, be subject to customs supervision and may be subject to customs controls. Where applicable, they shall be subject to such prohibitions and restrictions as are justified on grounds of, inter alia, public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property – including controls on drug precursors, goods infringing certain intellectual property rights and cash entering the Community, as well as to the **implementation of fishery conservation and management measures** and of commercial policy measures. [emphasis added by the author]

While customs controls used to mainly focus on fiscal aspects, i.e. serving the "collection" of duties, these should today integrate aspects of security, environmental protection and civil protection.

Nevertheless, customs law is still based on the relatively large freedom of the customs authorities of the Member States regarding enforcement. In the past, the subsidiarity principle, the general loyalty

<sup>41</sup> Fn. 8.

<sup>42</sup> "Summary entry declaration" means the act whereby a person informs the customs authorities, in the prescribed form and manner and within a specific time-limit that goods are to be brought into the customs territory of the Union, Art. 5 (9) Customs Code.



principle and the proportionality principle were applied here; today Art. 291 (1) TFEU applies ("Member States shall adopt all measures of national law necessary"), see above. The enforcement by the Member States is however becoming increasingly modified, here and elsewhere, by requirements under Union law – without forgoing the subsidiarity principle.<sup>43</sup>

With the revised version of the Customs Code in 2013, a real reform was introduced: the checking and verification system is now based on common risk management.

Section 7 of the Customs Code deals with enforcement, i.e. the control of goods is a core element in the enforcement of customs legislation. Art. 46 governs "risk management and customs controls". Accordingly, the customs authorities "may" (continue to) carry out "any customs controls they deem necessary" (para. 1), but should (be obliged to) undertake "risk management" pursuant to para. 4 "to differentiate between the levels of risk associated with goods subject to customs controls or supervision and to determine whether the goods will be subject to specific customs controls, and if so, where."

According to Art. 5 (2)5 of the Customs Code, risk management means the "systematic identification of risk, including through random checks, and the implementation of all measures necessary for limiting exposure to risk" - such as in the IUU Regulation. According to paragraph 2, "customs controls shall primarily be based on risk analysis using electronic data-processing techniques, with the purpose of identifying and evaluating the risks and developing the necessary counter-measures on the basis of criteria developed at national, Community and, where available, international level."

Unlike in the past, even control measures must now be preceded by a risk analysis; the former system, in which the content of the declaration submitted did not generally have to be checked in a first step, has been modified.

The Customs Code contains in para. 28 of the Preamble a statement of intent as follows:

"In order to minimise the risk to the Union, its citizens and its trading partners, the harmonised application of customs controls by the Member States should be based upon a common risk management framework and an electronic system for its implementation. The establishment of a risk management framework common to all Member States should not prevent them from controlling goods by random checks."

In the IUU Regulation, this system has been in fact "tested", as it were, for a limited, but particularly complex system of procurement and supply chain checking – both systems must thus be seen as being interrelated, when the aim is to carve out the Member States' precise obligations.

The next section will deal with the precise enforcement obligations in line with the IUU Regulation.

### **3.1 Stage 1 of the enforcement: checks**

According to Art. 16 (1), the monitoring and enforcement activities start with the *checking* of the incoming catch certificates. This obligation is unconditional and absolute:

"Those competent authorities shall, on the basis of risk management, check the catch certificate in the light of the information provided in the notification received from the flag State in accordance with Articles 20 and 22."

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<sup>43</sup> See: Calliess/Ruffert/Ruffert, TFEU 2016, Art. 291, marginal note 3-5.

### 3.1.1 Quantitative requirements

a)

In the author's opinion, it is mandatory that all catch certificates submitted be checked, i.e. with respect to quantity, 100% of catch certificates must be subject to enforcement activity. This does not correspond to the German Government's interpretation that the IUU Regulation "does not contain any precise objectives regarding the frequency and quality of the checks".<sup>44</sup> This statement might be true (with exceptions) for the second step (below), i.e. the further verification, but not for the simple checking of the catch certificates. There is a distinct reason for the IUU Regulation to distinguish between checking and verifying.

Art. 16 speaks of "**the** catch certificate" (see "**the** validated catch certificate **shall be ... submitted**. The competent authorities shall check ... **the** catch certificate in the light of ...").

This choice of words implies that all catch certificates must be checked. It means "the" catch certificate which is submitted to the importing State. Only afterwards is a further verification carried out pursuant to Art. 17 (1) and (2), where appropriate. The Commission's Handbook consequently requests "a prior checking of the catch certificate for all products pursuant to Art. 16 IUU Regulation".<sup>45</sup>

The intent and purpose of the entire Regulation, as well as the systematic position of Art. 16, underscore this interpretation. The system of a further verification in line with the principles of risk management pursuant to Art. 17 only makes sense assuming a quantitatively comprehensive (100%) checking of catch certificates. Only complete collection and checking can guarantee that catch certificates, which are subject to compulsory verification pursuant to Art. 17 (4), can be identified at all ("Verifications shall be carried out, in any case, where..."). This means that (in the words of the ECJ<sup>46</sup>) only a complete checking obligation is able to guarantee the unity and effectiveness of Community norms.

One may counter this argument by highlighting the fact that Art. 16 does not explicitly mention a compulsory checking of "100% of catch certificates", and that the Member States should and must have a margin of manoeuvre for the enforcement.

However, the benchmark for the interpretation of Art. 16 IUU Regulation is the practical effectiveness of European Union Law, and Art. 291 (1) TFEU (principle of loyal cooperation pursuant to Art. 4 (3) sub-para. 2 TEU).

As already described, the general duty of loyal cooperation requires that the Member States must take the measures in their area of responsibility to implement European Union Law.<sup>47</sup> Even if the provision only explicitly mentions the Member States, it is also directed at all public authorities in the Member States.<sup>48</sup> Any and all public authorities, including the institutions attributable to them, are included in the circle of parties obliged, insofar as they are designated to implement secondary European Union Law under the national distribution of responsibilities.<sup>49</sup> In practice, this means that, also at the level below the legislative level (here understood as the enforcement level), EU law is binding in the sense of a duty of loyalty.

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<sup>44</sup> Both quotes from the German Government's reply, German Bundestag printed paper 18/6948.

<sup>45</sup> fn. 3, p. 32.

<sup>46</sup> Fundamental: ECJ, legal case 39/70 (Norddeutsches Vieh- und Fleischkontor), Col. 1971, 49. Since then, this terminology has been consistent practice of the courts.

<sup>47</sup> GHN/Nettesheim TFEU Art. 291 marginal note 15-17, beck-online.

<sup>48</sup> Groeben, von der /Schwarze/ TFEU Art. 291 marginal note 6-10, beck-online.

<sup>49</sup> Streinz/Gellermann TFEU Art. 291 marginal note 1 - 23, beck-online.

The Treaty does not establish in detail which steps must be taken by a Member State, which will be area and case specific. Nevertheless, the Member State institutions must observe their duty to take action or their duty to refrain from something, if these apply to them directly. The term "carrying out" in this respect includes the authorisation, competence and the duty to observe and enforce European Union law.<sup>50</sup> In addition, Art. 291 does not exclude a request for Member States to carry out institutional, normative, personnel and financial measures, creating those prerequisites which are necessary for European Union Law to go beyond the normative and become effective in practice.<sup>51</sup> In this respect, Member States must take all measures necessary to ensure the complete and correct enforcement of Union Law.<sup>52</sup>

The limit as to what can be requested from the Member States is set by "necessity". A means-purpose relation is advisable here, but it is not clearly established in this context.<sup>53</sup> See the following for a commentary on this:

"So far it is completely unclear what efforts can be requested from a Member State to implement the norms of Union Law in a given situation. It seems to be appropriate when assessing a measure to consider both the contribution it is able to render towards the realisation of the priority of application of Union Law, as well as the financial and other costs resulting for the Member State. Thus it seems appropriate to introduce elements of an adequacy test when dealing with the criteria of necessity as provided for in Art. 291 (1) TFEU."<sup>54</sup>

It is left to the Member States to shape the organisational and procedural prerequisites necessary for that<sup>55</sup> – but this leaves the actual checking obligation untouched, since the IUU Regulation itself contains such an appreciation of necessity in individual cases.

All catch certificates must be controlled comprehensively in order to determine whether the mandatory reasons for refusal of Art. 18 of the IUU Regulation apply or whether further verifications are appropriate, which then - at least some of them - are at the discretion of the enforcement authorities of the Member States. This means that the Regulation does not, in principle, affect the procedural autonomy of the Member States<sup>56</sup> – rather, it regulates the 'whether' and 'how' of the enforcement activity in such detail (intentionally, as shown above) that the national administrations' room for manoeuvre is considerably restricted.

It is undisputed that the Member States are obliged to ensure compliance with and implementation of Community Law<sup>57</sup> - and insofar as these enforcement duties are the actual core of a Community Regulation (as here), the scope and extent of the enforcement may directly result from European Law.

The comprehensive (100%) checking obligation resulting from Art. 16 (1) is clearly in line with Art. 36 of the CFP Regulation (Common Fisheries Policy - Regulation 1380/2013 (2013)), which emphasises the common approach of enforcement and requests the Member States to ensure that checks are carried out.

In addition, with this interpretation, Art. 16 corresponds with the requirement for sufficient certainty and clarity of the norm which derives from the rule of law principle. This requires from the legislator that it define, in principle, its regulations in such detail that the party affected may recognise the legal

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<sup>50</sup> GHN/Nettesheim TFEU Art. 291 marginal note 15-17, beck-online.

<sup>51</sup> GHN/Nettesheim TFEU Art. 291 marginal note 15.

<sup>52</sup> Streinz/Gellermann TFEU 2012 Art. 291 marginal note 1 - 23

<sup>53</sup> GHN/Nettesheim TFEU 2016 Art. 291 marginal note 15

<sup>54</sup> GHN/Nettesheim TFEU Art. 291 marginal note 15-17; similar: Schulze/Zuleeg, *Europarecht*, (Magiera, *Durchsetzung des Europarechts*), p. 443

<sup>55</sup> Magiera, reference as above, with further evidence to the ECJ consistent practice of the court.

<sup>56</sup> See: Frenz, *Handbuch des Europarechts*, chapter 11 (enforcement), marginal note 1740 ff.

<sup>57</sup> ECJ, legal case 453/00 – 13 Jan. 2004, ECLI:EU:C:2004:17.

situation, i.e. the content and restrictions of orders and prohibitions in a reasonable manner, and align its behaviour accordingly.<sup>58</sup> Art. 16 (1), in conjunction with Art. 12 and Art. 18 (1) IUU Regulation, clearly defines that a missing or "incorrect" catch certificate leads to an import prohibition, and that the submission of the catch certificate will also be checked at the EU external borders – with the possible time implications involved in this check, which are also governed by the IUU Regulation. An entry check of only some catch certificates (and who would determine which ones is entirely open) would necessarily lead to a very imbalanced application of the law and thus an imbalanced legal reality in the Community.

This interpretation may also be justified against the background of the Customs Code and in relation to the *lex specialis* of the IUU Regulation. Even if the enforcement efforts required under the IUU Regulation are stricter than in the general customs system, these efforts are justified in view of the special purpose of the IUU Regulation. As a *lex specialis* of the Customs Code, the IUU Regulation and its Implementing Regulation cannot be interpreted more narrowly with regard to "how" the import prohibition is to be enforced. Indeed, the IUU Regulation system outlines in much more detail the 'how' and 'whether' of enforcement of the import prohibition than does the Customs Code.

When compared to the checking of illegally harvested timber and timber products on the basis of Regulation 995/2010, Art. 16 IUU Regulation is also clear with respect to the "whether" and "how" of enforcement. While Art. 10 of Regulation 995/2010 only obliges the Member States to "carry out checks" to "verify" if operators comply with their duty of care, Art. 16 (1) in its wording impliedly refers to every catch certificate (as established at the beginning of this section). In addition, Regulation 995/2010 does not contain any category of compulsory further verifications based on general checks, as provided for in Art. 17 (4) of the IUU Regulation.

The IUU Regulation only sets quantitative objectives in Art. 9 (5% of the landings and transshipments by third country vessels must be inspected in designated Member State ports). This is not, however, contrary to the interpretation of Art. 16 provided above. The obligation resulting from Art. 9 is a real "in situ" inspection obligation, and these, as far as the efforts are concerned, are by no means comparable to the check of conclusiveness of catch certificates in this first step. Again, the IUU Regulation - unlike other instruments of EU Law - defines the necessity of enforcement already at the legislative level.

b)

Regarding the scope and depth of checks of catch certificates, there is no relevant case law, and also no clear statements from the Commission, establishing any level of scope of the actual checking exercise. The practice applied by the Member States is not uniform. While Spain checks all catch certificates, this is, as shown above, not at all the case in Germany.<sup>59</sup>

If one does not follow the interpretation regarding the quantitative level of checks presented above, for example because the obligation does not explicitly refer to 100% of the catch certificates, or because Art. 16 (1) refers to a checking obligation on the "basis of risk management" (i.e. a special method of selecting the catch certificates), the following must be noted:

The Federal Government reasons that only a (small) and undetermined percentage of catch certificates within the scope of Art. 16 must be checked at all - despite an explicit import prohibition and comprehensive provisions in the Regulation itself. They maintain that the IUU Regulation does "not contain precise objectives concerning the frequency and the quality of checks".

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<sup>58</sup> Federal Constitutional Court [BVerfG], judgement from 27 July 2005 - 1 file 668/04, decisions of the BVerfG 113, 348).

<sup>59</sup> COM 2015/480 and EJP et al., fn. 11.

However, even if this opinion were to be shared, and Art. 16 (1) does not contain an obligation to check 100% of catch certificates but rather gives Member States the opportunity to make a quantitative selection as to which of the catch certificates they check at entry, the checking obligation must be complied with on the basis of a systematic risk assessment regarding both quantity (how many of the catch certificates must be checked) and quality. In other words: a random and arbitrary selection of catch certificates for checking purposes is by no means in compliance with the Regulation.

Yet, in the author's opinion, the reference to risk management is misleading at this point. The fact remains that it is impossible to comply with the compulsory verification obligation contained in Art. 17 (4), as well as the mandatory reasons for refusal set out in Art. 18, if only a quantitatively fragmentary checking of catch certificates is carried out. In the author's opinion, the result of a risk-based selection of the *number* of catch certificates to be checked would in the end lead to the same result as the requirement to screen 100% of the catch certificates.

### 3.1.2 Qualitative – plausibility and completeness check

Pursuant to Art. 16 (1), only a formal and/or plausibility and completeness check must be carried out with respect to quality at this stage. However, this does not solely refer to a check of the completeness of the form for the catch certificate, which currently seems to be the case in Germany.

The wording is also mandatory here: "Those competent authorities shall, **on the basis of risk management**, check the catch certificate **in the light of the information provided in the notification** received from the flag State in accordance with Articles 20 and 22."

As described above, Art. 20 stipulates that validations of catch certificates are only accepted from those flag States that provide information pursuant to Annex III, i.e. as to whether national rules apply regarding the application, monitoring and enforcement of legal regulations and conservation and management measures their fishing vessels are bound to, and furthermore whether a public authority empowered to attest the veracity has validated the catch certificate in line with Art. 20 (1) lit. b).

This means that, in the first instance, all formal requirements resulting from the form in Annex II in connection with Art. 12 (4) must be checked:

- that means all boxes are filled in plausibly, all catch certificates necessary are available, confirmation according to Annex IV (processing statement) and transshipment certificates are provided, etc.

Furthermore, it must be scrutinised as to whether all requirements of Art. 18, Art. 20 and Annex III have been fulfilled, i.e.:

- the catch certificate is validated by the correct authority / flag State (Art. 18 (1) c)
- the catch certificate indicates all required information (Art. 18 (1) d)
- it bears the correct seal, etc.
- the original fishing vessel is not on the IUU list (Art 18 (1) f)
- the flag State is not excluded pursuant to Art. 31 "red card" (see Art 18 (1) g)

The latter requirements are implied by the overall system of the IUU Regulation and must therefore already be included in the plausibility check. An excluded flag State may not carry out any validation.

This type of enforcement can mostly be done electronically, and is thus not an excessive requirement vis-à-vis the enforcement authorities of the Member States. It cannot be assumed that the actual efforts (which are not factually identifiable here) would be disproportionate to the outcome, i.e. the enforcement of the prohibition of IUU imports.

### **3.1.3 Qualitative: screening of the catch certificates - absolute rejection and further risk criteria**

Unless the checking phase at this point already proves that IUU fishing has taken place and thus the shipment/consignment must be rejected (Art. 18 (1)), the same catch certificates must additionally be subject to the application of absolute and risk-based criteria. Applying the interpretation of Art. 16 (1) supported here, this selection step refers to 100% of the catch certificates submitted.

Alternatively, if a selection in terms of quantity were to be permissible (see discussion under section 3.1.1 above), only the scope of the objects of observation, i.e. the volume of catch certificates, change, but not the obligation to apply absolute and risk criteria as such.

a)

First of all, Art. 17 (4) results in a compulsory screening of all catch certificates submitted regarding their content/risk of fraud.

Because the cases described in Art. 17 (4) always require further verification, these cases are subject to compulsory enforcement by the authorities already when checking the catch certificates. That means it must always be checked whether a case specified in Art. 17 (4) is applicable (see above). This verification necessarily overlaps with the plausibility and completeness check. Further verifications of the catch certificate must, for example, always be carried out according to Art. 17 (4) (a), if the enforcing body has grounds for doubting the authenticity of the catch certificate or the validating stamp. This is not a mere "identity check", but already a verification aimed at excluding fraud.

b)

Further at this point, risk management becomes relevant as a tool, which, pursuant to Art. 17 (3), is to serve as a basis for the verifications:

Verifications shall be focused towards risk identified on the basis of criteria developed at national or Community level under risk management. Member States shall notify to the Commission their national criteria within 30 working days after 29 October 2008 and update this information. The Community criteria shall be determined in accordance with the procedure referred to in Article 54 (2).

[emphasis added by the author]

The German statement on the lack of binding obligations with regard to the frequency and quality of checks seems to suggest that checking using risk criteria (whether defined at the national level or defined in the Implementing Regulation) is generally not prescribed by EU law. This may be correct, if Art. 17 (3) were only to be applicable at the Member State's own discretion as provided for under Art. 17 (1) and (2) (regarding the 'how' of the verification), as its position in the normative system suggests. This is because, according to Art. 17 (1), the Member States "may" carry out further verifications, if they deem them to be "necessary".

Yet, such an interpretation of the function of Art. 17 (3) misinterprets the role of risk management. And the legislator should take responsibility for not having explicitly clarified this role.

"Risk management" means, first of all, a "systematic identification of risks". That means that the risk management actually serves as a selective filter for further monitoring and verification measures, as also defined in the Customs Code. The enforcing authorities should collect and evaluate data and information - in coordination with other Member States and the Commission. With respect to the IUU

Regulation this refers to the risk that the catch itself might stem from IUU fishing despite a formally complete and conclusive catch certificate.

For this reason, a corresponding database of catch certificates at Community level is currently being developed by the European Commission. The database has also been requested by the governing coalition parties, among others<sup>60</sup>.

The IUU Regulation foresees a system that not only provides for random checks or chance discoveries, but rather identifies in what cases a further verification of the *content* of the catch certificates and the products themselves is appropriate, in order to prevent the importation of IUU products against the prohibition outlined in Art. 12 (1) IUU Regulation. Hence, at this stage, it is regulated 'whether' further verifications take place – just as in the new risk-oriented provisions of the Customs Code. In terms of German administrative law, this is a restriction of the discretion to select (Auswahlermessen).

This function is obvious when looking at the intent and purpose of this norm, but remains unclear in the inner logic of the Regulation.

This means that no free discretion is granted regarding the application of Art. 17 (3) and of risk management; rather, the Member States are obliged to use either national or Community criteria when selecting further enforcement steps.

What is important is the point of reference: at this point in time, the object of application is not the actual product, but still the catch certificate. The risk criteria are applied to its content, for example, the product or fishing ground indicated, to obtain clues for further verifications. In certain cases – this is the actual message of the risk criteria – the authorities of the Member States should not simply trust in the declarations given in the catch certificate, which ultimately certifies that the fishery product is not from IUU fishing.

c)

As far as can be seen, Germany has not communicated any national risk criteria to the Commission.

If one reads the abovementioned information provided by the Federal Government correctly, Germany seems to apply a single criterion “whether consignments are imported indirectly via another country”.<sup>61</sup> These consignments are said to be subject to an "increased risk". However, since these consignments in Germany account for 70-80% of imports, the fact of indirect import alone is not an appropriate point of departure for checking. Moreover, this criterion is not on the list adopted by the Commission pursuant to Art. 17 (3).

In absence of the notification of national criteria – the criteria cited in Art. 31 Implementing Regulation 1010/2009, which have already been mentioned above, are applicable:

Art. 31 Verifications intended to ensure that the provisions of Regulation (EC) No. 1005/2008 are complied with, as referred to in Article 17 of that Regulation, shall be focused towards risks identified on the basis of the following Community criteria:

- a) importation, exportation or trade in fishery products obtained from species of high commercial value;
- b) introduction of new kinds of fishery products or discovery of new trade patterns;

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<sup>60</sup> Fn. 23.

<sup>61</sup> It is noted that the German authorities refer to three additional risk criteria in the 2014/15 biennial report submitted to the Commission under the IUU regulation but these criteria do not appear to be applied in practice by the BLE.

- c) inconsistencies between the trade patterns and the known fishing activities of a flag State in particular in respect of species, volumes or characteristics of its fishing fleet;
- d) inconsistencies between the trade patterns and the known fishing-related activities of a third country in particular in respect of the characteristics of its processing industry or its trade in fishery products;
- e) trade pattern not justified in terms of economic criteria;
- f) involvement of a newly established operator;
- g) significant and sudden increase in trade volume for a certain species;
- h) submission of copies of catch certificates accompanying processing statements according to Annex IV of Regulation (EC) No. 1005/2008, for instance when the catch has been split during production;
- i) prior notification, required under Article 6 of Regulation (EC) No. 1005/2008, not transmitted at the proper time or information incomplete;
- j) inconsistencies between catch data declared by the operator and other information available to the competent authority;
- k) vessel or vessel owner suspected of being or having been involved in IUU fishing activities;
- l) vessel having recently changed name, flag or registration number;
- m) flag State not notified according to Article 20 of Regulation (EC) No. 1005/2008 or information available on possible irregularities in the validation of catch certificates by a given flag State (e.g. stamps or validation seal from a competent authority lost, stolen or forged);
- n) presumed deficiencies in the control system of a flag State;
- o) operators concerned who have already been involved in illegal activities constituting a potential risk in respect of IUU fishing.

The list is extensive and shows that the application of the criteria is ultimately aimed at narrowing down and determining the volume of imports for further desk-based or on-site verifications. Only in particular cases should (must) further verifications be carried out, which, indeed, require considerably more effort and resources than the rather bureaucratic job of checking the catch certificates.

The wording of the IUU Regulation states that the verifications "aim at" and/or shall "in particular" cover certain risks. Ultimately, this is a *method* to make the enforcement duties in the Member States more efficient. These findings are also considered in the newly adopted system of the Customs Code.

The coalition of NGOs that commissioned this expert opinion have studied this method both at technical and content level. They propose a three-step application of *risk management*, because only then can fraud and gaps in the system be proven, and IUU products actually be excluded from the common market.<sup>62</sup> This system would include the mandatory application of six of the criteria laid down in Art. 31 Implementing Regulation 1010/2009 (among others) to all catch certificates received, and the optional application of the remaining Art. 31 criteria should resources allow. The mandatory criteria are recommended to be applied uniformly by all Member States.

Whether the use of all of the Art. 31-criteria is compulsorily seems doubtful in light of the wording. First of all, the function of these criteria as a means to narrow down products on the basis of the catch certificates for further verification is not explicit. In addition, the German<sup>63</sup> (and Danish) text version includes a restriction by using the term "in particular" (insbesondere). The English text version contains the obliging "shall" ("Verifications shall be focused towards risk identified on the basis of criteria developed at national or Community level under risk management."), but actually also only aims at "focusing" and not at a final and complete application of all criteria. An unconditional and

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<sup>62</sup> EJF – Oceana – PEW – WWF, Risk Assessment and Verification of Catch Certificates under the EU IUU Regulation, July 2016, <http://www.iuuwatch.eu/wp-content/uploads/2016/07/Risk-Assessment-FINAL.pdf>.

<sup>63</sup> Art. 31: „Überprüfungen, die gemäß Artikel 17 der Verordnung (EG) Nr. 1005/2008 sicherstellen sollen, dass die Vorschriften der Verordnung ordnungsgemäß angewendet werden, zielen insbesondere auf die Risiken ab, die auf der Grundlage der folgenden Gemeinschaftskriterien ermittelt wurden“



precise obligation to screen all catch certificates according to all these criteria cannot be derived from this wording.

However, as part of the implementation obligation, Art. 17 (3) contains a duty of care on the part of the Member States to actually apply appropriate risk criteria in whatever form also at the checking level. This is because the aim of applying this risk approach is to actually exclude mere random selections or random checks, either as part of the IUU Regulation or elsewhere. The criteria applied must be well founded, and not random – which seems not to be the case in German practice, as already discussed above.

### **3.1.4 The role of "approved economic operators" (APEO)**

EU importers that have been granted the status of "approved economic operators", are not obliged to submit the validated catch certificate to the competent authorities of the Member State before the estimated arrival of the catch (Art. 16 (2) and (3) IUU Regulation). These importers (registered in the EU) are provided with a so-called APEO certificate, pursuant to Art. 9 ff. of Regulation 1010/2009, upon application. The main requirement is the particular reliability of the importer regarding compliance with conservation and management regulations.<sup>64</sup>

If importers are in possession of such a certificate, "they must keep available" the catch certificate "for the purposes of checks in accordance with paragraph 1 of this Article or verifications in accordance with Article 17". These catch certificates at no time form part of the multitude of catch certificates submitted, and they are also excluded from the automatic checking obligation. Holders of an APEO certificate must, however, be "strictly" monitored during the first year following approval (Art. 21 (4)), if the certificate refers to a company established in the Community for less than three years. According to Art. 20 (3) Implementing Regulation 1010/2009, "where, following a risk analysis, the competent Member State authority selects for further examination a consignment accompanied by a catch certificate lodged by an approved economic operator", verifications pursuant to Art. 17 IUU Regulation must be carried out and given priority.

This means that there is a clear (even if justified) monitoring disparity with regard to products imported by holders of APEO certificates. This speaks all the more in favour of submitting 100% of the remaining catch certificates for checks.

With respect to the holders of APEO certificates, the duty of care of the Member States still applies. If it becomes evident, for example, that certain products are increasingly being subject to management requirements, which means they may not be imported in the same scope as before, but still are, and the national authority knows that the holder of the APEO certificate imports such products preferentially, then the catch certificates should be requested proactively and submitted to checking pursuant to Art. 16 (1) in connection with Art. 17 (4).

### **3.2 Stage 2 of the enforcement: verifications**

After the checking process has been completed, Art. 17 (1) and (2) specifies that Member States may carry out further verifications at their own discretion. These include all measures aimed at comparing the content of the catch certificate with the reality, i.e. to actually ascertain whether the products – contrary to the information provided in the catch certificate – stem from IUU fishing.

Art. 17 applies to the verification of both fishing vessels and container goods. Possible measures pursuant to Art. 17 (2) are: examining the products, verifying declaration data and the existence and authenticity of documents, examining the accounts of operators and other records, inspecting means of transport, including containers and storage places of the products and carrying out official enquiries and other similar acts, in addition to the inspection of fishing vessels at port. A further important

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<sup>64</sup> In addition, the applicant must already be an economic operator under the Customs Code, Art. 9 a) Regulation 1010/2009.

measure is the option of consulting the flag State: pursuant to Art. 17(6), the competent authorities of a Member State "may" request the assistance of the competent authorities of the flag State (or of a third country other than the flag State).

In line with the wording of the IUU Regulation, there are two case groups:

- compulsory verification according to Art. 17 (4), and
- verification pursuant to Art. 17 (3) (and, where appropriate, Art. 17 (5)), which are at the discretion of the Member States with respect to selection and means.

Catch certificates and consignments falling under one of the case groups as defined in Art. 17 (4) must undergo compulsory further verifications. The Member States must provide the necessary personnel resources to this end – otherwise they are in direct violation of Community Law.

However, regarding the second case group of verifications (discretion), the question also arises as to whether the discretion of the competent authorities is possibly restricted if inconsistencies become evident when checking the catch certificates and if a particular risk criterion applies pursuant to Art. 31 Implementing Regulation 1010/2009.

From a practical point of view, the enforcing authority finds itself in the following situation: some consignments and/or catch certificates were conspicuous during checking and plausibility and completeness screening or when applying the risk-based criteria. These cases must be further processed and/or a decision must be taken.

The decision programme is, in turn, laid down in Community Law, i.e. in Art. 18. Either the products are admitted for importation, or the Member States refuse importation pursuant to Art. 18 (1). The latter provision governs cases of (compulsory) refusal of importation in which formal requirements are not complied with, i.e. "without having to request any additional evidence or send a request for assistance to the flag State" where the Member States "become aware that:

- a) the importer has not been able to submit a catch certificate for the products concerned or to fulfil his obligations under Article 16 (1) or (2);
- b) the products intended for importation are not the same as those mentioned in the catch certificate;
- c) the catch certificate is not validated by the public authority of the flag State referred to in Article 12 (3);
- d) the catch certificate does not indicate all the required information;
- e) the importer is not in a position to prove that the fishery products comply with the conditions of Article 14 (1) or (2);
- f) a fishing vessel figuring on the catch certificate as vessel of origin of the catches is included in the Community IUU vessel list or in the IUU vessel lists referred to in Article 30;
- g) the catch certificate has been validated by the authorities of a flag State identified as a non-cooperating State in accordance with Article 31."

The case groups c), d), f) and g) alone are absolute grounds for refusal, evident in the first checking step, and are thus already applicable in the first step of checking of catch certificates. The other grounds need further investigations and verifications, where appropriate (such as case group e). Case groups a) and b) will usually only attract attention when the products are actually compared with the information provided in the catch certificate.

With respect to the catch certificates selected pursuant to the abovementioned risk-based method, it is mandatory that a decision be taken as to whether the importation of the corresponding fishery products is admitted or whether further verifications are necessary to exclude that any of the case

groups pursuant to Art. 18 (1) exists. As such, it seems to be unlikely that the discretion provided for at this point can be lawfully exercised in a way that no further verification takes place.

Therefore, some parties have demanded that all catch certificates selected for certain risk criteria should actually be verified.<sup>65</sup>

According to the wording of the IUU Regulation, the following can be stated: in line with Art. 17 (3), verifications shall be aimed "in particular" at the risks already mentioned. It cannot be derived from the norm that further verification measures are compulsory whenever a criterion (theoretically a case of a possible IUU catch) is given. The English version even includes the wording "*shall focus*". This suggests an obligation to pursue the risk ascertained.

In this connection, Art. 17 (5), according to which free discretion is given, must also be observed:

(5) Member States may decide to carry out verifications at random, in addition to the verifications referred to in paragraphs 3 and 4.

This implies that verifications pursuant to paragraphs 3 and 4 should not be completely discretionary.

In any case, discretion must be exercised with respect to each individual case; in practice, several times, since several verification procedures and methods are available.

This means there are several facts speaking in favour of discretion on the part of Member States in the second stage of enforcement – however clearly restricted by Art. 17 (4) and 18 (1).

In the end, it is the Member States' duty to prove that their checking system is capable of actually submitting conspicuous catch certificates to a careful further verification process – otherwise the implementation of Art. 17 (4) and Art. 18 (1) would be impossible. Whether this is currently the case in German practice is doubtful taking into consideration, inter alia, the information provided by the Federal Government about their personnel resources. A non-random exercise of discretion is furthermore necessary with respect to the guarantee of basic rights of importers to avoid delays etc.

### III. Conclusion

The IUU Regulation establishes a detailed system regarding enforcement by the Member States. The margin for the "whether" and "how" of the implementation are clearly restricted; this is, however, intended and justified by the Regulation's aims. The EU does not infringe the principle of proportionality or the principle of administrative autonomy by imposing considerable requirements regarding the enforcement activities of Member States.

The current practice in Germany as implemented by the Federal Office for Agriculture and Food (BLE) as the competent authority for checking and verifying catch certificates, as well as imports/consignments, does not correspond with the detailed system of the IUU Regulation.

In particular, the BLE does not currently check all catch certificates submitted for plausibility and completeness of formal requirements, nor based on appropriate risk criteria, and in fact refuses to apply risk management criteria for enforcement as prescribed by European Law.

This practice violates Art. 291 TFEU and the general duty of loyalty. It actually impedes the creation of equal conditions in all EU Member States regarding the enforcement of the import prohibition for IUU catches.

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<sup>65</sup> EJF et al., fn 62, p. 6.

In order to prevent infringement proceedings from being instigated and the corresponding penalty from being imposed (Art. 260 TFEU), there is urgent need for action and reforms, both regarding personnel resources in the enforcement process and the enforcement method applied.

The system, as summarised in the table on p. 15, is consistent with the system of enforcement proposed in July 2016 by the coalition of environmental organisations on the basis of aspects of efficiency and effectiveness.