

## LEGAL OPINION SUMMARY:

# The duty of EU member states to enforce the IUU Regulation:

## Effective control of all catch certificates as a pre-condition to contain illegal fishing and to protect marine resources

### Overview

**A legal opinion<sup>1</sup> of February 2017 concludes that Germany does not meet its obligations under the European Union's (EU) Regulation to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing, since imports of fishery products are not sufficiently controlled as they enter the German Federal Republic. This could undermine a core aim of the EU IUU Regulation, which is to effectively prohibit the import of fishery products originating from IUU fishing into the EU. As Germany has not taken all measures necessary at the national level to effectively enforce the IUU Regulation, the opinion concludes that current practice in Germany is in breach of Article 291(1) of the EU Treaty.**

The legal opinion was commissioned by the Environmental Justice Foundation (EJF), Oceana and WWF, with the aim of determining Germany's compliance with key obligations of the IUU Regulation to control imports of fishery products. As Germany is one of the leading importers of fishery products in the EU, the implementation of the IUU Regulation in Germany has a decisive bearing on the EU's efforts to prevent illegally sourced fish from entering its market.

The Council Regulation (EC) No 1005/2008, which has been in force since 2010, prohibits the import of catches stemming from IUU fishing into the EU and establishes substantive and enforcement duties for EU member states – and thus Germany – to put in place adequate import controls to implement this prohibition. The legal opinion identifies deficits in the enforcement of the import prohibition and associated duties in Germany and identifies an urgent need for action and reform to bring Germany back in compliance with EU law.

### Implementation of import controls under the IUU Regulation in Germany

One of the EU's crucial tools in the fight against IUU fishing is the control of fishery products imported into the common market via so-called catch certificates. The enforcement scheme of the IUU Regulation, which the legal opinion analyses in detail, requires all EU member states – including Germany – to carry out mandatory checks of all catch certificates received, based on the formal requirements set out in the IUU Regulation. Member states are also required to apply risk criteria to all catch certificates received, in order to determine the risk that products originate from IUU fishing and to direct further enforcement effort. The result of this initial step informs the decision as to whether further verification of the consignment or data declared in the catch certificate is necessary and, if so, the type of verification required. According to the legal opinion, the standard practice currently applied in Germany does not comply with the control procedure.

The competent IUU control agency in Germany, the Bundesanstalt für Landwirtschaft und Ernährung (BLE), neither reviews all catch certificates received, nor selects catch certificates to be verified based on coherent and sufficient criteria. As conceded by the German Government, due to low levels of human resources, the BLE can only control one third of all incoming catch certificates, with the selection of catch certificates to be controlled taking place on an apparently arbitrary basis.

According to the IUU Regulation, catch certificates that are deemed suspicious are to be subjected to further verification, which may include requesting

<sup>1</sup> Legal opinion produced by Attorneys-at-law Günther, Dr Roda Verheyen, Hamburg, February 2017.

assistance from the flag State of the catching vessel. The legal opinion expresses doubt that the system implemented by the BLE is sufficient to perform such verifications thoroughly. Without adequate verification, implementation of the IUU Regulation, including the refusal of imports, becomes impossible.

According to official information, Germany refused only ten consignments under the IUU Regulation between 2010 and early 2015 - significantly fewer than other key EU member states in terms of volumes of fisheries imports.

Furthermore, Germany has thus far failed to apply a risk-based management of fisheries imports, as required under the IUU Regulation. The Implementing Regulation to the IUU Regulation specifies a total of 15 risk criteria to assist member states in focusing their verifications of catch certificates.<sup>2</sup> Yet, at present, Germany seems to implement just one criteria for risk management,<sup>3</sup> recognising a heightened risk of linkages to IUU fishing where products are imported into Germany indirectly via another country (i.e. a country other than the flag State of the catching vessel). Although member states are permitted to define risk criteria at the national level, with indirect imports comprising between 70-80% of all consignments of fisheries imports into Germany, this criterion appears to be an inadequate starting point for the application of further control measures.

In a paper published in July 2016, the NGOs referred to above set out their joint position on the procedures they consider necessary for the effective control of import catch certificates under the IUU Regulation. The paper outlines a three-stage approach to the risk-based control of catch certificates, which it considers would improve detection of fraud and products stemming from IUU fishing activities.<sup>4</sup> The legal opinion notes that this approach could provide a comprehensive basis for import controls which would be in line with the specific EU law analysed.

## Conclusions

The legal opinion concludes that urgent action and reforms are needed on the part of Germany – even to avoid infringement proceedings by the European Commission. It is emphasised, in particular, that Germany must:

- control **all** catch certificates submitted for imports of fishery products, at least with regard to formal requirements (validation by the correct authority, no obvious errors or omissions, imports from the flag State not prohibited, etc.) and the explicit list of reasons for mandatory verification (e.g. fraud) as defined by the IUU Regulation;

- implement a coherent risk management system with regard to **all** catch certificates submitted for the import of fishery products to ensure that catches with a higher risk of linkages to IUU fishing activities can be selected for further verifications instead of being arbitrarily chosen; and
- carry out further verifications of catches and consignments according to the principles set out in the IUU Regulation, particularly if irregularities are identified during initial controls.

As Germany has not taken all measures necessary at the national level to effectively enforce the IUU Regulation, in particular in relation to the above points, the opinion concludes that current practice in Germany is in breach of Article 291(1) of the EU Treaty. Since Germany does not implement the obligations required of all member states under the IUU Regulation, it *de facto* prevents harmonised conditions within the EU to prohibit IUU fishery products from entering the common market. This leads to different preconditions for importing companies and the risk that illegally sourced fish enters the EU market.

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<sup>2</sup> The Commission Regulation (EC) No 1010/2009 lays down detailed rules for the implementation of the EU IUU regulation.

<sup>3</sup> December 2015: <http://dip21.bundestag.de/dip21/btd/18/069/1806948.pdf>

<sup>4</sup> EJF - Oceana - Pew - WWF, 'Risk Assessment and Verification of Catch Certificates under the EU IUU-Regulation', July 2016, available online at: <http://www.iuuwatch.eu/wp-content/uploads/2016/07/Risk-Assessment-FINAL.pdf>.