

ISSUE BRIEF – JUNE 2017

Expert opinion provides clarity on member state legal obligations to control seafood imports under the European Union’s illegal fishing regulation – identifies breaches of EU law

An independent, expert opinion¹ commissioned by three non-governmental organisations – the Environmental Justice Foundation (EJF), Oceana and WWF – has provided the first comprehensive legal interpretation of member state (MS) obligations to control seafood imports under the European Union’s (EU) 2008 Regulation to combat illegal, unreported and unregulated (IUU) fishing².

Background to the legal opinion

The IUU Regulation, which entered into force on 1 January 2010, establishes a prohibition on the import of seafood deriving from IUU fishing activities into the EU (the “import prohibition”). All imports of seafood must be accompanied by a catch certificate (CC)³ attesting that catches were made in accordance with applicable laws and conservation and management measures (CMMs), which must be validated by the flag State of the vessel that caught the fish. The Regulation sets out obligations on MS to check and verify CCs for the import of seafood products, to ensure compliance of imports with the Regulation’s provisions.

The legal opinion was produced to evaluate Germany’s compliance with its obligations under the IUU Regulation CC scheme⁴, in light of shortcomings in implementation identified by the above-mentioned NGOs⁵. The opinion concludes that current procedures in Germany for the checking and risk-based verification of CCs are inadequate to effectively enforce the import prohibition and that Germany is thus in breach of EU law. The author highlights an urgent need for action and reforms in Germany, with respect to the level of human resources for enforcement, as well as the method of enforcement applied.

The need for legal clarity on requirements under the Regulation’s CC scheme

The opinion is of particular significance in that it brings much-needed legal clarity to the content and scope of MS obligations to check and verify CCs for seafood imports into the EU⁶. These obligations are relevant to all 28 MS, thus the opinion’s application extends beyond the German context.

The opinion focuses primarily on Articles 16 and 17 of the IUU Regulation, which set out the obligations on MS to check, inspect and verify CCs based on the risk that the imports concerned stem from IUU fishing activities. Article 16 concerns the obligation on MS to undertake initial checks of CCs for imported seafood, while Article 17 concerns the further verification of CCs based on risk management.

These Articles are currently subject to crucial differences in interpretation between MS, with serious implications for the harmonisation and effective implementation of the CC scheme. A recent analysis of MS biennial reports submitted under the Regulation identified wide disparities in the implementation of import controls across the EU⁷. In some cases, these disparities could be linked specifically to differences in interpretation of the Regulation’s provisions among MS (see below under **Key findings of the legal opinion and implications**). A 2013 study carried out by the European Parliament (EP) similarly found that “controls carried out by EU MS on [fisheries and aquaculture products under the IUU Regulation] vary widely in scope and practice” with “varied practices and risk assessment on entry [to the EU]”⁸.

There is evidence that disparities in import controls may be resulting in the diversion of high-risk trade flows to MS that implement less stringent procedures for the assessment of import CCs⁹. This undermines the significant progress made by some MS to fully implement their control obligations, as well as the overarching objectives of the Regulation itself. As concluded in the 2013 EP study, until there is a common front, importers will exploit the differences they experience in the controls implemented by different MS.

Key findings of the legal opinion and implications

A definitive, EU wide interpretation of Articles 16 and 17 of the IUU Regulation is a prerequisite for the harmonised implementation of the import prohibition in all 28 MS. Up to now, the failure to provide an authoritative interpretation of these key provisions has undermined the European Commission's stated aim of harmonising procedures for CC controls. This aim is set out in the Commission's handbook on the practical implementation of the Regulation, published in 2009, which states that:

*"...verifications [of CCs] will be organised and will be led on the basis of national and Community criteria of risk management in order to ensure their proportionality and their harmonisation in all EU Member States"*¹⁰.

The legal opinion creates a starting point for dialogue between the European Commission and MS on their obligations under Articles 16 and 17 of the Regulation, and could potentially serve as the basis for an agreed interpretation of the provisions at EU level.

A brief overview of the interpretation of these Articles presented in the legal opinion, and key disparities in interpretation observed to date, is provided below.

Checking of CCs for imported seafood in accordance with Article 16

(a) Interpretation presented in the legal opinion

The legal opinion concludes that MS must check "at a desk" every CC submitted for the import of fisheries products into the EU¹¹. This involves:

- The checking of all CCs to determine compliance with formal requirements (correct issuing authority, correct seal, CC indicates all required information, CC not validated by an excluded flag State, vessel not on EU IUU list, etc.)¹².

- The checking of all CCs with regard to the explicit list of reasons for mandatory verification listed in Article 17 (4) (e.g. fraud).

According to the opinion, *"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"*¹³

The opinion goes on to argue that *"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..."*¹⁴

In other words, Article 16(1) of the Regulation, as interpreted in the light of Articles 17(4) and 18(1), obliges MS to carry out a series of minimum checks of all incoming CCs. Although Article 16(1) refers to the checking of CCs *"on the basis of risk management"*¹⁵, in practice, MS will need to check each and every CC received in order to:

- Refuse consignments in accordance with Article 18(1), which sets out the scenarios in which a consignment shall be refused without having to request any additional evidence or send a request for assistance to the flag State. This includes where products are caught by a vessel on the Community IUU Vessel List¹⁶ or flagged to a red-carded country¹⁷.
- Identify consignments for which compulsory verifications are required under Article 17(4), for example: (i) in cases of suspected fraud; (ii) where the MS has information to question the compliance by the vessel with applicable laws or CMMs; or (iii) where the vessel, fishing company or other operator has been reported in connection with presumed IUU fishing.

According to the opinion, this type of enforcement can, for the most part, be carried out electronically, and thus is *"not an excessive requirement vis-à-vis the enforcement authorities of the member states"*¹⁸.

(b) Current interpretation(s) in practice

The German government has confirmed that, according to its interpretation of Article 16, it is under no obligation to carry out a series of minimum checks for all CCs received. In an official published response it stated the following:

“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 declarations for fishery products. From the German Government’s point of view this is appropriate to comply with the targets of the IUU Regulation.”¹⁹

It is currently unclear how other MS interpret their obligations under Article 16. The biennial reporting format does not require MS to detail the documentary checks undertaken as a matter of routine, or the proportion of CCs subjected to such checks.

However, some MS have reported on their Article 16 checks when asked to provide information on the number of CCs that they “verified”²⁰. There appears to be some disagreement or confusion as to which actions constitute “checks” under Article 16 and those constituting “verifications” under Article 17²¹.

This lack of legal certainty is problematic where MS consider these basic checks sufficient to comply with Article 17, and/or fail to carry out basic checks of all CCs received. Guidance from the European Fisheries Control Agency (EFCA) on fisheries inspections, published in 2015²², fails to clarify these two key terms, using “checks” and “verifications” interchangeably, for example “[t]he first level of verification is a documentary check required for all imports”²³.

It is clear that further information is required regarding the precise controls carried out in all 28 MS. However, it may be surmised that, based on the relatively low number of requests for verification sent to third country authorities and consignments rejected (compared to the IUU fishing risk associated with imports), consignments are not being verified or automatically rejected by some MS as required under Articles 17(4) and 18(1). This may indicate a failure to carry out the first tier of checks under the Regulation to identify the scenarios covered by these Articles.

Verification of CCs based on risk management in accordance with Article 17

(a) Interpretation presented in the legal opinion

The legal opinion argues that, under Article 17(3) of the Regulation, MS are required to apply a sufficient and conclusive risk management system to all CCs received, in order to ensure that catches at special risk can be selected for further verification, rather than selection occurring on a random basis. Verifications involve further desk-based or on-site scrutiny of the content of

the catch certificates and the products themselves, and necessarily involve more effort and resources than the first stage of checking CCs (described above)²⁴.

According to the opinion, MS are required to apply risk criteria defined at the EU level (as set out in Article 31 of the Implementing Regulation (EC) No. 1010/2009²⁵) and/or at the national level in order to focus their verifications. Although criteria may be defined at the national level, the opinion argues that Article 17(3) “contains a duty of care on the part of the Member States to actually apply appropriate risk criteria”, which must be “well founded and not random”²⁶. This is in light of the aims of risk management (whether in the context of the IUU Regulation, the EU Customs Code or other) namely “the systematic identification of risks”²⁷; “to serve as a selective filter for further monitoring and verification measures”²⁸; “to make the enforcement duties in the Member States more efficient”²⁹; and “to actually exclude mere random selections or random checks”³⁰.

Thus, according to the opinion, enforcing authorities “should collect and evaluate data and information” for the purposes of risk management, “in coordination with other Member States and the Commission”³¹.

(b) Current interpretation(s) in practice

Based on currently available information, it seems there is a lack of certainty across MS as to the content and quality of risk management required under the Regulation.

According to the German government, Germany applies a single risk criterion to direct further verifications, namely whether consignments are imported indirectly via another country³². The legal opinion notes that, since these consignments in Germany account for around 70–80% of imports, the fact of indirect import alone is not an appropriate point of departure for verifications. Moreover, this criterion is not on the list adopted by the Commission pursuant to Article 17(3) of the Regulation³³.

A recent analysis of biennial reports submitted by MS under the Regulation found that standards of risk assessment vary considerably across the EU. Only four MS appear to apply risk criteria defined at the EU-level to focus their import controls, while other MS define criteria at the national level, which can vary widely between countries. Ten MS reported that they do not apply a risk-based approach to the assessment of CCs, largely due to low numbers of CCs received.

Certain key importing MS, such as Italy, have not reported information on the specific risk criteria applied

to direct their verifications, while for other MS, such as Germany and the UK, there are disparities between the approaches to risk analysis described in the 2014/15 reports and procedures applied in practice³⁴.

In a December 2016 reply to an opinion on implementation of the IUU Regulation adopted by the Long Distance Advisory Council (LDAC)³⁵, the European Commission stated that “*[w]ith regard to risk analysis, Article 31 of Commission Regulation (EC) 1010/2009 already lays down Community criteria for risk assessment, which should be applied by all Member States*”³⁶.

This is the most recent commentary from the Commission regarding the Regulation’s provisions on risk management. The interpretation is consistent with the 2009 Commission Handbook, which provides that “*[v]erifications will be carried out mainly on the basis of common risk management criteria except in specific situations listed in the IUU Regulation where verifications will be obligatory*”³⁷ and further, as noted above, that “*[t]hese verifications will be organised and will be led on the basis of national and Community criteria of risk management in order to ensure their proportionality and their harmonisation in all EU Member States*”.

Guidance issued by EFCA in 2015 likewise suggests that MS should apply the common EU criteria for risk management, in addition to any criteria defined at national level. The guidance states that “*[v]erifications should be focussed on consignments carrying the risks identified in accordance with the following common criteria [...]. In addition to the common risk criteria, Member States should notify the Commission of any national risk management criteria they have adopted for implementation of the IUU regulation.*”³⁸

Conclusions

It is evident that further precision is required from the European Commission on the content and scope of MS obligations under the IUU Regulation to check and verify CCs on the basis of risk management. A definitive interpretation of Articles 16 and 17 would provide the starting point for improved and harmonised implementation of these provisions by MS.

The legal opinion referred to in this paper, as well as the commentaries provided by the Commission and EFCA, can provide the basis for an EU-wide interpretation of these key provisions. Any interpretation should specify, as a minimum, the required frequency and quality of checks and risk analysis, including the proportion of CCs concerned,

the nature of checks to be carried out, and the mandatory characteristics of the risk management system.

An NGO position paper³⁹, published in July 2016, also provides a practical framework for the risk-based verification of CCs, which, according to the above-mentioned legal opinion, is consistent with the requirements of the IUU Regulation.

A well-defined legal framework would assist the Commission in assessing the current status of implementation of import controls in all 28 MS, and in taking action with respect to identified shortcomings. To facilitate such assessments, it is critical that the biennial reporting format be updated to ensure comprehensive and consistent reporting by MS against these core requirements⁴⁰.

Finally, the clarification of MS obligations under Articles 16 and 17 is especially crucial as the Commission develops an EU-wide IT system to support MS in their CC cross-checks and risk analysis. Key checks must be automated within the system to increase efficiency and reduce administrative burden on MS authorities, with robust risk criteria and data sources integrated into the system to facilitate the identification of high-risk consignments for verification. This tool will play a central role in improving harmonisation across MS and the effectiveness of the CC scheme in detecting and blocking IUU products. In view of the discussion above, it is vital that a comprehensive system be implemented as soon as possible.

Contacts:

Irene Vidal | Environmental Justice Foundation |
Tel: +44 (0) 207 239 3310 | irene.vidal@ejfoundation.org

Vanya Vulperhorst | Oceana |
Tel: +32 (0) 2 513 2242 | vvulperhorst@oceana.org

Eszter Hidas | WWF |
Tel: +32 (0) 2 761 0425 | ehidas@wwf.eu

Victoria Mundy | Coalition Research Officer |
Tel: +32 (0) 2 513 2242 | victoria.mundy@ejfoundation.org

ENDNOTES

- 1 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf
- 2 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ L 286, 29.10.2008, p. 1.
- 3 Article 12(1) of Regulation (EC) No. 1005/2008
- 4 Set out in Chapter III of Regulation (EC) No 1005/2008.
- 5 http://www.iuuwatch.eu/wp-content/uploads/2015/07/IUU_Germany_Brief_ENG.11.pdf and http://www.iuuwatch.eu/wp-content/uploads/2015/06/FINAL_PositionPaper%C6%92_de_4pp_singles_1302.pdf
- 6 Articles 16 and 17 of Regulation (EC) No. 1005/2008.
- 7 <http://www.iuuwatch.eu/2017/03/analysis-member-states-progress-implementation-import-controls-iuu-regulation/>. The reports submitted by member states for the period 2010-2015 were obtained via access to information requests to the European Commission. The reports include, amongst other information, statistics on imports under the IUU Regulation, details of import control procedures and recommendations to improve current systems and frameworks. These data were analysed to provide an overview of progress towards the full and effective implementation by member states of the IUU Regulation CC scheme. Progress was measured against the following key requirements of the IUU Regulation: (1) routine documentary checks of all import CCs received; (2) application of a risk-based approach to assessing CCs; (3) verification of CCs to ascertain compliance of imports; (4) physical inspections of consignments; (5) rejection of consignments in case of non-compliance; (6) biennial reporting to the Commission on activities under the Regulation.
- 8 European Parliament (2013). *Compliance of imports of fishery and aquaculture products with EU legislation*. November 2013. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/513968/IPOL-PECH_ET\(2013\)513968_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/513968/IPOL-PECH_ET(2013)513968_EN.pdf).
- 9 In 2014/15, Spain noted a decline in imports of swordfish caught by Taiwanese and Indonesian vessels following an increase in verification requests to those flag States. It is possible that the operators concerned sought to avoid delays associated with verifications, and/or risk of rejection of their consignments, by importing products through other MS. See <http://www.iuuwatch.eu/2017/03/analysis-member-states-progress-implementation-import-controls-iuu-regulation/> for further examples.
- 10 European Commission (2009). *Handbook on the practical application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (The IUU Regulation)*. Version 1, 10/2009: https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/handbook_original_en.pdf at p.34
- 11 Article 16(1) Regulation (EC) No. 1005/2008.
- 12 See Articles 12(4), 16(1) and 18(1) Regulation (EC) No. 1005/2008.
- 13 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf at p.18
- 14 *Ibid.* at p.19
- 15 Article 16(1) of Regulation (EC) No. 1005/2008: “[Member state] 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.”
- 16 Commission Implementing Regulation (EU) 2016/1852 of 19 October 2016 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.
- 17 Flag State identified as a non-cooperating third country in accordance with Article 31 of Regulation (EC) No. 1005/2008.
- 18 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf at p.22
- 19 Quotes from the German Government’s response, German Bundestag printed paper 18/6948.
- 20 Question 7.2 of the biennial reporting template: “How many CCs were verified?”
- 21 See <http://www.iuuwatch.eu/2017/03/analysis-member-states-progress-implementation-import-controls-iuu-regulation/> for further information.
- 22 EFCA (2015). *Core curriculum for the training of fisheries inspectors and Union inspectors – 3 General principles and specific types of fisheries inspection*. Luxembourg: Publications Office of the European Union, 2015, pp. 307: <http://www.efca.europa.eu/en/content/core-curricula>
- 23 EFCA (2015). *Core curriculum for the training of fisheries inspectors and Union inspectors – 3 General principles and specific types of fisheries inspection*. Luxembourg: Publications Office of the European Union, 2015, pp. 307: <http://www.efca.europa.eu/en/content/core-curricula>. *Course on Illegal, Unreported and Unregulated (IUU) fishing*, at p.31.
- 24 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf at p.24
- 25 Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008, OJ L 280, 27.10.2009, p.5.
- 26 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf at p.25
- 27 *Ibid.* at p.22
- 28 *Ibid.* at p.22
- 29 *Ibid.* at p.24
- 30 *Ibid.* at p.25
- 31 *Ibid.* at p.22
- 32 Quotes from the German Government’s response, German Bundestag printed paper 18/6948. 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.
- 33 Verheyen, R. (2017). *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*. Rechtsanwälte Günther Partnerschaft, Hamburg. February 2017. Available at: http://www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf at p.23
- 34 See <http://www.iuuwatch.eu/2017/03/analysis-member-states-progress-implementation-import-controls-iuu-regulation/> for further information.
- 35 <http://ldac.chil.me/download-doc/125741>
- 36 <http://ldac.chil.me/download-doc/127494> at p.2
- 37 European Commission (2009). *Handbook on the practical application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (The IUU Regulation)*. Version 1, 10/2009: https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/handbook_original_en.pdf at p.28
- 38 EFCA (2015). *Core curriculum for the training of fisheries inspectors and Union inspectors – 3 General principles and specific types of fisheries inspection*. Luxembourg: Publications Office of the European Union, 2015, pp. 307: <http://www.efca.europa.eu/en/content/core-curricula>. *Course on Illegal, Unreported and Unregulated (IUU) fishing*. at p.30.
- 39 EJF, Oceana, The Pew Charitable Trusts and WWF (2016). *Risk Assessment and Verification of Catch Certificates under the EU IUU Regulation*. Brussels, July 2016, pp.20: <http://www.iuuwatch.eu/catch-certificate-scheme/#A>
- 40 See recommendations for improvements to the biennial reporting format set out in <http://www.iuuwatch.eu/2017/03/analysis-member-states-progress-implementation-import-controls-iuu-regulation/>