

# Intra-EU trade in fishery products bound for Spain: Possible traffic control measures for illegal fishery products

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## Summary and recommendations

### Identification of the problem

To achieve real and effective success in the fight against illegal, unreported and unregulated fishing (IUU fishing) at both domestic and European level, all products imported into the European Union (EU) should be subject to standard control systems in all Member States. Council Regulation (EC) No. 1005/2008 (the IUU Regulation), which lays down the necessary measures for Member States to prevent or hinder the entry of products from IUU fishing into the EU, has been issued for this purpose. Unfortunately, reality does not fully match the European goals. One of the problems that has become apparent in the European fight against IUU fishing is the clear and evident contrast in the ways the various Member States apply the IUU Regulation and, more specifically, in how strictly they apply import controls.

We must find a way for those Member States that are leading the fight against IUU fishing to be true drivers of change, encouraging the other Member States in their journey to more effective implementation of the IUU Regulation so that this goes beyond mere compliance with the minimum requirements.

Spain is one of the countries with the most efficient implementation of the IUU Regulation. Unfortunately, however, this does not prevent illegal fishery products from going into the Spanish market. As a result of differing standards in the application of control measures for imports between Member States, there is a risk of goods originally sent to high-control countries being diverted to countries with less stringent measures.

Abnormal flows of intra-Community trade in fishery products is of particular concern for countries like Spain which have a dual position of leadership both regarding the implementation of the IUU Regulation and the volume of imports of fishery products from the European Union and third countries. **Are the measures provided for in the European legal system enough to stop IUU fishery products from entering the Spanish market?**

### Aim of the report

What means of control do the various Member States – and specifically Spain – have to check import of fishery products from third countries entering EU territory through other Member States?

The aim of this report is to carry out a legal analysis of the existing control measures available to Spanish competent authorities to tackle the risk of IUU fishing products entering the Spanish market through intra-Community imports.

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## Conclusions and recommendations

The various checks that can be carried out by Spain on imports of fishery products depend on the customs status assigned to them. In general, there are not many intra-Community trade control measures for fishery products, particularly those fully obtained or produced in a Member State.

The barrier to further controls stems from the rules guaranteeing the free movement of goods, which is one of the essential tenets of the Treaty on the Functioning of the European Union (TFEU).

However, we can make a number of recommendations that we believe would help Spain to better control the fishery products entering the EU through other Member States:

- Spain's public bodies must increase the number of random sample checks on fishery products carried out both by the competent customs authority and by the *Secretariat General de Pesca* (General Secretariat for Fisheries) (SGP).
- The SGP must check all catch certificates accompanying third-country fishery products entering the EU territory through another Member State under a "transit procedure", and must ensure that similar checks to those established for ordinary imports continue to be applied.

And, in general:

- Spain must continue to move forward in the implementation of the IUU Regulation in order to retain its position of leadership and set an example of good practice for the other Member States.
- Spain must give the SGP more human and material resources so that it can continue, through the Sub-Directorate of Control and Inspection, to effectively control imports of fishery products within the scope of its competence under the IUU Regulation.
- The various public bodies involved in the fight against IUU fishing – whether directly (the Tax Agency (AEAT), the SGP or the regional governments) or indirectly (through the state's Security Forces) – must coordinate their import control activities so that the measures are implemented efficiently and in accordance with clear strategies and structured plans that result in the lowest possible number of IUU fishing products coming into Spain, regardless of whether they come from third countries or from other Member States.

In addition, the European Commission must ensure that the Common Fisheries Policy (CFP), CFP is implemented in a harmonised way by EU Member States, in particular when it comes to the implementation of the IUU Regulation. This would ensure equal standards for the control measures applicable to imports of fishery products and, ultimately, the establishment of a level-playing field and non-discrimination between EU operators".

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## Summary of the legal analysis

In the analysis of the relevant legislation, the jurisprudence and the reality of the implementation of the IUU Regulation in Spain, we have identified three distinct cases, divided into two categories, within this area, each of them with a different legal regime and applicable control measures:

1. Third-country fishery products sent to Spain through another Member State under a **“transit procedure”**:
  - They are included in the Special Procedure for goods in external transit.
  - Since imports are cleared at Spanish customs, Spanish authorities apply checks similar to those established for ordinary imports.
2. **Third-country** fishery products **imported by a Member State** and brought into Spain, as well as fishery products **fully obtained or produced in another Member State** and brought into Spain:
  - They have Union Goods customs status.
  - Generally, it is worth noting that such fishery products are not subject to any intra-Community trade control measures.
  - Imports may not be subjected to double checks based on the risk of IUU fishing as this would exceed the limits permitted by Article 36 of TFEU for exceptions to prohibitions or restrictions on importing.
  - Random sample checks by the fishery products’ countries of destination are permitted under Articles 30 and 34 of TFEU provided that they are justified by the public interest and are limited to what is essential for the achievement of the objective pursued, as provided in Article 26 of TFEU. Such controls include both those within the competence of the customs authority and those which can be carried out by the SGP.
  - The need to prove Union goods status could be considered an additional control measure for intra-Community fishery products.
  - There are other possible mandatory checks, which include those envisaged in the IUU Regulation and the Control Regulation for breaches of the rules of the CFP, but they do not apply to fishery products fully produced or obtained in another Member State.

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## 1 Introduction: what are the risks that IUU fishing products enter the Spanish markets through intra-EU trade?

### 1.1 Spain, leader in the implementation of the IUU Regulation

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) lays down a number of measures to fight illegal fishing. To that end, it establishes the necessary conditions for Member States to carry out control, inspection and verification activities. Under this regulation, IUU fishery products obtained may not be imported into the European Union (EU). For this purpose, only those fishery products accompanied by a catch certificate in which the authorities of the flag Member State of the vessel which caught the product certify that the fish was caught legally can be imported into the EU.

Spain is considered one of the Member State with the most efficient implementation of the IUU Regulation.<sup>1,2,3</sup>

### 1.2 Differences between Member States in the implementation of the IUU Regulation and their effects on fishery product trade flow interactions

One of the problems that has become apparent in the European fight against IUU fishing is the clear and evident contrast in the way each of the various Member States implements the IUU Regulation and, more specifically, how strictly they carry out import controls.<sup>4</sup>

Thus, catch certificate checks are not carried out in a uniform manner across the EU: the risk assessment criteria vary considerably, and there are great disparities in the number of requests to check catch certificates sent to third countries by the competent authorities of each Member State. There is no standard behaviour regarding physical inspections of consignments of goods in containers, and there are no harmonised criteria at the EU level for establishing the circumstances under which consignments must be refused entry into the EU.<sup>5</sup>

This undermines the significant progress achieved by some Member States in their efforts to fully implement the catch certificate system under the IUU Regulation and fails to provide sufficient guarantees that IUU fishery products will not enter the EU market.

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<sup>1</sup> Examples of the country's great progress in its application include the following: (i) it has established strict control over imported products: it scrutinises all catch certificates through the General Secretariat of Fisheries. In the period 2010-2017, it refused entry to 162 items for failure to comply with the IUU Regulation; (ii) it has issued significant deterrent sanctions against Spanish citizens and organisations that have taken part in illegal fishing activities; (iii) it has made a significant effort in terms of providing sufficient staff, technical experts and human resources to implement the catch certificate system; (iii) in higher-risk cases, it makes the landing or transshipment authorisation subject to a prior check by the control and inspection service of each government delegation, or the central departments to check the documents and catches; and (iv) it has established a single-window system to coordinate checks on imports of fisheries between the government's various departments.

<sup>2</sup> See "Improving Performance in the Fight Against Illegal, Unreported and Unregulated (IUU) Fishing. Spain – Leading Implementation of the EU's Regulation to Combat Illegal Fishing". At [http://www.iuuwatch.eu/wp-content/uploads/2015/07/IUU\\_SPAIN\\_Brief\\_ENG.FINAL\\_June\\_HIGH.pdf](http://www.iuuwatch.eu/wp-content/uploads/2015/07/IUU_SPAIN_Brief_ENG.FINAL_June_HIGH.pdf)

<sup>3</sup> The Spanish government reached exactly the same conclusions in the biannual report submitted by it to the Commission to monitor the application of the IUU Regulation in Spain for the period 2016-2017.

<sup>4</sup> See "The EU IUU Regulation. Analysis: Implementation of controls on imports of fishery products in the EU". Executive summary – March 2017. At <https://eu.oceana.org/es/prensa-e-informes/comunicados-de-prensa/un-analisis-concluye-que-los-controles-la-importacion-en>

<sup>5</sup> Ibid.

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In addition, and as a result of these unequal standards on import control measures, there is a risk that goods destined for high-control countries are being diverted to other Member States with less stringent standards. Disparities in export controls may lead to high-risk products being diverted to Member States that apply less stringent procedures for assessing import catch certificates.<sup>6</sup>

For example, the study “The impact of the EU IUU Regulation on Seafood Trade Flows”<sup>7</sup> found an abnormal import trade flow between Portugal and Spain. Portugal reported an increase in the number of imports of certain products – such as swordfish – from countries pre-identified or identified as non-cooperating in the fight against IUU fishing, from 2012, coinciding with a decrease in the imports reported by Spain and an increase in intra-Community trade from Portugal to Spain. This suggests a shift towards importing products through Portugal, which may be linked to disparities in the implementation of import controls.<sup>8</sup>

### 1.3 Intra-Community trade of fishery products sent to Spain

Abnormal flows in intra-Community trade are of particular concern for countries like Spain, which have a dual position of leadership both in the implementation of the IUU Regulation and in the volume of fishery products it imports from the EU and from third countries.

SPAIN TRADE BALANCE 2018 <sup>9</sup> EU and Third Countries								
Exported		Imported		Exported		Imported		
Value (Thousands of Euros)	Weight (t)	Value (Thousands of Euros)	Weight (t)	Value (Thousands of Euros)	Weight (t)	Value (Thousands of Euros)	Weight (t)	
EUROPEAN UNION				THIRD COUNTRIES				
Live fish	55,204.84	11,518.16	49,094.52	6,300.84	620.03	6.46	3,694.42	66.35
Fresh and refrigerated fish	384,444.61	76,793.82	765,763.70	182,506.11	111,186.36	16,597.55	298,694.30	50,977.23
Frozen fish	311,327.20	122,847.51	181,719.32	74,927.08	480,096.62	330,241.71	562,644.99	255,343.12
Fish flesh and fillets	334,143.46	55,891.84	203,416.75	38,278.12	74,882.88	6,947.07	610,395.48	161,008.63
Dried and smoked fish, fish in brine (...)	79,124.80	10,085.23	91,508.04	14,026.44	24,055.65	6,733.13	155,742.95	26,960.19

<sup>6</sup> See “The EU IUU Regulation. Analysis: Implementation of controls on imports of fishery products in the EU”. Executive summary – March 2017. At <https://eu.oceana.org/es/prensa-e-informes/comunicados-de-prensa/un-analisis-concluye-que-los-controles-la-importacion-en>

<sup>7</sup> The impact of the EU IUU Regulation on seafood trade flows: Identification of intra-EU shifts in import trends related to the catch certification scheme and third country carding process. At [http://www.iuuwatch.eu/wp-content/uploads/2018/02/TDA\\_report\\_IUUwatch\\_LQ.pdf](http://www.iuuwatch.eu/wp-content/uploads/2018/02/TDA_report_IUUwatch_LQ.pdf)

<sup>8</sup> Ibid, p. 88.

<sup>9</sup> These figures were provided by the Director General for the Regulation of Fisheries and Aquaculture in a resolution dated 30 April 2019, in response to a request for environmental information submitted on 5 April 2019.

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Crustaceans	379,531.04	47,146.28	264,490.34	34,301.51	25,038.23	4,088.98	1,002,071.85	152,587.44
Molluscs	767,882.95	194,671.32	341,164.51	68,769.49	146,503.66	25,372.43	1,635,123.49	340,186.90
Aquatic invertebrates	5,470.08	411.43	3,051.22	1,185.83	56.31	7.78	479.98	35.26
Tins and jars, caviar, roe	722,331.49	143,134.27	88,290.78	21,502.22	71,170.13	10,868.96	757,900.76	162,083.53
Molluscs and crustaceans in tins and jars	144,728.90	43,007.81	49,776.09	6,796.32	51,191.47	7,381.33	91,073.47	31,323.24
	<b>2,799,744.7</b>	<b>628,713.85</b>	<b>1,272,511.5</b>	<b>266,087.8</b>	<b>984,801.34</b>	<b>408,245.41</b>	<b>5,117,821.69</b>	<b>1,180,571.8</b>

Thus, in order to achieve actual and effective success in the fight against IUU fishing at both domestic and European levels, all imported products should have equivalent control systems in the various Member States. But, until this ideal situation is achieved, we believe that we must ascertain what means of control are available to the various Member States, and more specifically to Spain, to check the legality of the imports coming from third countries and entering their national market through another Member State.

#### 1.4 Aim of the report

The aim of this report, which is based on a coordinated study of the applicable law, is to carry out a legal analysis of the existing control measures available to the Spanish government to check the legality of fishery products entering its market through intra-Community trade.

We have identified three distinct cases within this area:

- Third-country fishery products sent to Spain through a Member State under a transit procedure.
- Fishery products from third countries imported by a Member State and sent to Spain.
- Fishery products fully obtained or produced in another Member State.



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## 2 Starting Point: The Free Movement of Goods

Under the framework of the Internal Market, the customs union, which was created on 1 July 1968,<sup>10</sup> is one of the basic foundations upon which the European Union (EU) was built.<sup>11</sup> The scope of the customs union encompasses all the trade in goods and prohibits the implementation of customs duties on imports and exports and all charges with an equivalent effect between Member States. It also involves the adoption, by the EU, of a Common Customs Tariff (CCT) in its relations with third countries.<sup>12</sup> As a result, the CCT is applied to goods from third countries at the EU's external borders.

The existence of a customs union means that no trade barriers hindering the free movement of goods within the EU territory are permitted. In particular, the Treaty on the Functioning of the European Union (TFEU)<sup>13</sup> implements this basic principle in its Article 34,<sup>14</sup> and its following articles by forbidding import restrictions and equivalent measures between Member States.

The first thing to do in order to establish which type of controls are applicable to fishery products entering the territory of each Member State is to determine their *customs status*, which varies based on whether they are *Union goods* or *non-Union goods*.<sup>15</sup>

- *Union goods* are those that are fully obtained or produced in the customs territory of the Union<sup>16</sup> and do not include any goods imported from countries or territories outside the Union's customs territory.<sup>17</sup> All goods located in the customs territory of the Union shall be presumed to have the customs status of Union goods, unless it is established that they are not Union goods.<sup>18</sup>
- *Union goods* also include goods that are *released for free circulation*,<sup>19</sup> i.e. products from third parties in relation to which the import formalities have been complied with and any customs duties or charges have been levied in a Member State.<sup>20</sup> Release for free circulation confers Union goods customs status of non-Community goods.
- All other goods are *non-Union goods*.<sup>21</sup>

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<sup>10</sup> Although the Treaty establishing the European Economic Community (TEC) was signed before this, in Rome (Italy), on 25 March 1957.

<sup>11</sup> Article 26 of TFEU (formerly Article 14 of TEC).

<sup>12</sup> Articles 27 and 30 of TFEU.

<sup>13</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Correlation tables Official Journal No. C 326 of 26/10/2012 p. 0001 – 0390.

<sup>14</sup> Former Article 28 of TEC.

<sup>15</sup> Article 5.22 of Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC Regulation).

<sup>16</sup> Due to Article 60 of the UCC Regulation "2. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory. 2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture".

<sup>17</sup> Article 5.23 of the UCC Regulation.

<sup>18</sup> Article 153 of the UCC Regulation.

<sup>19</sup> Article 201 of the UCC Regulation.

<sup>20</sup> Article 29 of TFEU.

<sup>21</sup> Article 5.22 of the UCC Regulation.

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## 3 Control of third-country fishery products sent to Spain through a Member State under a transit procedure

### 3.1 Customs procedure for fishery products in transit

Third-country fishery products that enter the EU under a transit procedure through one Member State but are finally sent to another Member State are considered to be *goods not belonging to the Union*<sup>22</sup> and therefore do not have Union goods customs status.

EU customs legislation applies to the transit of products from third countries in cases of *external transit*.<sup>23</sup> External transit is a Special Customs Procedure that allows non-EU goods to move from one point to another within the customs territory of the Union, without being subject to import duties or other charges as provided for under other relevant provisions in force or commercial policy measures.<sup>24</sup>

### 3.2 Customs control

Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC) establishes the procedures applicable to all goods brought into the EU territory and applies equally throughout the territory. This means that each Member State applies this common legislation at its borders.

Article 141 of the UCC Regulation establishes that goods in transit that have entered the customs territory do not have to be presented to customs, or unloaded or unpacked for examination, on arrival.

Article 233 of the UCC Regulation states that holders of the Union transit procedure are under an obligation (among others) to present the intact goods and the required information at the customs office of destination, within the stipulated time and having complied with the measures taken by the customs authorities to ensure their identification.



These customs controls, which are carried out by the customs authorities to ensure compliance with the customs legislation and other provisions on the entry, exit, transit, movement, storage and final destination of goods,<sup>25</sup> may consist of:

<sup>22</sup> Ibid.

<sup>23</sup> Article 210 of the UCC Regulation.

<sup>24</sup> Articles 210 and 226 of the UCC Regulation.

<sup>25</sup> Article 5.13 of the UCC Regulation.

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- **A request to furnish any kind of information to the customs authorities:**<sup>26</sup> In particular, Spain has established an obligation for fishery products being imported into Spain to be accompanied by the catch certificate and transport information.<sup>27</sup>
- **Random checks of goods:** This may include examining goods, taking samples, verifying the accuracy and completeness of the information supplied in a declaration or notification, and the existence, authenticity, accuracy and validity of documents, examining the accounts of economic operators and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons, and carrying out official enquiries and other similar acts.<sup>28</sup>
- **Checks based on a risk analysis:** These are based on criteria developed at national, EU and, where available, international level.<sup>29</sup>
- **Post-release checks:** They may verify the accuracy and completeness of the information supplied in a customs declaration, temporary storage declaration, exit and entry summary declaration, re-export declaration or re-export notification, and the existence, authenticity, accuracy and validity of any supporting documents. They may also examine the accounts of the declarant and other records relating to the operations in respect of the goods in question or to prior or subsequent commercial operations involving those goods. The customs authorities may also examine such goods and take samples where it is still possible for them to do so.<sup>30</sup>

In other words, it seems clear that, in the case of fishery products in transit from a third country, goods are cleared at the Member State of destination, which means that, in addition to potentially being extremely detailed, customs checks will be carried out at the customs office of destination.<sup>31</sup> In our study, that would be Spain.

### 3.3 Checks under the IUU Regulation

In relation to products in transit, Article 19 of the IUU Regulation contains similar provisions to those of the UCC Regulation in that it establishes that the rules for the verification<sup>32</sup> and refusal of importation<sup>33</sup> of fishery products under a transit procedure being transported to another Member State shall be applied in the Member State of final destination.

On the other hand, this would imply that the checks referred to in Article 16 – i.e. the submissions and checks of catch certificates following validation, *will* fall within the remit of the authorities of the Member State of entry.

This would result in the following division of powers:

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<sup>26</sup> Article 15 of the UCC Regulation.

<sup>27</sup> Article 12.4, Annex II and the Appendix to Council Regulation (EC) No. 1005/2008 of 29 September 2008 (the IUU Regulation).

<sup>28</sup> Article 46.1. of the UCC Regulation.

<sup>29</sup> Article 46.2. of the UCC Regulation.

<sup>30</sup> Article 58 of the UCC Regulation.

<sup>31</sup> Article 141 of the UCC Regulation.

<sup>32</sup> Article 17 of the IUU Regulation.

<sup>33</sup> Article 18 of the IUU Regulation.

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- Verification and refusal of importation:<sup>34</sup> The competent authorities of the Member States of destination of the product will be the ones with the power to both confirm and refuse, if applicable, the import of fishery products into the EU.
- Submittal and checks of validated catch certificates: The validated catch certificate shall be submitted by the importer to the competent authorities of the Member State of entry of the product.<sup>35</sup>
- Verifications: The competent authorities of the Member State of final (?) destination of the product shall be the ones that carry out all of the verifications they may deem necessary in order to ensure that the provisions of the IUU Regulation are properly applied. Such verifications may consist of: 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.<sup>36</sup>

### 3.4 The competence of the General Secretariat of Fisheries: verification, validation and refusal

The competent authority to carry out the verification, validation and refusal of fishery imports in Spain is the General Secretariat of Fisheries (SGP), which is affiliated to the Ministry of Agriculture, Fisheries and Food.<sup>37</sup>

For this purpose, under Article 5.1 of Order ARM/2077/2010,<sup>38</sup> gaining access to port requires an authorisation from the competent port authorities following a favourable report from the General Secretariat of Fisheries. Article 7.3.a), on the other hand, requires the submittal to the SGP of the catch certificate for importing fishery products into the Spanish territory through any entry route.

Following receipt of the application and the appropriate verifications, the SGP shall issue a pre-importation report and send it to the customs authorities with a copy for the importer. If the report is unfavourable, the import operation may not be carried out.<sup>39</sup>

Thus, as a result of applying EU legislation on the Special Procedure for goods in external transit, if Spain is the country of destination of third-country fishery products that have entered the EU territory through another Member State, it will apply similar checks to those established for ordinary imports, as imports are cleared at the Spanish customs and the goods do not acquire Union good status until that moment.

The SGP points out that third-party fishery products arriving in transit from another EU Member State are fully checked by the SGP in full compliance with the IUU Regulation.<sup>40</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Article 19, in conjunction with Article 16 of the IUU Regulation.

<sup>36</sup> Article 17 of the IUU Regulation.

<sup>37</sup> Article 16 of the IUU Regulation.

<sup>38</sup> Order ARM/2077/2010 of 27 July 2010 on access control for third-country vessels, transit operations, transshipment, and importing and exporting of fishery products for the prevention, deterrence and eradication of illegal, unreported and unregulated fishing (Order ARM/2077/2010).

<sup>39</sup> At <https://www.mapa.gob.es/es/pesca/temas/control-e-inspeccion-pesquera/productos-pesqueros-terceros-paises/entrada.aspx>

<sup>40</sup> This information was provided by the Director General for the Regulation of Fisheries and Aquaculture in a resolution dated 30 April 2019, in response to a request for environmental information submitted on 5 April 2019.

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CONTROL OF THIRD-COUNTRY FISHERY PRODUCTS ENTERING UNDER THE TRANSIT PROCEDURE THROUGH A MEMBER STATE, WITH SPAIN AS THEIR DESTINATION					
CUSTOMS STATUS	SCOPE OF THE CUSTOMS STATUS	TYPES OF CHECKS CARRIED OUT	COMPETENCE	EXTENT OF CHECKS	PARTY TO WHICH THE LEGAL OBLIGATION APPLIES
<b>CONTROLS AT THE MEMBER STATE OF ENTRY</b>					
Non-Union goods (up to the import clearance)	Special Transit Procedure (Art. 233 of the UCC Regulation)	Authorisation before accessing the port, landing and transhipment of the vessel or other means of transport.	Competent customs authority of the Member State of entry.	Submittal of documents: <ul style="list-style-type: none"> <li>• Prior notification form.</li> <li>• Validated catch certificate.</li> <li>• Transport information.</li> <li>• Documents relating to indirect importing.</li> <li>• Prior declaration of disembarkation or transhipment.</li> </ul> (Arts. 4 and 5 of Order ARM/2077/2010, Art.3.1. of the Regulation Implementing the IUU Regulation <sup>41</sup> )	The captain or representative of the fishing vessel
CONTROL OF THIRD-COUNTRY FISHERY PRODUCTS ENTERING UNDER THE TRANSIT PROCEDURE THROUGH A MEMBER STATE, WITH SPAIN AS THEIR DESTINATION					
CUSTOMS STATUS	SCOPE OF THE CUSTOMS STATUS	TYPES OF CHECKS CARRIED OUT	COMPETENCE	EXTENT OF CHECKS	PARTY TO WHICH THE LEGAL OBLIGATION APPLIES
<b>CHECKS AT THE MEMBER STATE OF DESTINATION</b>					
Non-Union goods (up to the import clearance)	Special Transit Procedure (Art. 233 of the UCC Regulation)	Verification and/or refusal of importation	SGP	Similar checks to those applicable to ordinary imports. (Arts. 16, 17 and 18 of the IUU Regulation)	The captain or representative of the third-country fishing vessel
		Authorisation for the importation of fishery products from third countries	Competent customs authority in the Member State of destination (Spanish Tax Agency – AEAT)	Entry summary declaration. (Art. 127 of the UCC Regulation)	The carrier, importer or consignee. (Art. 127 of the UCC Regulation)
				Similar checks to those applicable to ordinary imports: Verification and control of goods in transit, ordinary application of the legal provisions. (Arts. 5 and 7-11 of Order ARM/2077/2010).	The holder of the transit procedure (Art. 233 of the UCC Regulation)

<sup>41</sup> Commission Regulation (EC) No. 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (the Regulation implementing the IUU Regulation).

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## 4 Possible controls of intra-EU trade in fishery products sent to Spain

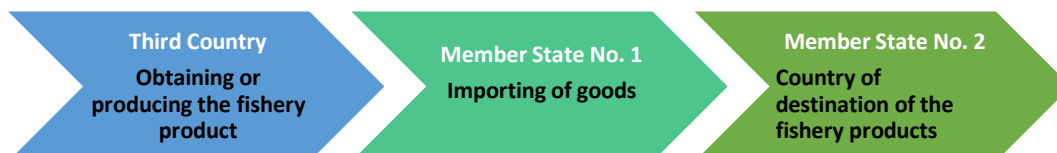
### 4.1 Union goods customs status

This section analyses two distinct cases which, as they both have Union goods customs status, would be covered by the same control procedure:

- Fishery products fully obtained or produced in another Member State: These are *Union goods*.<sup>42</sup>



- Third-party fishery products imported by a Member State and brought into Spain: They too are *Union goods* because they are considered to be *released for free circulation*,<sup>43</sup> i.e. they are those third-party products in relation to which a Member State has complied with the import formalities and paid the customs duties and other charges.<sup>44</sup> *Release for free circulation* confers Union goods customs status on non-Community goods.



Once a product has acquired *Union goods* customs status, it can move freely within the EU customs territory, as this status in principle means that it cannot be the subject of further customs checks or restrictions on free movement.<sup>45</sup>

In fact, the SGP has stated<sup>46</sup> that neither Spain nor any other Member State can use any control and inspection measures as such to prevent, deter and eradicate IUU fishing in the trade of fishery products between EU countries.

The fact that the EU was created on the basis of a customs union and the free movement of goods thus provides the starting point for the legal analysis of the possible control of fishery products from other Member States.

<sup>42</sup> Article 153 of the UCC Regulation.

<sup>43</sup> Article 201 of the UCC Regulation.

<sup>44</sup> Article 29 of TFEU.

<sup>45</sup> *Ibid.*

<sup>46</sup> This information was provided by the Director General for the Regulation of Fisheries and Aquaculture in a resolution dated 30 April 2019, in response to a request for environmental information submitted on 5 April 2019.

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This is why a cautious approach must be adopted in this analysis, because advocating certain controls in intra-Community trade could conflict with one of the pillars upon which the EU was built.

POSSIBLE CONTROLS ON INTRA-COMMUNITY TRADE IN FISHERY PRODUCTS IN SPAIN					
CASE	CUSTOMS STATUS	CASE	CUSTOMS STATUS	TYPE OF CONTROL	COMPETENCE
Fishery products fully obtained or produced in another Member State	Union Goods	Fishery products from third countries imported by a Member State and brought into Spain	Special Procedure for release for free circulation	Requirement for proof of Union Goods Status	Spanish Tax Agency
				Random border checks of goods	Spanish Tax Agency / SGP
				Measures to ensure compliance with the provisions of the Control Regulation (Art. 89.1)	SGP
				Prohibition on access to a Community port (Art. 37.5 of the IUU Regulation)	SGP
				Immediate enforcement measures (Art. 43 of the IUU Regulation)	SGP

## 4.2 The requirement to prove Union goods status for fishery products

Article 153 of the UCC Regulation establishes a presumption that all goods located in the customs territory of the Union have Union goods customs status unless otherwise established. In cases where the presumption does not apply, proof of Union goods customs status must be provided.

Article 119 of Commission Delegated Regulation (EU) No. 2015/2446 of 28 July 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (the UCC Delegated Regulation) provides that the Union goods customs status presumption shall not apply to certain goods, which include (section (f)) the following marine fisheries products:

1. Those caught by Union fishing vessels outside EU customs territory in waters other than the territorial waters of a third country.
2. Goods obtained from the products mentioned in section (a) on board a Union vessel whose production may have included other products with Union goods customs status.

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3. Those taken or caught by vessels flying the flag of a third country in the customs territory of the Union.

An additional control measure for fishery products is thus established since, if required, proof that such goods have Union goods customs status must be provided<sup>47</sup> by producing, as appropriate and among others, the following means of proof as envisaged in Article 199 of Commission Regulation (EU) No. 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (the UCC Implementing Regulation):<sup>48</sup>

- ✓ The transit declaration data of goods placed under internal transit
- ✓ T2L or T2LF data proving the goods' Community status<sup>49</sup>
- ✓ The customs goods manifesto
- ✓ The invoice or transport document
- ✓ The fishing logbook, landing declaration, transshipment declaration and vessel monitoring system data

#### 4.3 Double-checking of goods: The scope of the prohibition on restrictions on imports between Member States

This analysis starts on the basis that the free movement of goods is a fundamental principle of the European Union that materialises in the prohibition contained in Article 34 of TFEU on quantitative restrictions on imports between Member States as well as a prohibition of all measures with an equivalent effect.

However, Article 36 of TFEU then goes on to make an exemption to this quasi-absolute principle in the case of prohibitions or restrictions on imports which are justified by grounds of public order, public morality and public security; the protection of health and life of humans and animals and the preservation of plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property; provided that such prohibitions or restrictions are not used as a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The resulting question therefore relates to the scope of the prohibitions of the "measures having an equivalent effect" as quantitative restrictions envisaged in Article 34 in relation to the extent of the exceptions permitted by Article 36.

The requirements laid down by the Court of Justice through its settled case law forming the so-called *principle of proportionality* of the measures set forth in Article 34 can be very briefly summarised:

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<sup>47</sup> Article 215 of the UCC Implementing Regulation.

<sup>48</sup> By reference to Article 215 of the UCC Implementing Regulation.

<sup>49</sup> Due to title II of the UCC Implementing Regulation, these are Codes to be used in the context of proof of the customs status of Union goods: T2L, a proof establishing the customs status of Union goods and T2LF a proof establishing the customs status of Union goods consigned to, from or between special fiscal territories.



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- “Measures having an equivalent effect” to quantitative restrictions are defined based on the well-known *Dassonville formula*, under which they are deemed to include “*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade*”.<sup>50</sup>
- The exceptions envisaged in Article 36 of TFEU are subject to the following requirements:<sup>51</sup>
  1. They must be necessary for the effective protection of public order, public morality and security, the protection of health of humans and animals and the preservation of plants, the protection of national treasures possessing artistic, historical or archaeological value or the protection of industrial and commercial property.
  2. The EU must not have common or harmonised rules covering the field of control in question.
  3. It must not be possible to preserve the legal asset with the same degree of effectiveness by using measures that are less restrictive of intra-Community trade.
- Finally, the general rule is that, although obstacles to the principle of freedom of movement in the EU could be permitted in certain exceptional cases, they must not be generally permitted in the EU.<sup>52</sup>

Applying the cited case law to this case study, it seems that double checks on imports of fishery products due to possible risks of IUU products entering the national market, based on an unequal application of EU law by Member States, could exceed the limits permitted by Article 36 of TFEU. This is due to the following:<sup>53</sup>

- The concept of “measure having equivalent effect” to quantitative restrictions would thus include double checks on imports of fishery products involving both a requirement for catch certificates and systematic border checks.
- We are dealing with an industry – the fishing industry – whose laws and regulations are harmonised at Community level, and this too precludes the application of Article 34 of the TFEU.
- Systematic double checks by Spain on fishery products could breach the principle of proportionality, as the product has already undergone a certain control in the exporting country. It would be too risky to venture to officially assert that the control measures applied by a given country in relation to IUU fishing are not equivalent to the control measures on imports used by Spain. In addition, it would require some means of proof, and obtaining them would far exceed the power of the State.

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<sup>50</sup> See Judgment of 11 July 1974, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5); and Judgment of 9 September 2008, Case C-141/07 *Commission v Germany*, EU:C:2008:492, paragraph 28 and the cited case law.

<sup>51</sup> See Judgment of 20 May 1976, Case 104/75 *De Peijper* [1976] ECR 613, paragraphs 16 and 17.

<sup>52</sup> See the Judgment of the European Court of Justice in the case *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (‘*Cassis de Dijon*’ case), 20 February 1979.

<sup>53</sup> In relation to this, the Court of Justice has already held on several occasions that double-checking imports of products involving, first, the requirement for a certificate from the competent authorities of the exporting country confirming that the goods have undergone a process to destroy certain parasites and, second, a systematic border check under which imports are only authorised after the health authorities of the country of destination have verified that the goods do not contain those parasites, exceeds what is permitted under Article 36 of the Treaty. See the Judgment of 8 November 1979, *Denkavit*, 251/78, ECR p. 3369; the Judgment of 7 April 1981, *United Foods*, 132/80, ECR p. 995; the Judgment of 17 December 1981, *Biologische Producten*, 272/80, ECR p. 3277; and the Judgment of 8 February 1983, *Commission v. United Kingdom*, 124/81, ECR p. 203.

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#### 4.4 Permitting random checks by the customs and fisheries inspectorate offices

However, if you apply the case law of the Court of Justice of the European Union *sensu contrario*, you can conclude that random sample checks of fishery products at the border by the Member State of final destination are permitted under Articles 30, 34 and 36 of TFEU, as they are justified by the public interest, but they may not exceed the essential measures required to achieve the intended objective.<sup>54</sup>

Such checks include both those within the competence of the customs authority referred to above and those envisaged by the SGP.

##### Random checks by domestic fisheries inspectors

The body appointed to combat IUU fishing in Spain is the General Secretariat of Fisheries (SGP), which is affiliated to the Ministry of Agriculture, Fisheries and Food and, more specifically, to the Sub-Directorate of Control and Inspection, which is affiliated to the Directorate General for the Regulation of Fisheries. The Sub-Directorate of Control and Inspection is responsible for checking direct landings of third-country fishing vessels, for checking catch certificates for direct landing imports and for checking catch certificates for imports arriving through means other than fishing vessels (such as containers or lorries).

The said sub-directorate includes teams of specialist employees such as operators, inspectors and sea-fishing inspectors who are authorised – each of them in their own field of competence – to check certain activities in the scope of the IUU Regulation. Examples of these include:<sup>55</sup> checking compliance with requirements for gaining access to port, port inspections, infringement procedures, the application of the catch certificate scheme, catch certificate checks, any verifications they may deem necessary in order to ensure the proper implementation of the provisions of the IUU Regulation, and the start and execution of any appropriate investigations and of inspection operations where applicable.

The Customs Single Window<sup>56</sup> for handling imports of fishery products is already in operation.

Finally, Article 95 of Law 3/2001 of 26 March 2001 on State Sea-Fishing<sup>57</sup> reinforces the Fisheries Inspection Services' control duties by establishing that competent officials may, in the context of preliminary proceedings or of the initiation of sanctioning proceedings:

1. Investigate natural or legal persons who may have any kind of direct or indirect legal, commercial, financial or other relationship with fishing or with the marketing of fishery products.

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<sup>54</sup> See the Judgment of the Court of Justice of 25 May 1993. *Commission of the European Communities v Italian Republic. Action against a Member State for failure to fulfil obligations — Fish containing nematode larvae — Systematic inspection at frontiers — Prohibition on importation of fish infested with larvae, even devitalized.* Case C-228/91. F 23

<sup>55</sup> Articles 6, 7, 8, 12, 13, 14, 15, 16, 19 and 21 of the IUU Regulation.

<sup>56</sup> The Customs Single Window is a tool from the Public Administration that allows the centralisation of all documentation presented by the economic operators to the different public authorities with customs and foreign trade competences, enabling the cooperation and interaction of operators (Border Inspection Services, Port Authorities and Customs), with the objective of coordinating the inspection of imports.

<sup>57</sup> As amended by Law 33/2014 of 26 December 2014 amending Law 3/2001 of 26 March 2001 on State Sea-Fishing.

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2. Examine documents, books, principal and ancillary accounts, files, invoices, supporting documents, correspondence that is relevant to the investigation, computer databases, software, computer files and records relating to economic activities, as well as the inspection of goods, items, operations and any other background or other information that has to be provided to the government or that is necessary for complying with the obligations laid down in the legislation on fishing and the marketing of fishery products.
3. Pursuant to EU legislation on controlling and fighting IUU fishing, they may access all parts of vessels, as well as properties, business premises and other establishments or locations where activities that could be related to fishing or the marketing of fishery products are conducted.

### Random checks by regional fisheries inspectors

The regional governments' inspection duties relating to the control of the fishing industry begin from the landing or unloading of catches under the terms that may be established by their laws and regulations and in relation to the marketing of fishery products, regardless of their origin, and start to apply after the initial sale at port markets or from the first act of commercialisation in cases of products that are not sold for the first time at such markets.

Regulation (EC) No. 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (the Control Regulation) states that all batches of fishery and aquaculture products must be traceable at every stage of the production, processing and distribution chains, from the catch or harvest stage to the retail stage.<sup>58</sup>

The various autonomous regions' fisheries inspectorates will thus be competent to control the traceability of fishery products if this is so provided by their corresponding Statutes of Autonomy and implementing legislation.

To this end, they may inspect the documents accompanying the fishing lots, up to certain limits. In the case of lots forming part of imports with a catch certificate that is submitted under the IUU Regulation, the checks will not include verifying their content. However, the officials in charge of this action may inform the Sub-Directorate of Control and Inspection of any irregularities detected.

## 4.5 The enforcement measures envisaged in the IUU and Control Regulations<sup>59</sup>

### Measures to ensure compliance with the provisions of the Control Regulation (Art. 89.1)

Member States are required to systematically adopt suitable measures, including administrative or criminal proceedings, in accordance with their own domestic laws, against any natural or legal persons suspected of infringing the rules of the CFP, which includes combating IUU fishing.

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<sup>58</sup> Article 58 of the Control Regulation

<sup>59</sup> Robin Churchill, Daniel Owen. "The EC Common Fisheries Policy". OUP Oxford, 4 mar. 2010. P. 476

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This would involve carrying out controls on intra-Community trade so that the measures required by the Regulation can be adopted and should in principle be permitted provided that it does not involve double-checking the goods.

### **The prohibition on accessing a Community port (Art. 37.5 of the IUU Regulation)**

IUU fishing vessels flying the flag of a Member State may not be authorised to enter any Community port other than their home port save in cases of force majeure or distress or if their catches and prohibited fishing gear are confiscated.

The problem with this prohibition is that it is limited to the entry of goods by port but makes no provision for checks in cases of entry through air or land channels.<sup>60</sup>

### **Immediate enforcement measures (Art. 43 of the IUU Regulation)**

If a natural or legal person is suspected of having committed a serious infringement<sup>61</sup> or is caught in the act of committing it, Member States shall embark on a thorough investigation of the infringement and shall take immediate measures such as stopping the fishing activities, making the vessel return to port or inspecting the vehicle.

It is worth noting that, although these last two measures do involve controls on intra-Community trade, they will be limited to cases of analyses of third-country fishery products imported by a Member State and brought into Spain.

This means that they will not apply to fishery products fully produced or obtained in a Member State, as in that case they are not deemed to be imports for the purposes of the IUU Regulation<sup>62</sup> and will not be covered by it.

## **5 Conclusions and recommendations**

### **5.1 Conclusions**

As a consequence of a coordinated analysis of the relevant legislation, the state of the jurisprudence and the reality in the implementation of the IUU Regulation in Spain, the following conclusions can be reached:

- The various checks that can be carried out by Spain on imports of fishery products depends on the customs status assigned to them.

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<sup>60</sup> Ibid. p 477

<sup>61</sup> These are the ones envisaged in Article 42 of the IUU Regulation.

<sup>62</sup> Articles 2, 10 and 11 of the IUU Regulation.

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- The difficulty in the application of these controls stems from the rules guaranteeing the free movement of goods, which is one of the essential freedoms of the Treaty on the Functioning of the European Union (TFEU).
- Third-country fishery products sent to Spain through another Member State under a “transit procedure” are included in the Special Procedure for goods in external transit, and since imports are cleared at Spanish customs, Spain applies similar checks to those established for ordinary imports.
- In general, there are not many intra-Union trade control measures for fishery products, particularly those fully obtained or produced in a Member State.
- In relation to third-country fishery products imported by a Member State and brought into Spain, as well as fishery products fully obtained or produced in another Member State and brought into Spain, they both have Union Goods customs status and may not be subjected to double checks based on the risk of IUU fishing as this would exceed the limits permitted by Article 36 of TFEU for exceptions to prohibitions or restrictions on importing.
- Random sample checks by the countries of destination are permitted in intra-Union trade under Articles 30 and 34 of TFEU provided that they are justified by the public interest and are limited to what is essential for the achievement of the objective pursued, as provided in Article 26 of TFEU. Such controls include both those within the competence of the customs authority and those envisaged by the SGP.
- The need to prove Union goods status could be considered an additional control measure for intra-Union fishery products.
- There are other possible mandatory checks, which include those envisaged in the IUU Regulation and the Control Regulation for breaches of the rules of the CFP, but they do not apply to fishery products fully produced or obtained in a Member State.

## 5.2 Recommendations

As a result of the conclusions obtained in the current analysis, the following recommendations are proposed:

- The European Commission must ensure that the CFP is implemented in a harmonised way by EU Member States, in particular when it comes to the implementation of the IUU Regulation. This would ensure equal standards for the control measures applicable to imports of fishery products and ultimately, the establishment of a level-playing field and non-discrimination between EU operators.
- Spain must continue to move forward in the implementation of the IUU Regulation in order to retain its position of leadership and set an example of good practice for the other Member States.

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- The SGP must keep checking all catch certificates (for third-country fishery products entering EU territory through another Member State under a “transit procedure”, ensuring that similar checks to those established for ordinary imports continue to be applied.
- Spain’s public bodies must increase the number of random sample checks on fishery products, both by the competent customs authority and by the SGP.
- Spain must give the SGP more human and material resources so that it can continue, through the Sub-Directorate of Control and Inspection, to effectively control imports of fishery products within the scope of its competence under the IUU Regulation.
- The various public bodies involved in the fight against IUU fishing in Spain – whether directly (the Tax Agency (AEAT), the SGP or the regional governments) or indirectly (through the state’s Security Forces) – must coordinate their import control activities so that the measures are implemented efficiently and in accordance with clear strategies and structured plans that result in the lowest possible number of IUU fishing products coming into Spain, regardless of whether they come from third countries or from other Member States.

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